
HOW BREXIT CAN TRANSFORM THE GOVERNANCE OF GLOBAL CIVIL AVIATION

by

Brian F. Havel*

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* Director and Professor, McGill University Institute of Air and Space Law. This article is based on prior presentations I made to the UK Institute of Directors' "Brexit Lectures" in London in May 2017, and to the Annual Meeting of the Air and Space Law Section of the American Bar Association in Montreal in September 2017. I am grateful to the members of both organisations for their assistance in thinking through these issues. The discussion has been updated where necessary to reflect the shape-shifting - on both sides - that marks the Brexit negotiations. I am grateful to McGill LLM students Ingo Borgdorf (from Germany) and Georgia Maria (Yolanda) Kalogirou (from Greece) for the exceptional research support they provided in adapting my lectures for publication.

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ABSTRACT

The United Kingdom (UK) is expected to withdraw from membership of the European Union (EU) on 29 March 2019, with the possibility of a transition period until the end of 2020. The UK's departure, commonly known as "Brexit", will have many consequences across all sectors of its economy, but none more profound than withdrawal from one of the EU's signature achievements, the single aviation market. Exiting that market could reduce the commercial rights of UK airlines as well as the UK's participation in key EU aviation organisations. While the UK might enjoy greater freedom over aviation policy after Brexit, this could come at significant cost to the rights its airlines have enjoyed inside the EU. There are possibilities for limiting post-Brexit disruption, including reviving prior UK/Member State bilateral air services agreements, using the accession provisions of the US/EU air transport treaty, and creating subsidiaries and affiliates of UK and EU airlines in order to avoid falling afoul of airline ownership and control rules. However, a more dramatic possibility exists to transform the UK's aviation relationship with the EU and potentially the entire governance of global civil aviation. The "right of establishment" in the single aviation market undermines restrictions like the ownership and control rules that have prevented airlines worldwide from having the commercial freedom that other economic sectors take for granted. The UK could secure the most important benefits of the single aviation market by exchanging the right of establishment with the EU and thereby allowing the EU to achieve its long-standing but frustrated goal of exporting its single aviation market to another major aviation jurisdiction.

R É S U M É

Il est prévu que le Royaume-Uni se retirera de l'Union européenne (UE) le 29 mars 2019, avec la possibilité d'une période de transition jusqu'à la fin de 2020. Le départ du Royaume-Uni, communément appelé « Brexit », aura une multitude de conséquences sur l'ensemble des secteurs de son économie, la plus profonde des conséquences étant le retrait de l'une des grandes réalisations de l'UE, son marché unique du transport aérien. Se retirer de ce marché pourrait réduire les droits commerciaux des compagnies aériennes britanniques, ainsi que la participation du Royaume-Uni dans les organisations phares de l'aviation européenne. Malgré le fait que le Royaume-Uni pourrait jouir, après le Brexit, d'une plus grande liberté quant à ses politiques de transport aérien, cette liberté pourrait néanmoins venir à un coût pour les compagnies aériennes britanniques, en particulier par rapport à leurs droits dont elles ont pu profiter à l'intérieur de l'UE. Il existe des options pour limiter le risque de perturbation du Brexit, notamment la possibilité de ranimer des anciens accords bilatéraux en matière de services aériens entre le Royaume-Uni et les membres de l'UE; utiliser les dispositions d'accession du traité entre les États-Unis et l'UE; et créer des filiales et des sociétés affiliées des compagnies européennes et britanniques dans le but d'éviter de ne pas transgresser les règles de propriété et de contrôle s'appliquant aux compagnies aériennes. Cependant, une option plus dramatique existe pour transformer la relation Royaume-UE quant à l'aviation, et potentiellement l'entière de la gouvernance de l'aviation civile mondiale. Le « droit d'établissement » du marché d'aviation unique amoindrit des restrictions telles que celles de la propriété et du contrôle qui ont empêché des compagnies aériennes à travers le monde d'avoir une liberté commerciale que d'autres secteurs de l'économie prennent pour acquis. Le Royaume-Uni pourrait obtenir les plus importants avantages du marché d'aviation unique en échangeant le droit d'établissement avec l'UE et du coup permettre à l'UE d'atteindre son but, poursuivi depuis longtemps mais jamais réalisé, d'exporter son marché d'aviation unique dans une autre juridiction majeure en aéronautique.

KEYWORDS

Brexit; United Kingdom (UK); European Union (EU); United States (US); Ownership and control; Cabotage; Single aviation market; Right of establishment; Bilateralism; Bilateral air services agreements; US/EU Air Transport Agreement.

I. INTRODUCTION

A. PREPARING FOR AN AVIATION BREXIT

In this article, I will discuss how Brexit could affect the aviation relationship¹ between the United Kingdom (UK) and the European Union (EU) if and when the UK exits the EU.² But I will also discuss

¹ This article focuses almost entirely on the commercial air transport industry, although the “aviation” value chain also encompasses airports, air navigation service providers, aircraft manufacturers, computer reservation and other online booking and travel systems, and airport ground-handlers, in addition to military, State, and private flying. See Brian F Havel & Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press, 2014) at 2, fn 3.

² As of 1 August 2018, it is expected that the UK will exit the EU on 29 March 2019, two years after it notified to the European Council, the EU’s ultimate governing body comprising Heads of State and Government, its intention to leave in accordance with Article 50 of the Treaty on European Union, see *infra* note 6. 80% of the UK/EU Withdrawal Agreement has already been negotiated, including matters regarding the status of EU citizens living in the UK and vice versa as well as the UK’s financial obligations to the EU. See *infra* note 140 (with citation to the draft treaty). Moreover, it has been agreed that the UK would remain in the EU Single Market (including the Single Aviation Market, see *infra* note 15) and customs union for a 21-month transition period until December 31, 2020. Other important issues, such as the protection of “geographical indications”, the status of the border between Ireland and Northern Ireland and, notably, the future economic relationship between the UK and the EU, remain to be resolved. See Michel Barnier (European Commission’s Chief Negotiator for the Negotiations with the United Kingdom), “An Ambitious Partnership with the UK After Brexit”, *European Commission* (2 August 2018), online: European Commission <ec.europa.eu/commission/news/ambitious-partnership-uk-after-brexit-2018-aug-02_en> [Barnier, *Op-Ed*]. Nevertheless, UK Prime Minister Theresa May’s current plan for a “free trade area for goods” still contradicts EU Brexit guidelines on the indivisibility of the freedoms of the single market. See Alex Barker, “The soft-Brexit Chequers deal: what it means”, *Financial Times* (8 July 2018), online: FT <www.ft.com/content/aeb53c82-82ac-11e8-96dd-fa565ec55929>; See also “Statement from H.M. Government”, *The Chequers Plan* (6 July 2018), online: UK Government <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF>. See also White Paper, *The Future Relationship Between the United Kingdom and the European Union*, Cm 9593 (July 2008). The prospect of a “no-deal Brexit”, therefore, has grown after the EU rejected central elements of May’s proposal. Such an outcome would leave a void for the aviation sector, as discussed further in Part II of this article. The EU refuses to fill this void through separate back-channel discussions with the UK on a new aviation agreement. See *infra* note 156 (discussing efforts by the UK to secure bilateral understandings with certain EU Member States to preserve air traffic rights with those States after Brexit). Without such an agreement, consequences would include non-recognition of safety certificates for UK-made aircraft parts, non-recognition of UK pilot licenses, and UK carriers losing flying rights both to and within the EU as well as to third countries. See Daniel Boffey & Gwynn Topham, “Aviation Industry: EU blocks talks to avert ‘no-deal’ Brexit crisis”, *The Guardian* (18 June 2018), online: The Guardian <www.theguardian.com/business/2018/jun/18/aviation-industry-eu-blocks-talks-to-avert-no-deal-brexit-crisis>.

how, depending on what happens in the UK/EU Brexit negotiations on aviation, the future UK/EU air transport relationship could have a profound effect on the governance structure for all of global civil aviation. The UK/EU aviation relationship, it must be said, is by far the most important commercial and legal relationship in air transport that the UK enjoys with any other country or group of countries: the UK is the largest component – about 25% – of the US\$ 600-billion EU air transport market.³ Concomitantly, the UK/EU aviation relationship is also one of the most important enjoyed by the EU27.

Brexit, moreover, is one of the great surprises in the complex history of multilateral organisations. It is also the biggest legal transaction in the history of the UK, and quite possibly the world.⁴ The *Financial Times* reported in May 2017 that a directory of at least 759 separate treaties would need to be renegotiated as a result of Brexit.⁵

The UK Department for Transport admitted that until very recently it had given virtually no thought whatsoever to what will happen to the UK aviation industry after Brexit. In contrast, the EU moved rapidly to establish its Task Force 50⁶ and appointed Mr Peter Sorensen to advise on

³ In 2016, for example, London's Heathrow Airport remained the largest air passenger airport facility in the EU, see Eurostat, "Air Transport Statistics" (November 2017), online: Eurostat <ec.europa.eu/eurostat/statistics-explained/index.php/Air_transport_statistics> (also showing that the UK was involved in half of the top ten routes in intra-EU country-to-country traffic flows).

⁴ See Matt Ross, "Brexit will be 'largest legal, legislative and bureaucratic project in British history', says former UK Treasury Solicitor", *Global Government Forum* (24 June 2016), online: Global Government Forum <www.globalgovernmentforum.com/brexit-will-be-largest-legal-legislative-and-bureaucratic-project-in-british-history-says-former-uk-treasury-solicitor/>; See also Allen & Overy & Thomson Reuters Foundation, "Brexit: A Briefing Note for Charities, Social Enterprises, and Not-for-Profit Organisations" (2016), online: Thomson Reuters Foundation <<http://www.trust.org/contentAsset/raw-data/2901457b-2d15-4897-8dae-bba57a0a8912/file>> at 9 (describing the exit of the world's fifth largest economy from the world's largest economic grouping as "the biggest demerger in history").

⁵ See Paul McClean, "After Brexit: the UK will need to renegotiate at least 759 treaties", *Financial Times* (30 May 2017), online: FT <www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e>. Through analysis of the EU treaty database, the Financial Times found 759 separate bilateral agreements with potential relevance to the UK, covering such diverse sectors as trade in nuclear goods, customs, fisheries, transport, and regulatory cooperation in areas such as antitrust and financial services. Some additional UK unilateral treaties, outside the EU framework, may also need to be revised because they make reference to EU law. See *ibid.*

⁶ The "50" here refers to Article 50 of the Treaty of European Union (EU), known as the withdrawal clause. See *Consolidated Version of the Treaty on European Union*, O.J. (C326) 13 (Oct. 26, 2012), art 50.

UK/EU aviation negotiations.⁷ Given that a technocratic Brussels is so often the object of caricature in the UK, it is worth noting (if only as a human interest matter) that Peter Sorensen's father, Frederik, was himself a senior EU air transport official. The elder Sorensen shared the zeal of the European Commission (the EU's administrative steering body) to promote a new liberalised world order in air transport. Frederick Sorensen admonished the Americans that their vaunted open skies policy was a sham: unlike the EU's Single Aviation Market, it applied only to international air transport services and did not include abolition of two of the most illiberal features of the present regulatory system for global civil aviation: the traditional "nationality" rule that prevents foreign ownership and control of national airlines,⁸ and the "cabotage" rule that prohibits foreign airlines from serving entirely domestic routes such as New York-Chicago.⁹ Accordingly, in the case of the United States, 30% of world air transport remains sealed off from genuine foreign competition through the combined effect of these rules, both of which survived the era of US airline liberalisation that began almost exactly 40 years ago.¹⁰

⁷ In contrast to the fast-acting EU, the UK Department for Transport has only very recently advertised for a position called Head of Aviation EU Exit Negotiations. See Simon Calder, "Government criticised for slow progress securing post-Brexit aviation deal", *The Independent* (27 June 2018), online: The Independent <www.independent.co.uk/travel/news-and-advice/brexit-uk-aviation-deal-flights-eu-mark-tanzer-open-skies-a8419156.html>.

⁸ The nationality rule appeared originally in two subsidiary agreements drafted at the Chicago Conference in 1944 (the gathering which produced the Convention on International Civil Aviation, see *infra* note 42). The relevant text in each of the subsidiary instruments is identical:

Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State.

International Air Services Transit Agreement, opened for signature 7 December 1944, 84 UNTS 389 (entered into force 30 January 1945); *International Air Transport Agreement*, opened for signature 7 December 1944, 171 UNTS 387 (entered into force 30 January 1945). Similar clauses appear in virtually all air services agreements between States. Moreover, the nationality rule is usually accompanied by domestic legislation that forecloses majority ownership and/or effective control of national airlines by foreign investors. See, e.g., 49 USC §40102(a)(15) (limiting foreign stock ownership of a US airline to 25% of the voting equity).

⁹ Cabotage can be defined neutrally as the carriage of passengers, cargo, and mail between two points within the territory of the same State for compensation or hire, but also peremptorily as a sovereign right that has been reserved to the exclusive use of that State's airlines. See analysis in General Accounting Office (GAO), *International Aviation: Measures by European Community Could Limit US Airlines' Ability to Compete Abroad*, GAO/RCED-93-64 (April 1993) at 54; See generally Pablo MJ Mendes de Leon, *Cabotage in Air Transport Regulation* (Martinus Nijhoff Publishers, 1992).

¹⁰ Frederik Sorensen spoke and wrote about these issues in many fora and publications, see e.g., Frederik Sorensen, Wilko van Weert, & Angela Cheng-Jiu Lu, *ECJ Ruling on Open Skies Agreements: Future International Air Transport, Air & Space Law* 28 (2003) at 3, 5; See also

In the absence of a British equivalent to Peter Sorensen,¹¹ my default position in this article is to look to a transport briefing paper on Brexit drafted for the UK House of Commons by Ms. Louise Butcher.¹² Ms. Butcher's paper concludes that, given how much the UK contributed to the European Commission's liberal market-based aviation and maritime sectors, air transport post-Brexit, at least in the UK, may not look "*wildly different*" to how it looks now.¹³ I invite readers to keep those eye-catching words – *not wildly different* – in mind as they read this article.

B. SUMMARY OF THE ARTICLE

In Part II of the article, I will look at a number of key regulatory and policy consequences for the UK aviation industry that will flow from Brexit. In Part III, I will consider possibilities for limiting the expected post-Brexit disruption in air transport, including for example reviving prior UK/Member State bilateral agreements, using the accession provisions of the US/EU air transport treaty, and creating subsidiaries and affiliates of UK and EU airlines in order to avoid falling afoul of airline ownership and control rules. In Part IV, I will discuss how the "right of establishment" operates in the EU single aviation market to undermine restrictions like the ownership and control rules that have prevented airlines from exercising the global commercial freedom that other economic sectors take for granted. Finally, in Part V, I will propose that the UK could secure the benefits of EU single aviation market membership

University of Georgia Law, "The Trans-atlantic Air Transport Relationship – Aviation Policy, Clearing the Way to a More Open Market", Conference Proceedings in Occasional Paper Series no. 3 (2003) at 129 (including Sorensen's oft-repeated call for a "new foundation" in international air transport regulation and his criticism of a lack of political will by the United States to achieve it). On the airline deregulation anniversary, see *infra* text accompanying note 186.

¹¹ But see *supra* note 7 (regarding a possible impending appointment).

¹² This report is constantly updated and the latest version was published in April 2018. Louise Butcher, "Briefing Paper: Brexit and Transport", no CBP 7633, House of Commons Library (16 April 2018), online: UK Parliament <researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7633> [Butcher, *Briefing Paper*].

¹³ *Ibid* at 5. As mentioned, *supra* note 12, Butcher's paper is continually updated but the "wildly different" language has survived through all iterations to date. Admittedly, Butcher's paper equivocates about whether operators will notice significant differences "within the EU", but I am not sure that her distinction is well-taken. *Ibid* at 5. In any event, a similar perspective was offered by UK Secretary of State for Transport Chris Grayling MP in testimony before the House of Commons Transportation Select Committee in October 2017: "The day after we have left the EU the world from our airports will look very similar to the day before". Transportation Committee, Oral Evidence: *Policy Priorities for the Department for Transport*, HC 430, 16 October 2017, Qq 118 & 126.

by exchanging the right of establishment with the EU, thereby allowing the EU to achieve its long-standing but frustrated goal of exporting its single aviation market to another major aviation jurisdiction.

II. BREXIT'S REGULATORY AND POLICY CONSEQUENCES FOR UK AVIATION

A. REGULATORY CONSEQUENCES OF BREXIT

Re-imagining, recreating, and replacing the trade and organisational arrangements lost to Brexit will present staggering hurdles in every sector of the UK economy, and that will be true not least in the air transport sector. In using Louise Butcher's trope of an order of things that will be "not wildly different", I must start by fundamentally disagreeing with her premise. From the perspectives of both law and policy, things *will* be wildly different if the UK simply tumbles out of the EU without replacement arrangements, the so-called "hard" Brexit.¹⁴ The following are six predictable regulatory consequences of Brexit for UK aviation.

First, UK airlines will cease to be licensed EU airlines and will cease to benefit from open access to all airline routes, including cabotage routes, throughout the EU as given by EU Regulation 1008/2008,¹⁵ the single aviation market regulation.

Second, the traditional ownership and control rule will snap back, so that UK airlines will be required once again to be majority-owned and effectively controlled by UK citizens (or by the UK itself) and not open to

¹⁴ Given the notorious instability of Brexit terminology, it is hardly a surprise that the term "hard" Brexit has also been applied to describe UK Prime Minister Theresa May's "red lines" that include leaving the customs union, leaving the single market, and no longer being subject to EU law or the jurisdiction of the European Court of Justice. See Karan Bilimoria, "Desperate for a hard Brexit, May has shown she has no time for democracy", *The Guardian* (7 June 2018), online: <www.theguardian.com/commentisfree/2018/jun/07/hard-brexit-theresa-may-mps-eu-withdrawal>. The latest White Paper from the UK Government, launched amidst huge controversy in July 2018, see *supra* note 2, appears to have rolled back Mrs May's insistence on a clean break with the customs union: the red lines are becoming pinker as the months proceed.

¹⁵ See *Common Rules for the Operation of Air Services in the Community*, Council Regulation 1008/2008, [2008] OJ, L 293/3 [*EU Regulation 1008/2008*]. This legislation provides common rules for the operation of air services in the EU. The Regulation's chief purpose is to "ensure a more efficient and consistent application of Community legislation for the internal aviation market". *Ibid* at preamble, para 2. In particular, the Regulation introduced an EU-wide regime for "the licensing of [EU] air carriers, the right of [EU] air carriers to operate intra-[EU] air services and the pricing of intra-[EU] air services". *Ibid* at art. 1.

ownership and control by EU citizens of the remaining 27 Member States (or by any of those States). Similarly, it will no longer be legally possible for EU airlines to be owned and controlled by UK citizens or by the UK State.

Third, the UK will no longer be a party to more than 40 air services agreements that fix traffic rights between the EU and non-EU third countries, and most dramatically will have to surrender the highly liberalised traffic rights and other commercial arrangements provided by the 2007 US/EU Air Transport Agreement and its 2010 amending Protocol.¹⁶

Fourth, the UK will no longer be a full member of the European Aviation Safety Agency (EASA), the European analogue of the US Federal Aviation Administration (FAA). This departure will be of paramount significance. The UK and France have together generated over two-thirds of EASA's rulemaking.¹⁷ Industry experts estimate that it could take five to 10 years to build a replacement customised UK certification infrastructure.¹⁸ Conceivably, post-Brexit, a lack of technical reciprocity

¹⁶ The US/EU Air Transport Agreement was signed and provisionally applied on 25 April and 30 April 2007, and subsequently amended by a Protocol signed and provisionally applied on 24 June 2010. See Air Transport Agreement, US/EU, 30 April 30, [2007] OJ, L 134/4, 46 ILM 470, as amended by Protocol to Amend the Air Transport Agreement, US/EU, 25 March 2010, OJ L 223/3 [US/EU Air Transport Agreement or US/EU ATA, US/EU Protocol]. The Agreement

represents important steps towards the normalisation of the international aviation industry. The ultimate objective of the [EU] is to create a transatlantic Open Aviation Area: a single air transport market between the EU and the [United States] with free flows of investment and no restrictions on air services, including access to the domestic markets of both parties.

European Commission Directorate-General for Mobility & Transport, "International aviation: United States", online: European Commission <https://ec.europa.eu/transport/modes/air/international_aviation/country_index/united_states_en>.

¹⁷ See Butcher, *Briefing Paper*, *supra* note 12, at 24. Butcher's paper also notes, however, the UK Government's recently-expressed interest in negotiating "some sort of ongoing membership of EASA after Brexit". *Ibid* at 23. The nature of that membership remains unclear, and it is equally imaginable that all EASA powers would be repatriated to the UK Civil Aviation Authority (CAA), with some contracted back to EASA. See *ibid* at 24. For similar comments by the head of the CAA, see Andrew Haines, "The Future of Open Skies Post-Brexit", *UK Civil Aviation Authority* (1 December 2016), online: CAA <https://www.caa.co.uk/uploadedfiles/caa/content/news/speeches_files/gadspeech_andrewhaines_011216.pdf>.

¹⁸ See Sarah Young, "British aviation regulator steps up planning for disorderly Brexit", *Reuters* (10 July 2018) online: Reuters <<https://www.reuters.com/article/us-britain-eu-aviation/british-aviation-regulator-steps-up-planning-for-disorderly-brexit>>.

(i.e., mutual recognition) between EASA and the UK would mean, for example, that a Lufthansa aircraft needing a mechanic and replacement parts at London Heathrow would be obliged to fly an EASA-certified mechanic and EASA-certified parts from Lufthansa Technik in Frankfurt to Heathrow. Otherwise, the use of non-EASA parts and workers would risk loss of certification for the aircraft under EU law.¹⁹ The head of the UK Civil Aviation Authority (CAA), Andrew Haines, has stated that the UK cannot afford to become an EASA “backwater”.²⁰ In his view, the UK needs to maintain its voting power in EASA, not least because the EASA “Basic Regulation” is about to undergo a major revision that will modernise EASA’s governance framework and substantive responsibilities and from which the UK would be excluded.²¹ To become a follower rather than a shaper of EASA’s future as the agency reaches peak influence would be potentially calamitous for the UK.

Fifth, the UK would also leave the monumental “Single European Sky” (SES)²² air traffic management project that is intended to supersede Wright Brothers-era radar navigation with 21st century satellite-based global positioning systems. The UK would not, however, exit Eurocontrol, the agency that oversees route charges and air traffic management in Europe, which has a membership that extends well beyond that of the

idUSKBN1K027U> (noting that the UK Civil Aviation Authority has reversed its position on *not* planning for an exit from EASA).

¹⁹ Author’s telephone interview with Regula Dettling-Ott, former Vice President, EU Affairs, for the Lufthansa Group (22 February 2017).

²⁰ Haines, *supra* note 17. The UK Government’s recent White Paper, see *supra* note 2, does agree that continued membership of EASA would be in the UK’s interest. See *ibid* at para. 131.

²¹ The European Commission has been conducting a consultation on the Basic Regulation since 2014, see A-NPA 20145-12, *European Commission Policy Initiative on Aviation Safety and a Possible Revision of Regulation (EC) No. 216/2008*. Adoption of a successor to the Basic Regulation is reportedly imminent, See Kerry Lynch, “EASA’s Basic Regulation Update Takes Step Forward” *AINonline* (28 January 2018), online: <www.ainonline.com/aviation-news/business-aviation/2018-01-28/easas-basic-regulation-update-takes-step-forward>.

²² See Butcher, *Briefing Paper*, *supra* note 12 at 21 (describing the SES project, launched in 1999 to refocus and reform the architecture of European air traffic management); See also comments by the European Commission’s Directorate-General for Mobility & Transport, European Commission, “Single European Sky” online: <ec.europa.eu/transport/modes/air/single_european_sky_en> (describing how the SES “has moved away from an intergovernmental practice to the EU framework. The EU’s main objective is to reform air traffic management in Europe in order to cope with sustained air traffic growth and operations under the safest, most cost- and flight-efficient and environmentally friendly conditions”). Norway and Sweden, on the other hand, are part of the SES despite not being EU members, and the European Commission has indicated that ways will exist for neighboring countries to participate in the SES. See *ibid*.

EU.²³ The UK has had a key role in the success of Eurocontrol, and indeed its fellow EU Member States have long admired the draconian UK civil aircraft detention system that allows the CAA to ground aircraft at UK airports pending payment of Eurocontrol charges.²⁴

Sixth, the UK will no longer be bound by the more than 30 major pieces of specific EU legislation that deal with air transport and a whole slew of other more general legislation that affects aviation. In those two lists one can include rules on value-added taxes, competition law, state aid, insolvency, employment rights, data protection, consumer rights, mutual recognition of court judgments, environmental protection, safety, security, airports, and air traffic management. After Brexit, under the terms of the EU Withdrawal Act of 2018²⁵ – the so-called “Henry VIII” legislation²⁶ – the UK will set itself the micro-level tasks in all of these areas of assessing, re-writing, or just re-adopting EU legislation as UK law through statutory instruments. Will the UK simply absorb all of this air transport legislation as “retained EU law”?²⁷ Andrew Haines accurately predicts that all these actual and potential legal changes would give the

²³ The UK joined Eurocontrol in 1963. The UK will not exit Eurocontrol because membership of that organisation – despite confusing jurisdictional overlaps with the EU especially with respect to air traffic management and the SES (see *supra* note 22) – is based on the ratification of an international convention and being a member of the organisation is not conditional on being a member of the EU: for further analysis, See Eurocontrol, “Governance”, online: <www.eurocontrol.int/articles/governance>. On the UK’s continued membership of Eurocontrol despite Brexit, see also Air Traffic Management, “Brexit fallout for Single Sky remains unclear”, Air Traffic Management (24 June 2016), online: Key Publishing <<https://airtrafficmanagement.keypublishing.com/2016/06/brexit-fallout-for-single-sky-remains-unclear/>>.

²⁴ See Havel & Sanchez, *supra* note 1 at 366, fn 169 (discussing UK CAA authority under a national statutory instrument called the Civil Aviation (Navigation Services Charges) Regulations 2000 to seize an aircraft without court order when the lessor or the operator is delinquent on Eurocontrol-regulated route charges and – with a court order – to sell the aircraft to recoup unpaid charges; in certain circumstances, the aircraft may be sold to satisfy the entire fleet debt of the operator to Eurocontrol).

²⁵ *European Union (Withdrawal) Act 2018*, 2018 c 16, online: <www.legislation.gov.uk/ukpga/2018/16/contents/enacted> [*EU (Withdrawal) Act*]. Section 1 of the Act repeals (as of exit day) the European Communities Act 1972 by which the UK Parliament assented to UK membership of the EU.

²⁶ The *EU (Withdrawal) Act* confers on government ministers certain powers, in defined circumstances, to make direct amendments without parliamentary oversight to secondary EU legislation that is being converted into domestic UK law. The expression “Henry VIII powers” to describe these procedures is a reference to King Henry VIII’s supposed preference for legislating directly by decree rather than through Parliament.

²⁷ Section 6 of the *EU (Withdrawal) Act* introduces the concept of “retained” EU law, *i.e.*, EU-derived secondary legislation that is not otherwise modified by UK law – including through exercise of the UK Government’s new “Henry VIII” powers, see *supra* note 26.

UK the opportunity to take charge of its own aviation affairs, but it would still have much to re-learn in order to conduct such affairs effectively.²⁸

B. POLICY CONSEQUENCES OF BREXIT

From the perspective of aviation policy, matters would also be “wildly different”.²⁹ The UK would no longer be exposed, just to take one prominent example, to the policy-oriented rulings of the Court of Justice of the European Union (CJEU) on passenger rights³⁰ – a long-running exercise in interpretive freestyling that has vexed the airline industry.³¹ Nor would UK aviation be shackled to EU policy prescriptions that limit State subsidies to airlines and airports,³² that regulate the award of scarce slots at congested airports,³³ or that impose a particular carbon trading regime on airlines and their passengers.³⁴

²⁸ Concerns have also emerged about the precise mechanisms that will steer the UK’s (and the UK airline industry’s) exit from the single aviation market. In the absence of a final agreed Withdrawal Agreement, see *supra* note 2, Ryanair chief Michael O’Leary has warned against a so-called “cliff-edge” departure on the scheduled Brexit Day, 29 March 2019, predicting that that all flights between the UK and the EU will be abruptly suspended and the British people, as he put it in characteristically jaunty prose, will have to become “boat people” again. See RTE, “Ryanair’s O’Leary predicting ‘hard Brexit’ on the way”, RTE (24 May 2017), online: RTE <www.rte.ie/news/business/2017/0524/877493-ryanair-and-alitalia/>.

²⁹ See Haines, *supra* note 17.

³⁰ The EU had adopted a number of pieces of passenger rights legislation including Regulations 261/2004, OJ, L 46/1 (17 February 2004), and 1107/2006, OJ, L 204/1 (26 July 2006), *inter alia* on denied boarding, cancellation, delay, upgrading/downgrading and reduced mobility passengers. CJEU rulings interpreting (and in some cases enlarging the applicable scope of) this legislation include *Joined Cases C-402/07 and C-432/07 (Sturgeon)* regarding compensation for long delays, *Case C-11/11 (Folkerts)* regarding compensation for missed connecting flights, *Case C-549/07 (Wallentin-Hermann)* regarding compensation in case of technical defects, *Case C-12/11 (McDonagh)* on care in extraordinary circumstances, *Case C-452/13 (Germanwings)* interpreting “time of arrival”, *Cases C-22/11 (Finnair) and C-321/11 (Rodríguez Cachafero and Martínez-Reboredo Varela-Villamor)* on the concept of “denied boarding,” and *Case C-294/10 (Eglitis-Ratnieks)* regarding reasonable measures to be taken by the air carrier.

³¹ For a robust airline critique of this body of rulings, see PPC Haanappel, “Air Passenger Rights in the Electronic Age” (2018) 43:1 *Air and Space Law*.

³² See Julia Fioretti, “EU to tackle unfair airline competition with new rules”, Reuters (8 June 2017) online: Reuters <www.reuters.com/article/us-eu-aviation/eu-to-tackle-unfair-airline-competition-with-new-rules-idUSKBN18Z1A0>; See also *Communication From The Commission – Guidelines on State Aid to Airports and Airlines*, OJ, C 99/3 (4 April 2014).

³³ See, e.g., Regulation 95/93, O.J. (L 14), Jan. 22, 1993, on common rules for the allocation of slots at Community airports.

³⁴ See generally Alejandro Piera Valdes, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges* (The Hague: Eleven International Publishing, 2015), *Essential Air and Space Law Series*, vol 14.

The UK will, of course, be left with questions as to what UK policy ought to be on passenger rights, subsidies, the environment, and many other aspects of air transport. And it will be left with the related question of possibly having to trade off some or even a lot of policy freedom against the need for continued access for UK airlines and their customers to the single aviation market.

The UK will also be forced to consider how far it is willing to travel along the path to further liberalisation of air transport services. The UK, after all, will be leaving the greatest aviation liberalisation project in existence, the combination of the EU's own 27-member single aviation market with the wider European neighborhood project for a European Common Aviation Area (ECAA),³⁵ at a time when protectionist sentiment is in the drinking water throughout Europe and is gaining support to undermine EU air transport liberalisation from within.³⁶ A case in point is a proposed new EU regulation designed to police foreign airline subsidies more intrusively,³⁷ an initiative that is largely the result of aggressive lobbying of European transport chancelleries by Lufthansa, Air France-KLM, and other EU carriers to prevent the three big Gulf airlines from securing "open skies" arrangements with the EU.³⁸ This trend is visible also in the weaponisation of labour relations intended to capsize new transatlantic low-cost services inaugurated by a Norwegian low-cost airline.³⁹ One can read the Brexit negotiations in this setting as potentially

³⁵ See *infra* text accompanying note 104.

³⁶ See Henrik Hololei, Director-General, European Commission Directorate-General for Mobility and Transport, Speech to the International Aviation Club, Washington, DC, (19 July 2018), reported in ATW Online, 20 July 2018 (warning against "a purely nationalist agenda" that could undermine the leadership role of Western nations in global aviation).

³⁷ An existing 2004 regulation has been widely considered too cumbersome and was never relied upon. See Tom Madge-Wyld, "EU law aims to level playing field with Gulf carriers", Getting the Deal Through (15 June 2017), online: <gettingthedealthrough.com/aviation/article/5649/eu-law-aims-level-playing-field-gulf-carriers>. The replacement version includes sweeping powers for the European Commission to impose provisional redressive measures even before concluding any investigations. See Proposal for a Regulation of the European Parliament and of the Council on Safeguarding Competition in Air Transport, Repealing Regulation (EC) No. 868/2004, COM(2017) 289 final (9 June 2017).

³⁸ See Paul McClean, "EU plans to lower bar for airlines complaining about foreign rivals" *Financial Times* (8 June 2017), online: <<https://www.ft.com/content/04657c80-4c3c-11e7-919a-1e14ce4af89b>>; See also "Commission Staff Working Document, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Safeguarding Competition in Air Transport", repealing Regulation (EC) No. 868/2004 (European Commission: Brussels, 08/06/2017), online: European Commission <<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-182-F1-EN-MAIN-PART-1.pdf>>.

³⁹ US labour unions, fearing that the Norwegian airline, Norwegian Air Shuttle (NAS), was

another opportunity to dilute the liberal ideals of the single aviation market.⁴⁰ As I will consider in Part V, the UK, long a champion of aviation liberalisation, may have a key role to play in helping the EU to resist the influence of protectionism.

Finally, and relatedly, the UK aviation authorities will need to settle on what kind of post-Brexit regulatory system they will need to put in place. While that decision is as much a matter of law as of policy, the UK faces a critical policy dilemma because of the unique way in which international aviation is governed. International air transport has its own exceptional legal regime of 4,000 mostly highly restrictive bilateral air services treaties (more than a thousand of which are between the EU Member States and non-EU countries), authorising airlines almost on a case-by-case basis to serve routes between different countries.⁴¹ That regime emanated from the Convention on International Civil Aviation of 1944 (the Chicago Convention),⁴² an autonomous treaty arrangement which meant that international aviation was never a covered sector in the World Trade Organization (WTO) regulatory structure including the General Agreement on Trade in Services.⁴³ The EU Single Aviation Market is an anomaly, in fact, precisely because it breaks with the rigidity of the so-called "Chicago System"⁴⁴ of bilateral treaties and allows air transport services to operate according to the regular rules of international trade. Within the EU, there is no traditional narrow bartering of air freedoms and the ownership/control and cabotage rules are disapplied among the 28 sovereign EU Member States.

In this regulatory context, the UK's post-Brexit air transport relationship with the EU could not slide easily into an arrangement like

taking advantage of differences in social protection laws among EU Member States, persuaded the US Department of Transportation to take the unusual action of opening a full public docket in relation to Norway-based NAS's application (through a subsidiary based in Ireland) for a foreign air carrier permit to serve US airports. The saga recently reached the US courts, see *Air Line Pilots Association International et al. v. Elaine Chao, Secretary of the US Department of Transportation*, No. 17-1012, DC Cir 2018 (11 May 2018) (finding that the Secretary acted properly in eventually granting the permit despite an extraordinarily long delay in the review process).

⁴⁰ Victoria Moores, "Airlines need Brexit answers. Soon"., *Air Transport World* (7 June 2017), online: ATW Online <<http://atwonline.com/blog/airlines-need-brexit-answers-soon>>.

⁴¹ See Havel & Sanchez, *supra* note 1, at 76.

⁴² See *Convention on Civil Aviation (Chicago Convention)*, 7 December 1944, 15 UNTS 295.

⁴³ See *General Agreement on Trade in Services (GATS)*, 15 April 1994, 1869 UNTS 183; see also *infra* note 131 (explaining the GATS Air Transport Annex).

⁴⁴ See Brian F Havel, *Beyond Open Skies: A New Regime for International Aviation* (Kluwer Law Intl, 2009) at 5.

the new EU/Canada Comprehensive Economic and Trade Agreement (CETA),⁴⁵ for example, which is almost entirely based on WTO non-discrimination principles like most favored nation and national treatment, neither of which has ever been applied to a bilateral system based on restrictive one-for-one bilateral exchanges of traffic rights and the exclusionary ownership and control and cabotage rules.⁴⁶ Airlines in the United States and the UK, as well as in the EU27, have made major business decisions on the back of the existing EU single aviation market and will not welcome the UK's return to traditional bilateralism.⁴⁷

III. TOWARD A "STATUS QUO" AVIATION BREXIT

Having laid out how things will in fact be wildly different and not so promising for post-Brexit UK aviation, I turn now to a partial rehabilitation of Louise Butcher's prediction by suggesting that UK/EU air transport after Brexit may not be so wildly different after all. In Part V of this article, however, I will pivot one more time to assert that things once again *could* be wildly different – *but more appreciably in Britain's favor*

⁴⁵ The CETA is the new multi-faceted free trade agreement between the EU and Canada that cuts almost 98% of trade tariffs to boost investment and trade but also includes liberalisation provisions for key services sectors including telecommunications, financial and e-commerce, government procurement, and the maritime industry. See the full text of the CETA online: <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>. Air transport, however, remains excluded from the CETA (as it has typically been excluded from free trade agreements of all kinds). See also Global Affairs Canada, "Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)", online: Global Affairs Canada <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

⁴⁶ If applied to the bilateral air services system described in the main text, the WTO most favoured nation principle would require a State to provide *every other State* on a non-reciprocal basis with the most liberal bilateral concessions (*e.g.*, under an open skies agreement) it provides to particular favoured trading partners. Also, the WTO national treatment principle would require a State to give foreign airlines the same regulatory treatment as its own air carriers, including for example full access to cabotage and non-application of the nationality rule. Both WTO principles are manifestly at odds with protectionist bilateralism. See World Trade Organization, "Principles of the trading system" in "Understanding the WTO: The Basics", online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.

⁴⁷ Major global corporations such as FedEx have geared up to lobby the EU's Brussels-based mandarinat about the future aviation order. FedEx and its peers have been leading a pre-Brexit "education phase" that has involved talking with many EU officials. The corporations have sometimes been surprised to discover that, outside the European Commission's Directorate-General for Mobility and Transport (which uses the apt sobriquet DG MOVE), Commission officials had little conception that global aviation is not governed by the general rules of international trade. See Author's telephone interview with Nancy Sparks, Managing Director, Regulatory Affairs, FedEx Express, 16 February 2017.

– if the UK Government were to take a giant leap of faith and to pitch radical post-Brexit air transport regulatory reform to its EU counterparts. I will argue that the UK should propose the aviation equivalent of what the UK Prime Minister Theresa May has called (in the context of general Brexit trade talks) “a bold ambitious free trade area” (a BAFTA),⁴⁸ but in keeping with air transport’s unique regulatory circumstances this offer would be aimed specifically at the air transport sector. The proposal will build on Andrew Haines’s contention that the aviation interests of the UK and the EU are not “fundamentally misaligned”.⁴⁹

A. LEVERAGING AIR TRANSPORT DIPLOMACY

Air transport diplomacy, as in a lot of situations where there is commercial wrangling between States, rarely proceeds along predictable paths. An air transport negotiator like the EU’s Brexit aviation pilot Peter Sorensen would be well aware that inter-State discussions about air traffic rights and routes can be messy and *ad hoc*, and moreover that air transport negotiators do not fetishise treaties or drop-dead deadlines.⁵⁰ These negotiators are usually pragmatists and are willing to frame many kinds of transitional and subsidiary arrangements (often incorporated into soft law instruments like memoranda of understanding or letters of intent⁵¹) to advance their immediate and ultimate goals. Indeed, while we may be reasonably confident that there exists a directory of some 4,000 formal bilateral air transport treaties, we must also admit that we are unlikely to

⁴⁸ See Sieglinde Gstöhl & Christian Frommelt, “Back to the Future? Lessons of Differentiated Integration from the EFTA Countries for the UK’s Future Relations with the EU” (2017) 6:4 Social Sciences; See also Theresa May, “Prime Minister’s Letter to Donald Tusk Triggering Article 50” (29 March 2017), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf>.

⁴⁹ Haines, *supra* note 17.

⁵⁰ As noted earlier, see *supra* text accompanying note 5, the *Financial Times*, in contrast, does seem to have something of a treaty fetish. See Alex Barker, “Key points from Brussels’ text on Brexit treaty”, *Financial Times* (28 February 2018), online: FT <<https://www.ft.com/content/0460cb6c-1c7b-11e8-956a-43db76e69936>>; Alex Barker, Max Harlow & Caroline Nevitt, “Brexit countdown: what needs to be done with one year to go” *Financial Times* (29 March 2018), online: <ig.ft.com/brexit-countdown/>.

⁵¹ On the concept of soft law, see Jack L Goldsmith & Eric A Posner, “International Agreements: A Rational Choice Approach” (2003) 44 *Virginia Journal of International Law* at 114 (cataloguing 21 different types of agreements between States that are mostly considered non-legally binding and that certainly do not qualify as “treaties”: in addition to memoranda of understanding and letters of intent, their long list also includes nonbinding resolutions, exchanges of notes, joint communiqués, joint declarations, political agreements, administrative agreements, voluntary guidelines, declarations of principles, best practices, exchanges of letters, gentlemen’s agreements, and side letters).

be able to corral the approximately 10,000 or more sub-treaty deals that are probably in place throughout the global airline industry, the vast majority of which have never been touched or seen by any elected representative.

International aviation diplomacy even has a legal/political doctrine that expresses some of the uncertainty that accompanies air transport negotiations. “Comity and reciprocity”⁵² is an *ad hoc* diplomatic understanding that permits air services to continue between States in the absence of any agreement at all, much less that of a solemnised treaty. Comity and reciprocity, for example, was the formula that allowed France and the United States, after France denounced the France/US bilateral air services agreement in 1992, to freeze existing transatlantic service levels and to continue those levels during subsequent International Air Transport Association (IATA) scheduling seasons until a new agreement between the two countries – ultimately a liberalised “open skies” model – could be negotiated and put into effect.⁵³ It would not be hard to imagine UK/EU and even UK/US air transport relations persisting indefinitely on this basis after Brexit.⁵⁴ In those situations, a key objective would be to avoid a situation where the EU (or the United States) were to react in the way the United States responded when the UK abandoned its Bermuda I air services agreement⁵⁵ with the United States in 1977, declaring in effect “no agreement, no service”.⁵⁶

B. TRANSITIONAL SCENARIOS FOR AIR SERVICES AGREEMENTS

The doomsday scenario of “no agreement, no service” should not happen after Brexit, despite some dark prophecies.⁵⁷ The UK might well be able to exploit familiar, time-tested ways to manage the transition and the later post-Brexit airspace. The following represent a sampling of transitional – and even potentially permanent – scenarios that might open

⁵² For commentary on this doctrine as a matter of public international law, see Joel R Paul, “Comity in International Law” (1991) 32 *Harvard International Law Journal* at 6; Francesco Paris & Nita Ghei, “The Role of Reciprocity in International Law” (2003) 36:1 *Cornell International Law Journal* at 124.

⁵³ See Havel, *supra* note 44, at 306.

⁵⁴ See comments of Michael Whitaker, Principal, Whitaker AirSpace, *Impact of Brexit on US Air Services*, International Air Transport Association, Aviation Day USA Conference, New York, (22 February 2018) (from author’s notes).

⁵⁵ See *Air Services Agreement*, 11 February 1946, US-UK, 60 Stat 1499, TIAS No 1507.

⁵⁶ Handley Stevens, *The Life and Death of a Treaty: Bermuda 2* (Palgrave Macmillan, 2018) at 31.

⁵⁷ See *supra* note 28 (quoting Ryanair chief Michael O’Leary’s prediction of a “cliff-edge Brexit”).

a new era when (again adapting the words of Louise Butcher's briefing paper), things will not be "wildly different" in UK/EU (and even (UK/US) aviation.⁵⁸ And, consistent with the general tenor of air transport diplomacy, there is a strong hint of pragmatism in the declaration in July 2018 by Henrik Hololei, the European Commission's administrative chief of DG MOVE, that "all options are still possible [for post-Brexit air transport], including the most dramatic ones . . . [w]e are preparing for all scenarios".⁵⁹

1. REVIVING BILATERALISM WITH THE EU27

First, although technically the European Council "Guidelines" on the Brexit negotiations ordain that there can be no separate Brexit negotiations between individual Member States and the UK, there is also provision for adjustment of the Guidelines to address emerging issues in the overall negotiations.⁶⁰ Thus, with EU approval, the UK could feasibly strike a series of *in camera* aviation deals with some or all of the EU27 as an interim measure: reflecting Brexit's potential for novel responses given the complex issues at stake, a senior Czech government minister has already mentioned a possible side deal on the status of Czech nationals in the UK.⁶¹

But entirely new deals may not even be needed in some cases. Arguably, the individual pre-single aviation market bilateral treaties concluded by the UK between most (but not all) of the EU27 were never formally abrogated. At most, it can be said that only the restrictions in those agreements on access to routes incorporated into the Single Aviation Market were specifically declared to be "superseded" under Article 15(4) of EU Regulation 1008/2008 (the consolidated single aviation market regulation)⁶² once the EU had constructed the legal framework for the Single Aviation Market.⁶³ But if the law of that market were no longer

⁵⁸ Butcher, *Briefing Paper*, *supra* note 12 at 5.

⁵⁹ Holei, *supra* note 36; see also *infra* text accompanying note 123. DG MOVE is the European Commission's transport directorate, see *supra* note 47.

⁶⁰ See, e.g., European Council Guidelines (29 April 2017) EUCO XT 20004/17 at Introduction. See *infra* note 137, explaining the status of the European Council as the EU's highest agenda-setting body.

⁶¹ See Matthew Day & Peter Foster, "Czech interior minister: we should 'negotiate own Brexit deal' with UK", *The Telegraph* (24 January 2017), online: [The Telegraph <www.telegraph.co.uk/news/2017/01/24/czech-interior-minister-should-negotiate-brexit-deal-uk/>](http://www.telegraph.co.uk/news/2017/01/24/czech-interior-minister-should-negotiate-brexit-deal-uk/).

⁶² See *EU Regulation 1008/2008*, *supra* note 15, art 15(4).

⁶³ See *ibid.* Article 15(4) of EU Regulation 1008/2008 provides *inter alia* that "any restrictions

applicable to those agreements after Brexit, the specific supersession of restrictions in Article 15(4) of the 2008 Regulation should not be legally sufficient to prevent their revival in the absence of a general and formal abrogation. Some of those earlier bilateral agreements – notwithstanding recent House of Commons evidence condemning them as “not fit for purpose”⁶⁴ – were appreciably liberal. Even though the 1946 UK/Netherlands air services treaty, for example, hewed to the traditional rules on ownership and control and cabotage (which even modern open skies agreements typically do), as amended through 2000 it offered a broad range of traffic rights to points beyond the Netherlands; UK airlines, of course, would never have needed cabotage connectivity between Dutch cities.⁶⁵

2. REVIVING THIRD-COUNTRY BILATERALISM

Second, the same approach could apply to all other EU Member State international air services treaties with non-EU countries that were negotiated by the EU or by the Member States themselves or that are currently managed by the EU. It is worth noting, in this regard, that the UK actually has some currently unenforced bilateral air services agreements with third countries that are not EU-negotiated agreements. In fact, the UK Department for Transport’s report on the UK’s new

on the freedom of [EU] air carriers to operate intra-[EU] air services arising from bilateral agreements between Member States are hereby superseded”. Moreover, the US/EU Air Transport Agreement, see *supra* note 16, “superseded” air services agreements between the United States and the EU Member States, but had no effect on any intra-EU agreements. Moreover the original US/Member State agreements continue to be “suspended” pending entry into force of the ATA – a legal status yet to be achieved, see comments of Daniel Calleja, former European Commission Director of Air Transport-General for Aviation, “US-EU Open Skies, 10 Years On... Reflections & Prophecies: A Conversation with John R Byerly and Daniel Calleja” (2017) 17:1 Issues in Aviation Law and Policy [Byerly & Calleja, *Reflections*] – and only then could they be “superseded”. See *US/EU ATA*, *supra*, note 16, art. 26. But in that situation the reference to supersession (after entry into force) embraces the entirety of each bilateral rather than specific provisions as in the case of Regulation 1008/2008, and a more cogent case could therefore be advanced for their abrogation.

⁶⁴ See Written Evidence submitted by the Airport Operators Association to the House of Commons Digital, Cultural, Media and Sports Committee, IOB0112 (undated). This evidence was later incorporated into a full Committee report: see House of Commons Digital, Cultural, Media and Sport Committee, *The Potential Impact of Brexit on the Creative Industries, Tourism and the Digital Single Market*, 2nd Report of Session 2017-19, HC 365 (28 January 2018) at 36.

⁶⁵ See generally Organization for Economic Cooperation and Development (OECD)/International Transport Forum, “Air Services Agreements Liberalisation and Airline Alliances: Country-Specific Policy Analysis” *International Transport Forum* (2014), online: International Transport Forum <www.itf-oecd.org/air-service-agreement-liberalisation-and-airline-alliances> at 14, fn 2.

aviation strategy states that 111 bilateral air services treaties will continue to apply after the UK leaves the EU.⁶⁶ One of the most important yet virtually unknown examples is an aviation agreement that was negotiated between the UK and Canada in 2006. The EU prevented the UK from putting this agreement into effect because of a then-forthcoming EU/Canada Air Transport Agreement in 2009 that superseded existing bilateral treaties between Canada and the separate EU Member States.⁶⁷ It is quite possible that the UK regulators are not even aware of this agreement, which goes unmentioned in Louise Butcher's briefing paper to the UK House of Commons.⁶⁸ (The author's information on the stillborn 2006 agreement, incidentally, comes from a recent conversation with a former member of the Canadian Transportation Agency who prefers to remain unidentified.)

As to the US/EU Air Transport Agreement itself, recognized as the high-water mark for modern open skies agreements,⁶⁹ Article 18(5) of the original 2007 agreement contemplates the development of procedures allowing third states (as the UK will become) to accede.⁷⁰ Norway, as a member of the European Economic Area (EEA), exercised this so-called "plurilateral" option in 2011.⁷¹ Although the UK may emulate Norway,

⁶⁶ UK Department for Transport, "Beyond the horizon – the future of UK aviation: next steps towards an aviation strategy" *HM Government* (April 2018) at 38.

⁶⁷ See *Agreement on Air Transport between Canada and the [EU] and its Member States*, OJ, 2010 L 207/30 (not yet entered into force).

⁶⁸ See generally Butcher, *Briefing Paper*, *supra* note 12. Indeed, the author has not seen a reference to the 2006 UK/Canada agreement in any UK official report consulted during research for this article.

⁶⁹ See generally Byerly & Calleja, *Reflections*, *supra* note 63.

⁷⁰ See *US/EU Air Transport Agreement*, *supra* note 16, art 18(5):

The Parties share the goal of maximising the benefits for consumers, airlines, labour, and communities on both sides of the Atlantic by extending this Agreement to include third countries. To this end, the Joint Committee shall work to develop a proposal regarding the conditions and procedures, including any necessary amendments to this Agreement, that would be required for third countries to accede to this Agreement.

This provision was used to allow the accession of Norway and Iceland to the US/EU Air Transport Agreement as of June 2011. See European Commission, *Proposal for a Council Decision, Explanatory Memorandum*, COM(2011) 238 final (2 May 2011) (explaining Joint Committee actions leading to these accessions).

⁷¹ The European Economic Area [EEA] is a broad customs zone encompassing the EU Member States and the three remaining members of the European Free Trade Area (EFTA), Iceland, Norway, and Liechtenstein. See, *inter alia*, *EEA Enlargement Agreement*, OJ, L 130/3 3 (29 April 2004). The most conspicuous legal feature of the EEA is its almost wholesale application of EU legislation for the free movement of goods, capital, services, and persons in the many economic sectors, including air transport, that it now covers. The EEA also applies certain flanking policies in the areas of competition and State aid rules. See generally

there is also speculation that there could instead be a US/UK bilateral aviation deal if for no other reason than to preserve antitrust immunity⁷² for the American Airlines OneWorld alliance with British Airways.⁷³ The United States and the UK already seem to be nearing completion of a bilateral open skies deal with formal meetings apparently taking place at least since June 2018.⁷⁴ Another key factor for the US team in US/UK pre-Brexit talks, and one that is certainly encouraging the bilateral courtship between the two countries, is to avoid a reversion to the Bermuda II air services agreement that preceded the US/EU treaty and which included strict caps on the number of US and UK airlines serving London's Heathrow Airport.⁷⁵ Negotiators from the United States still recall Bermuda II with disfavour: the chief US negotiator for the US/EU air services agreement described it as "the greatest crime in aviation history".⁷⁶

EFTA, "The Basic Features of the EEA Agreement; What is the European Economic Area?" (1 July 2013) online: EFTA <www.efta.int/eea/eea-agreement/eea-basic-features#1>.

⁷² See International Civil Aviation Organization (ICAO), "Antitrust Immunity For Airline Alliances", ICAO Working Paper (18-22 March 2013) *Working Paper on Antitrust Immunity For Airline Alliances*, online: <www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp85_en.pdf>, noting how liberalisation has expanded worldwide use of airline alliances despite the constraints of the nationality rule, but to protect against accusations of collusion or price-fixing among alliance members some countries, notably the United States, have granted immunity from competition laws to participating airlines in certain circumstances. But "no international standards or agreements [for the grant of immunity] currently exist ... [a]s a result, each alliance currently has to comply with different systems or standards depending on each State's competition law". *Ibid.*

⁷³ British Airways and American Airlines are the anchor members of the OneWorld global airline alliance launched in 1999. Oneworld has enjoyed various kinds of antitrust immunity from US and EU regulators since the UK became an original party to the US/EU Air Transport Agreement, see *supra* note 16.

⁷⁴ See Ben Goldstein, "US-UK Open Skies deal expected this summer", (31 May 2018), *Air Transport World Online*, online: ATW Online <<http://atwonline.com/open-skies/us-uk-open-skies-deal-expected-summer>>.

⁷⁵ See *Air Services Agreement*, US-UK, 28 UST 5367 (23 July 23 1977).

⁷⁶ Byerly & Calleja, *Reflections*, *supra* note 63 at 1674. According to comments exchanged in a panel discussion on Brexit at the 28th Annual Conference of the European Air Law Association (EALA) in Warsaw in 2017, the United States might conceivably denounce the entire US/EU Air Transport Agreement if it can preserve its airlines' access to Heathrow through a UK bilateral deal. According to some participants in the Warsaw discussion, unfettered access to London Heathrow is what the United States really wanted from the original US/EU negotiations that finally brought Britain into the open skies fold. (From Author's Notes of the EALA Annual Conference in Warsaw); see also John Balfour, Mark Bisset & Thomas van der Wijngaart, "UK: The EU Air Law Consequences of Brexit for The UK" *Mondaq* (4 July 2016), online: <www.mondaq.com/uk/x/506110/Aviation/The+EU+air+law+consequences+of+Bretxit+for+the+UK>.

Hints of compromise in how the EU might treat the UK's future engagement with non-EU third countries emerge from the European Council's Brexit negotiation Guidelines, mentioned earlier, as well as the ministerial Council of the European Union's Brexit negotiation Directives. Thus, the April 2017 European Council Guidelines specify, in language that is largely echoed in the May 2017 EU Council Directives, that there should be a "constructive dialogue" between the EU and the UK on a "possible common approach" toward third countries where the UK has already been a party to EU-negotiated international commitments with those countries prior to its withdrawal from the EU.⁷⁷ While the intent of this language is not absolutely clear, and it may indeed be primarily a generalised warning to the UK not to shirk from commitments already negotiated through the EU with third countries, the EU's suggestion of a "common approach" could also serve as a useful incentive to the UK to use third country air services relationships – particularly with the United States – to enhance its bargaining position for a more effective future air transport relationship with the EU itself.

The UK could, for example, avoid the feared EU doomsday scenario by including EU Member States in a new US/UK air services agreement. Were that to occur, the UK could designate EU-licensed airlines to serve the US market directly from London or other UK airports (the seventh freedom right that is currently freely available throughout the EU to all EU-licensed carriers including those of the UK).⁷⁸ To be sure, the vagaries of the nationality rule, which still applies pervasively outside the EU, might require that EU airlines might have to maintain affiliate (minority-owned) airline companies in the UK to take advantage of this concession.

⁷⁷ See, e.g., *European Council Guidelines of 29 April 2017*, *supra* note 60 at para 13; *Council [of the EU] Directives of 22 May 2017*, XT 21016/17 at para 18. On the role of the Council of the European Union, which is a distinct EU institution from the European Council, see *infra* note 138.

⁷⁸ The much-prized seventh freedom, part of the catalogue of traffic rights (the "freedoms of the air") that are exchanged in bilateral air services agreements, allows an airline to serve points located outside its home State independent of any route connection to the home State. Thus, the seventh freedom rights granted to EU airlines under the *US/EU Air Transport Agreement*, *supra* note 16, allow Lufthansa to serve any point in the United States with direct service from any point in the EU. Under normal bilateral treaty arrangements, Lufthansa could only provide direct service to the United States from its licensing State, Germany, and otherwise only indirect service via other points (such as France or the UK) in accordance with the so-called "fifth freedom". Similarly, EasyJet, a UK-licensed carrier, can operate inter-EU flights between Berlin and Madrid or intra-Italy flights between Milan and Rome without any connection to the UK. This would not be legally possible if the UK left the single aviation market without negotiating these specific rights on behalf of its airlines. For a full analysis of the freedoms of the air, see Havel & Sanchez, *supra* note 1, at 76-86.

After all, in the current negotiations toward a US/UK open skies deal, the UK does not seem to be successful in securing US consent for disapplying the ownership rule even in relation to UK carriers themselves. The tentative agreement that appears to be under consideration suggests that current ownership structures of UK carriers will merely be grandfathered,⁷⁹ whereas new UK carriers – and therefore very likely also EU carriers seeking seventh freedom rights out of the UK market – would be required to abide by the traditional ownership and control rules.⁸⁰

In return for traffic rights under the US/UK arrangement, the EU might be persuaded – as part of a “common approach” – to add the UK to the list of non-EU Member States whose airlines can be designated by EU Member States to serve third countries directly from EU airports.⁸¹ That concession would at least save the British Airways all-business class OpenSkies airline serving US points from Paris (although that carrier may be slated for extinction anyway⁸²). Iceland, Liechtenstein, and Norway, all founder participants in the EEA,⁸³ as well as Switzerland which has its own set of expansive aviation bilateral agreements with the EU,⁸⁴ already enjoy those privileges. A creative negotiation could extend them to the UK also even if full EEA membership is not likely to be contemplated.

3. ALIGNING THE OWNERSHIP AND CONTROL RULES TO PROTECT UK/EU AIR CONNECTIVITY

Another commercial consequence of Brexit, this one of greater concern to UK-licensed or UK-owned low-cost carriers, is potential disruption to traffic rights connectivity within the EU27 and between the UK and the EU27. Low-cost carriers operate freely between and among hundreds of EU airports exploiting the unlimited traffic rights privileges of the Single Aviation Market. What happens to these privileges, after Brexit, for low-cost carriers that have a legal affiliation with the UK? The primary at-risk airlines – EasyJet and Ryanair – will be anxious to maintain

⁷⁹ See *infra* text accompanying note 155.

⁸⁰ See Goldstein, *supra* note 74.

⁸¹ Again, this is the so-called seventh freedom privilege, see *supra* note 78, which (in this situation) would require no route connection to UK airports.

⁸² See Gulliver, “Will British airlines lose their rights to fly to America after Brexit?” *The Economist* (10 March 2018), online: <www.economist.com/gulliver/2018/03/10/will-british-airlines-lose-their-rights-to-fly-to-america-after-brex>.

⁸³ See *supra* note 71 (discussing the institutional nature of the EEA).

⁸⁴ In contrast to the EEA, the Swiss agreement with the EU involves a specific *sectoral* integration of Switzerland into the entire EU aviation *acquis*. See *Agreement Between the [EU] and the Swiss Confederation on Air Transport*, O.J. (L114) 73 (30 April 2002).

the status quo.⁸⁵ Both carriers face an existential question that is familiar to the international airline industry but especially vexing to the Southeast Asian low-cost sector that is dominated by multi-jurisdictional franchised airline groups like AirAsia and Jetstar:⁸⁶ how can an airline company comply with the strict terms of the majority ownership and effective control rules in one country (here, the UK) and another country or region (here, the EU) at the same time? The answer, once Brexit occurs, is that it cannot. No single UK or EU airline will be able simultaneously to align its ownership structure with the requirements of the two jurisdictions.

The solution most widely thought to be workable – but that nevertheless remains untested and therefore open to legal challenge in both jurisdictions – is to emulate the Asian franchise model. Adapting the legal scenario that governs that model, an affected airline would set up distinct airline companies in the UK and in an EU Member State and then decide which of those companies should be, in effect, the “junior operator” that has to be handed over to local ownership and control. This kind of corporate gerrymandering may be more manageable for EasyJet, a UK-licensed airline that carries 40% of its passengers on EU27 and other European routes that do not touch UK airspace.⁸⁷ To legitimise the strategy, however, EasyJet’s EU-based “affiliate” will need an air operator’s certificate (or AOC) and license⁸⁸ granted according to common EU criteria – including the requirement of majority ownership and effective control by citizens of an EU Member State or States (or by an EU Member State or States) – under the auspices of an EU Member State civil

⁸⁵ Another UK-licensed operator of Wizz Air has also publicly expressed its concern. Although its primary affiliation is with Hungary, an EU Member State, Wizz Air has a UK-incorporated subsidiary set up under current single aviation market rules. See Conor Humphries & Victoria Bryan, “Airlines warn of disruption if no quick Brexit aviation deal” *Reuters* (29 March 2017), online: Reuters <uk.reuters.com/article/us-britain-eu-ryanair-hldgs-idUKKBN1700JA>; Josh Spero, “Wizz Air gets UK licences as airlines ready for Brexit” *Financial Times* (3 May 2018), online: FT <www.ft.com/content/824728fc-4e9c-11e8-a7a9-37318e776bab>.

⁸⁶ See *The Sydney Morning Herald*, “Jetstar and AirAsia in low-cost alliance” (06/01/2010), *The Sydney Morning Herald* (6 January 2010), online: SMH <www.smh.com.au/business/jetstar-and-airasia-in-lowcost-alliance-20100106-1sze.html>.

⁸⁷ See Easyjet, “Easyjet and the EU”, online: Easyjet <corporate.easyjet.com/~media/Files/E/Easyjet/pdf/about-easyjet/easyjet-and-the-eu.pdf>.

⁸⁸ An airline receives an AOC certifying professional ability and organization to ensure safe operation of aircraft; the operating license signifies financial fitness and good business repute. Although much of this permit-granting activity is State-based, ICAO, as the U.N. specialized agency for international aviation, sets minimum international standards. See ICAO, *Manual on the Regulation of International Air Transport*, ICAO Doc 9626 (2d ed, 2004).

aviation licensing authority.⁸⁹ Even though EasyJet's founder Stelios Haji-Ioannou reportedly holds dual UK/Cypriot citizenship and also a sizeable minority shareholding in the company, circumstances that could assist EasyJet in finessing the EU ownership/control issue for its non-UK operations, the airline has already secured an Austrian AOC and license as a prophylactic measure.⁹⁰

The situation for rival carrier Ryanair is actually more troublesome. Ryanair holds its license from an EU Member State, the Republic of Ireland, but – in complete synchrony with the rules of the EU single aviation market – the majority of its shareholders are EU nationals (current estimates vary between 54 and 60%).⁹¹ But many of those EU nationals are in fact UK citizens, whose post-Brexit loss of EU citizenship could convert the airline's shareholder profile into a non-EU majority.⁹² Ryanair needs to keep access to the UK (for its three principal domestic markets there) but also needs its dense network of EU routes including cabotage operations in Spain and Italy. Obviously, an unchanged ownership structure for Ryanair after Brexit would risk violating EU ownership and control rules. Accordingly, it is reported that CEO Michael O'Leary has begun a share buy-back that returns cash to shareholders,⁹³ and has also moved to protect his UK access by instructing his legal team to establish a new UK subsidiary.⁹⁴

⁸⁹ See *EU Regulation 1008/2008*, *supra* note 15.

⁹⁰ See Chris Lyle (Principal, Air Transport Economics), "The Truth About Brexit and Civil Aviation", Colloquium on Air and Space Law, McGill Institute of Air and Space Law (9 November 2017); See also Gwyn Topham & Mark Sweney, "EasyJet to set up Austrian HQ to operate EU flights after Brexit" *The Guardian* (14 July 2017), online: [The Guardian <www.theguardian.com/business/2017/jul/14/easyjet-austria-eu-flights-brexit>](http://www.theguardian.com/business/2017/jul/14/easyjet-austria-eu-flights-brexit); See also Tanya Powley, "EasyJet forges ahead to protect flying rights after Brexit" *Financial Times* (8 February 2018), online: [FT <www.ft.com/content/7c6796e8-0cf6-11e8-8eb7-42f857ea9f09>](http://www.ft.com/content/7c6796e8-0cf6-11e8-8eb7-42f857ea9f09).

⁹¹ See Reuters, "Ryanair's CEO says Brexit may lead to more share buy-backs" *Reuters* (11 July 2017), online: [Reuters <www.reuters.com/article/us-britain-eu-airlines-ryanair-idUSKBN19W24L>](http://www.reuters.com/article/us-britain-eu-airlines-ryanair-idUSKBN19W24L); See also Lyle, *supra* note 90.

⁹² See Reuters, *ibid.*

⁹³ Like other EU airlines, Ryanair has clauses in its articles of association that allow it to force non-EU shareholders to sell their shares to ensure that EU investors retain a majority. The target for the buy-back scheme, therefore, will ideally be UK shareholders, but it is unclear that Ryanair has authority pre-Brexit to force these cash-for-shares exchanges on its UK shareholders. See *ibid.*

⁹⁴ The subsidiary company would be called Ryanair UK. See Gwyn Topham, "Ryanair applies for UK licence as airline braces for hard Brexit" *The Guardian* (2 January 2018), online: [The Guardian <www.theguardian.com/business/2018/jan/02/ryanair-applies-uk-licence-airline-braces-hard-brexit>](http://www.theguardian.com/business/2018/jan/02/ryanair-applies-uk-licence-airline-braces-hard-brexit).

It is worth noting that EasyJet, Ryanair, and to some extent Hungarian low-cost carrier Wizz Air,⁹⁵ are pursuing a model of franchising or affiliation that, although it has mostly evolved in the Southeast Asian sector, has recently been subject to regulatory pushback – especially with respect to interpretation of the “control” element of the citizenship test – in the key Hong Kong market. It is challenging – and, in a business sense, absurdly constraining – for the “parent” corporation to avoid close oversight of its affiliates elsewhere. The Australian low-cost carrier, Jetstar,⁹⁶ was unable to convince the Hong Kong Air Transport Licensing Authority (ATLA) that its proposed Jetstar Hong Kong affiliate was truly master of its own commercial destiny.⁹⁷

Other interim solutions, however, may be more legally predictable than an unnatural splitting of the corporate operations of the UK-oriented low-cost airlines. To serve Amsterdam/Bologna for example, a current EasyJet “seventh freedom” route,⁹⁸ post-Brexit (and in the absence of a broader UK/EU settlement), if EasyJet were still operating as a UK-licensed airline it would presumably have to align traffic rights in the traditional way by linking the appropriate provisions under separate UK/Netherlands and UK/Italy air services treaties. But neither of those bilateral treaties would likely award seventh freedom rights (which are usually granted only for air cargo services in modern open skies treaties), leaving EasyJet to fall back on services commencing out of its London or other UK bases in order to create the premise for a fifth freedom service⁹⁹ from Amsterdam to Bologna.

But consider the alternative premise that EasyJet uses its Austrian AOC and operates entirely as an EU-licensed airline with no trailing UK subsidiaries or affiliates. The UK authorities, in such a situation, might recognise an “EasyJet Europe” as a UK carrier without requiring a franchised affiliate or other specific UK corporate presence. Moreover, it

⁹⁵ See *supra* note 85.

⁹⁶ The Jetstar Group was founded by Qantas Airways Ltd. and its wholly-owned subsidiary Jetstar Airways Pty. Ltd. as part of their “Jetstar Pan-Asia Strategy”. See “Jetstar Group”, online: Jetstar <www.jetstar.com/au/en/about-us/jetstar-group>.

⁹⁷ The ATLA found *inter alia* that Jetstar Hong Kong did not have its “principal place of business” in Hong Kong because, although its day-to-day operations were conducted in Hong Kong, it could not make business decisions independently of its non-Hong Kong shareholders. See Transport and Housing Bureau for the full decision, online: <<https://www.thb.gov.hk/eng/boards/transport/air/atla.htm>>.

⁹⁸ See *supra* note 78 (explaining the “seventh freedom” of the air).

⁹⁹ That is, a service commencing in the UK and connecting via an EU27 airport to one or more additional points in the EU27; see *supra* note 78 (explaining fifth freedom traffic rights).

is clear from the terms of the UK Civil Aviation Act of 1982 that, prior to the EU single aviation market, the UK Secretary of Transport possessed some power to alter a finding by the Civil Aviation Authority on the issue of whether a UK airline satisfied UK ownership and control rules.¹⁰⁰ It would be a small step, and certainly not contrary to the intent of the legislation, to re-introduce and re-apply the Secretary's discretion with respect to EU-licensed airline companies like EasyJet which have a substantial UK presence even if many of its operations are dispersed throughout the EU27. The UK might even offer an exemption from the harsh rules on airline nationality on a "blind eye" basis, exactly as the United States has done as a policy matter on a number of occasions. Aerolineas Argentinas operated under Spanish ownership and control for several years, but the Argentine carrier never forfeited any traffic rights under the US/Argentina air transport treaty despite the presence of a strict nationality requirement.¹⁰¹ Ryanair, of course, could also benefit from such a generous waiver policy.

The post-Brexit connectivity canvassed in this section shows that, as a general matter, once an airline has competed in a post-bilateral world such as the EU Single Aviation Market, where a single AOC gives that airline all the traffic rights and access it needs to 28 national air transport markets, returning to a world of 27 bilateral agreements (just in relation to the UK) would be commercially distasteful to say the least. One hopes, of course, that workable short-term solutions to these operational obstacles will lie among the ideas I have been discussing here. Now, however, I turn to prospects for a radical and permanent UK/EU aviation settlement.

IV. DECONSTRUCTING THE EU'S AVIATION RIGHT OF ESTABLISHMENT

The more profound legal and political questions for the future of the UK/EU aviation relationship are not related to the mere trading of traffic rights. It has been true since the outset of the global air transport regulatory system that these rights are simply the tangible consequence of a system that is fundamentally protectionist and nationalistic. If airlines could freely invest in each other or set up their own subsidiaries and affiliates across borders, the often mechanistic process of exchanging traffic rights would naturally atrophy and vanish. That is precisely how the

¹⁰⁰ See *UK Civil Aviation Act 1982*, 1982 c 16, Part I, §6, as interpreted in UK Civil Aviation Authority, *Economic Regulation Group, Ownership and Control Liberalisation: A Discussion Paper*, CAP 769 (October 2006), Ch 2 at 3 [CAA, *Discussion Paper*].

¹⁰¹ See Brian F Havel, *In Search of Open Skies: Law and Policy for a New Era in International Aviation* (Kluwer Law International, 1997) at 421.

EU Single Aviation Market evolved in a series of incremental steps culminating in the open investment rules that govern today. If UK airlines could continue after Brexit to have access to those rules, they would not be harmed at all by the UK's exit from the EU.

Abolition of the ownership and control rules within the EU allowed the International Airlines Group to unite British Airways, Iberia, Vueling, Aer Lingus, and potentially Norwegian Air, allowed Air France and KLM to pursue a *de facto* merger (modulated to reflect the desire of both airlines to maintain brand goodwill and also the continued sway of the nationality rule outside the EU),¹⁰² and allowed EasyJet, Ryanair, and Wizz Air freedom to to serve every EU route regardless of whether that service involved internal cabotage connections or cross-border journeys. The conceptual apparatus of tradeable traffic rights, in other words, disappeared as intra-EU connectivity became (like its US domestic counterpart) functionally analogous to a digital online network.¹⁰³ Within a post-Brexit EU, can this new regulatory order be preserved for the UK air transport industry?

To answer that question, the discussion must now be framed outside the conventional framework of open skies agreements including specific deals on enhanced traffic rights with the EU (such as, for example, a seventh freedom Amsterdam/Bologna service for a UK-licensed EasyJet). The apposite legal construct for the next part of the discussion is the *right of establishment*. To understand that construct and its importance for a post-Brexit US/EU aviation order, I need to look more closely at how it functions within an existing EU institutional innovation called the European Common Aviation Area (ECAA).¹⁰⁴ The ECAA is an instrument

¹⁰² These intra-EU mergers are dependent on third countries refraining from applying the nationality rule under their bilateral air services agreements with EU Member States such as France, the Netherlands, the UK, Spain, Ireland, and so on. Russia, for example, threatened revocation of Austrian Airlines' market access rights after its acquisition by Lufthansa. See Havel & Sanchez, *supra* note 1, at 93, fn 95. The European Commission has been endeavoring (mostly successfully) to persuade third countries to accept the concept of "EU" corporate nationality for EU-licensed air carriers. See *infra* note 135; see also Erwin von den Steinen et al., "An Overview of the Air Services Agreements Concluded by the EU" *European Parliament, Directorate-General for Internal Policies*, PE 495.849 (15 February 2013) [European Parliament, *Overview of Air Services Agreements*].

¹⁰³ See Matt Andersson, *The New Airline Code: Why the Industry Must be Programmed to a Public-Private Integration* (Lincoln, NE: iUniverse, 2005) at 344; But see *infra* note 116 (noting that EU "airspace" remains under the separate sovereign control of the individual Member States).

¹⁰⁴ See *Multilateral Agreement on the Establishment of a European Common Aviation Area, between the European [Union] and its Member States, the Republic of Albania, Bosnia and Herzegovina, the*

of the EU's "European Neighbourhood Policy", a set of multi-sector action plans designed to improve economic development and security between the EU Member States and a ring of their contiguous countries and regions.¹⁰⁵ In that vein, the original ECAA treaty sought to extend the EU single aviation market's *acquis*¹⁰⁶ to eight countries surrounding the EU, while aiming ultimately to "establish a single pan-European air transport market, based on a common set of rules and encompassing up to 60 countries with approximately one billion inhabitants".¹⁰⁷

Adherence to the ECAA does not at present appear to be a vehicle for a future UK/EU air transport relationship, in part because continuing UK membership¹⁰⁸ would breach one of the most controversial UK negotiation "red lines",¹⁰⁹ acquiescence to the jurisdiction of the CJEU.¹¹⁰ Adherence would also require passive adoption of virtually all EU

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 (9 June 2006), OJ, L 285/3 (entered into force on 1 December 2017) [ECAA Agreement].

¹⁰⁵ See generally European Commission, Communication from the Commission, "European Neighbourhood Policy: Strategy Paper" COM(2004) 373 final (12 May 2004).

¹⁰⁶ In this context, the *acquis* is the accumulation of EU treaties, legislation, and judicial and administrative decisions that relate to air transport. See European Commission, "A Community Aviation Policy Towards its Neighbours", COM(2004) 74 final (9 February 2004) at para 35. The ECAA Agreement makes clear, however, that progress toward the eventual ECAA will be "transitional". *ECAA Agreement, supra* note 104, preamble.

¹⁰⁷ European Commission, Communication from the Commission, "Common Aviation Area with the Neighbouring Countries by 2010: Progress Report", COM(2008) final (undated), at para 4. In addition, EEA Members Iceland and Norway were also parties to the first iteration of the ECAA, as well as the then U.N.-administered area of Kosovo. See *supra* note 104.

¹⁰⁸ The UK is, of course, already a member of the ECAA pending Brexit. See Institute for Government, "Aviation and the Common Aviation Area (ECAA)", *Institute for Government* (14 August 2017), online: Institute for Government <www.instituteforgovernment.org.uk/explainers/european-common-aviation-area-brexite> (noting confirmation from the UK Government that the UK will leave the ECAA when Brexit occurs).

¹⁰⁹ See David Allen Green, Brexit: why did the ECJ become a UK 'red line'?, (12 April 2017), online: FT <<https://www.ft.com/content/32cd1e87-c7d1-3026-86fc-bce5229711d1>>.

¹¹⁰ See *ECAA Agreement, supra* note 104, Annex IV. UK rhetoric on the CJEU's jurisdictional reach has cooled somewhat as the negotiations have progressed. Prime Minister Theresa May has largely abandoned her original opposition, conceding that UK courts will look at CJEU rulings where appropriate, particularly where UK and EU law could be considered identical. During the projected transition period, at least, the CJEU will continue to exercise some jurisdiction also. But whether the UK would be prepared to concede *a priori* CJEU oversight over an entire sector of the economy, as ECAA membership would certainly entail, presents a much more uncertain proposition. See generally Alasdair Sandford, "Article 50 a year on: Brexit 'red lines' change color", *Euronews* (29 March 2018), online: Euronews <www.euronews.com/2018/03/29/article-50-a-year-on-brexite-red-lines-change-colour>.

aviation legislation.¹¹¹ But in this article I am not concerned with the imponderable of a future UK re-accession to the ECAA. I am proposing, rather, that the UK could and should (in settling a deal with the EU on air transport) secure continued application of the key benefit of the ECAA – a reciprocal right of establishment for airlines embracing the EU27 (and possibly the entire ECAA) and the UK – in exchange for adopting a major reform of the international air transport regulatory system (as presented in Part V of this article). In this section, therefore, I am setting aside the political skirmishings of the Brexit negotiations and focusing instead on the precise legal content of the ECAA agreement itself, in particular its conceptualisation of the right of establishment.

The critical provisions on the right of establishment in the ECAA Agreement are Articles 7 and 8,¹¹² which give effect to the general principle in Article 6 prohibiting “any discrimination on grounds of nationality.”¹¹³ The text of Articles 7 and 8 is modeled directly on how the non-discriminatory right of establishment is rendered in the Treaty on the Functioning of the European Union (TFEU).¹¹⁴ Articles 7 and 8 grant access to the single aviation market not in terms of more or less liberal exchanges of traffic rights – the traditional currency of aviation services treaties – but as coordinate with a right of air transport “establishment”.¹¹⁵

In brief, the right of establishment in the ECAA Agreement treats all airlines licensed in any ECAA State as part of a single air services jurisdiction (comparable in this respect to the United States).¹¹⁶ Interpreting the right of establishment as it was applied by the CJEU in

¹¹¹ See, e.g., *ECAA Agreement*, *supra* note 104, Annex I (“Rules Applicable to Civil Aviation”) (including a comprehensive listing of current EU air transport legislation).

¹¹² See *ECAA Agreement*, *supra* note 104, arts 7-8.

¹¹³ See *ibid*, art 6.

¹¹⁴ See *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)*, OJ, C 324/47 (26 October 2012), arts 49-55 (“Right of Establishment”).

¹¹⁵ See *ECAA Agreement*, *supra* note 104, art 1(1) (mentioning additional coordinate bases of the ECAA as including common rules relating to equal conditions of competition, safety, security, air traffic management, social issues, and the environment).

¹¹⁶ But note that the EU air services jurisdiction simply refers to the cumulative territory of the EU. The Union, unlike the Federal Aviation Administration in the United States, does not yet as a legal matter comprise the combined *airspace*s of the 28 Member States. The EU, in fact, is not yet a party to the Chicago Convention, see *supra* note 42, which recognises in Article 1 that each of its 192 member States has complete and exclusive sovereignty over its airspace. See Brian F Havel & John Q Mulligan, “The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme” (2012) 37:1 *Air and Space Law* at 6, fn 13.

the celebrated *Open Skies* cases,¹¹⁷ ECAA-licensed airlines are granted the right – subject only to circumscribed conditions of public policy, public security, and public health¹¹⁸ – to set up new airlines in another ECAA Member State, to create and manage subsidiaries in another ECAA Member State, and to acquire existing airlines in another ECAA Member State.¹¹⁹ Additionally, ECAA-licensed airlines can operate any air service within another ECAA State or within the entire EU or ECAA from that State – and between any other EU or ECAA States to third countries if the EU or an individual ECAA member can negotiate that kind of third-country access.¹²⁰

In effect, the right of establishment confers the same broad rights of market access on all ECAA-licensed airlines as an EU Member State airline enjoys under EU legislation even though the ECAA airline may be licensed in a State which is not an EU Member State.¹²¹ At a stroke, the

¹¹⁷ See, e.g., Case 466/98, *Comm'n v. UK*, 2002 E.C.R. I-09427. Seven other Member States were also named defendants.

¹¹⁸ See ECAA Agreement, *supra* note 104, art 9(2).

¹¹⁹ The right to acquire existing airlines in another country (e.g., Lufthansa's acquisition of Austrian Airlines) is not *expressis verbis* present in the language of the ECAA Agreement – or in the original language of the TFEU (see *supra* note 114) – but is clearly implied by (i) the provision in Article 7 of the ECAA Agreement that grants the right to “manage” undertakings in another country (see *ECAA Agreement, supra* note 104, art 7), (ii) the broad non-discriminatory provision in Article 8 of the *ECAA Agreement*, supplementing Article 6 (see *supra* note 113) that grants ECAA-licensed airlines the right to be treated “in the same way” as nationals of any other ECAA Member State, and (iii) the provisions in EU legislation that, in conformity with the right of establishment, disapply the old ownership and control rules among the ECAA States by redefining an EU (and now an ECAA) air carrier as majority-owned and effectively controlled by citizens of EU (and now ECAA) States, or by EU (and now ECAA) States themselves. See *EU Regulation 1008/2008, supra* note 15, art 4(f).

¹²⁰ See *infra* note 135 (discussing the methodology of EU third country air services negotiations).

¹²¹ Although beyond the scope of the present article, it is worth noting that the EU's right of establishment is conceptually connected to a notion of “regulatory nationality” that is sometimes advocated as a replacement for the traditional ownership and control rules. Regulatory nationality requires an airline, in order to operate internationally, to have a substantial legal and commercial presence within the State from which it secures its license (for example, abiding by national labour, tax, immigration, registration, safety, security, and other laws), but does not require that the airline be owned and/or controlled by citizens of that State. The existence of a regulatory nationality gives the equivalent assurance of civil aviation authority oversight of an airline's operations that all States now expect under the existing system of national licensing (including the ownership and control rules). The EU multilateralises regulatory nationality so that EU airlines have a common EU citizenship but licenses are granted (using common criteria) by the separate Member States. See generally Havel & Sanchez, *supra* note 1, at 53, 85, 127-128 (explaining *inter alia* how adoption of an air transport right of establishment, including regulatory nationality, would align the international airline industry with other economic sectors that pursue cross-border

conferral of an ECAA-style right of establishment on UK airlines would resolve the connectivity challenges discussed earlier in relation to the UK-affiliated low-cost carriers, as well as sustaining the hybrid UK/EU arrangements that link, for example, the member airlines of the British Airways-led International Airlines Group (IAG).¹²²

V. A RADICAL OFFER BY THE UK BREXIT NEGOTIATORS

Now this article pivots a final time, toward contemplating once again a “wildly different” future for the post-Brexit UK/EU (and, relatedly, UK/US) aviation relationship. EU senior aviation official Henrik Holelei, as noted in Part II, recently pronounced that “even the most dramatic options” are not off the table in the quest for a new UK/EU aviation *ordo mundi*.¹²³ In that setting, *the right of establishment needs to become part of the UK/EU negotiations on air transport*. It is transcendently more significant to UK aviation interests than the negotiation of specific aviation freedoms or even cabotage.¹²⁴

Before moving to the proposal on the right of establishment, however, it is worth pausing to consider two critical “gateway” issues that are presented in the current UK/EU aviation negotiations. First, there is the question of whether aviation will continue to be treated as “exceptional” in the Brexit negotiations or instead will be absorbed into the general trade arrangements that will eventually be agreed. Second, assuming that aviation will keep its exceptional status, it is also necessary to consider why the radical proposal I will make here may actually be essential to jolt the EU from its current unwillingness to consider early deals in any economic sector.

investment opportunities).

¹²² See Lyle, *supra* note 90 (noting that British Airways does not operate within the EU27 – *i.e.*, without touching UK airspace – but that IAG, with its operational headquarters in the UK and incorporation in Spain may need to divest shareholders in order to be majority EU27-owned and therefore allowing EU-based IAG carriers to continue to operate).

¹²³ See Holelei, *Speech, supra* note 36.

¹²⁴ Indeed, if an airline *establishes* as an EU or ECAA carrier, the multiple “freedoms” of the air will in any case become part of the established airline’s portfolio of available legal rights.

A. MAINTAINING AVIATION'S "EXCEPTIONALISM"

The path to the mutual exchange of a right of establishment will, in the end, require a UK/EU aviation agreement, what some observers have called, using English tailoring argot, as a "bespoke agreement". In its 2017 Brexit negotiation Guidelines, the European Council did specifically acknowledge that, in the context of "socio-economic cooperation", continued UK/EU connectivity through an "air transport agreement" between the EU and UK "could be envisaged".¹²⁵ At the same time, the Council did not reject the UK proposal of an "ambitious" free trade agreement between the UK and EU¹²⁶ that (presumably) would follow the general lines of the 2017 EU/Canada Comprehensive Economic and Trade Agreement, the CETA.¹²⁷ That Agreement, comprising 1,598 pages in its principal text, is wholly free from "red line" UK issues like the EU doctrine of the free movement of workers or the compulsory jurisdiction of the CJEU.¹²⁸ UK Prime Minister Theresa May might even come to the view that the CETA is ambitious enough, given that it covers both trade in goods and trade in services, to serve as her ultimate "backstop" in general trade negotiations.¹²⁹

But the CETA stands squarely within the post-war history of trade negotiations in that, although it embraces trade in services,¹³⁰ it does not break with the exceptional status of aviation as a sector that is regulated primarily by a system of bilateral air services agreements lying outside general trade negotiations or agreements.¹³¹ The CJEU, too, in rulings

¹²⁵ See *European Council Guidelines*, *supra* note 60, para 11. The Council also mentioned the possibility of separate aviation safety and security agreements. See *ibid.*

¹²⁶ *Ibid.*, para 12.

¹²⁷ See *European Council Guidelines*, 29 April 2017, *supra* note 60, para 9. The Council signals the EU's "readiness to initiate work towards a balanced, ambitious and wide-ranging free trade agreement (FTA) . . . [addressing inter alia] trade in goods . . . [and] trade in services". *Ibid.* For citation to the CETA, see *supra* note 45.

¹²⁸ See *supra* text accompanying note 109 (commenting on the UK's "red line" issues in the UK/EU Brexit negotiations).

¹²⁹ See Barnier, *Op-Ed*, *supra* note 2 (using this term to describe the state of negotiations on the Irish North-South border). See also Jason Beattie & Dan Bloom, "Brexit explained - the ultimate guide to Britain leaving the EU, what's going to happen and can it be stopped" *Mirror* (28 June 2018), online: *Mirror* <www.mirror.co.uk/news/politics/brexit-explained-leaving-eu-guide-12026950>.

¹³⁰ See *supra* note 45 for a representative sample of covered sectors in the CETA.

¹³¹ See Havel & Sanchez, *supra* note 1 at 242 (on the trade exceptionalism of the air transport industry). Indeed, the CETA repeatedly draws a distinction between, on the one hand, its coverage of certain "auxiliary" air transport sub-sectors - selling and marketing of air transport services other than pricing, computer reservation systems, ground-handling, and maintenance and repair of aircraft - which could become subject to eventual CETA coverage

where it has had occasion to engage with the global regulatory system for air transport, has recognised the application of an autonomous body of international air law.¹³² Accordingly, even if Brexit were to produce one big free trade agreement between the UK and EU, it is likely that the aviation sector will continue to be exceptionalised.¹³³

Like the CETA, a projected UK/EU air services agreement would exclude CJEU jurisdiction and give the UK *access* to the single aviation market as opposed to being *part* of the single aviation market.¹³⁴ Under the “exceptionalism” reflected in existing EU aviation law and practice, moreover, it is likely that the Commission will undertake the hard diplomatic work of getting the Council of the European Union to consent to a mandate for a so-called “vertical” air services agreement with a third country (the post-Brexit UK).¹³⁵ The Commission, in other words, would

but are currently subject to reservations from fundamental trade principles such as most favored nation and national treatment, and, on the other hand, its exclusion of issues that are the traditional province of separate bilateral air services negotiations such as the regulation of routes, prices, market access, ownership, licensing, and other “hard” trade issues. See, e.g., CETA, *supra* note 45, art 8(2), (5) (respectively confining the scope of market access in the air transport sector to the sub-sectors mentioned above, as well as excluding rights and obligations under the EU/Canada air transport agreement, see *supra* note 67. Note that the potentially covered aviation sub-sectors identified in the CETA are derived from a similar list, created for a similar purpose of stating the limits of trade-related coverage, in the Air Transport Annex to the World Trade Organization General Agreement on Trade in Services. See *General Agreement on Trade in Services, Annex on Air Transport Services, Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, Legal Instruments – Results of the Uruguay Round, *opened for signature* 15 April 1994, 1869 UNTS, 33 ILM 1125, 1167 (1993).

¹³² See, e.g., Case C-366/10, *The Air Transport Ass’n of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Sec’y of State for Energy and Climate Change*, 2010 OJ, C-260/12, at § 123 (emphasising that the EU institutions must respect international law, including the international law of the air); see also the *Open Skies* judgments referred to *supra* note 117.

¹³³ This is confirmed by the language in the *European Council Guidelines*, see *supra* note 60, and also in the June 2018 House of Lords report on UK/EU commercial relations after Brexit. See UK House of Lords, European Union Committee, 17th Report of Session 2017-19, *UK-EU relations after Brexit*, HL Paper 149 (8 June 2018), at 10, 18 [*House of Lords Report (2018)*].

¹³⁴ There has been speculation that the UK would accept a limited ECJ jurisdiction for purposes of a future affiliation with (or even membership of) EASA. The recent House of Lords Report seems to confirm that speculation. See House of Lords Report (2018), *supra* note 133 at 10 (assuming continued UK “membership” of EASA).

¹³⁵ Under an understanding reached between the European Commission and the Council of the EU after the *Open Skies* cases (see *supra* note 117), as well as subsequent EU legislation, EU Member States can continue to conduct their own bilateral air transport negotiations with third countries provided they insist on including provisions as to the EU-wide ownership and control rules. At the option of Member States, however, they can also allow the Commission to negotiate “horizontal” agreements with third countries on behalf of multiple Member States in order to add the new EU rules to the roster of existing bilateral agreements.

be seeking the same species of comprehensive negotiating mandate, in the tradition of exceptionalism, that will allow it to be designated as sole air transport negotiator on behalf of all of the EU Member States. Previously, the Commission secured vertical mandates for negotiations with major aeropolitical powers such as Brazil, Canada, China, Turkey, and the United States, while similar mandates are now being sought for pan-EU agreements with the United Arab Emirates and the Association of South-East Asian Nations (ASEAN) and others.¹³⁶

B. THE EU'S REFUSAL TO ALLOW SECTORAL "CHERRY-PICKING"

One of the original Brexit-related *idées fixes* among EU officials and inside the EU institutions was that there would be no early sectoral deals as part of Brexit. Aviation, in this thinking, would have to get in line alongside the financial industry, the automobile industry, the pharmaceutical industry, and all other industries. This mantra that there would be no special deal for any sector and that aviation must be considered no differently from other industries is conceptually at odds with the regulatory system for international air transport described in Part II.

At the same time, both the heads of State and government of the EU's European Council¹³⁷ and the various EU government ministers in the Council of the European Union¹³⁸ instructed Michel Barnier, the chief EU negotiator for Brexit, to ensure that the principles of withdrawal -

The much rarer "vertical" mandate, on the other hand, puts the Commission in the catbird seat to negotiate plenary agreements with third countries that displace all separate Member State bilateral agreements with those countries. The pre-eminent example of such an agreement is the US/EU Air Transport Agreement of 2007 (see *supra* note 16), but the EU/Canada Air Transport Agreement of 2009, *supra* note 67, is interesting also for its attempt at a phased reciprocal elimination of the traditional ownership and control rules, a process that remains inchoate. See *ibid*, art 4 ("Investment"); see also Havel & Sanchez, *supra* note 1 (with citations to relevant legislation). Finally, one should be careful to distinguish the Commission's horizontal/vertical mandates for third country negotiations from the separate ECAA arrangements that the Commission has been conducting with certain neighbouring European countries (see *supra* text accompanying note 104).

¹³⁶ But see European Parliament, *Overview of Air Services Agreements*, *supra* note 102 (describing "mixed results" of EU third country negotiations, with only a handful of comprehensive external agreements actually concluded).

¹³⁷ Because of its composition, the European Council is the agenda-setting body for the EU that reflects the highest level of political cooperation among the Member States.

¹³⁸ The Council of the European Union is the principal decision-making body of the EU and comprises ministers of the Member State governments meeting according to portfolio.

including the financial bill for the UK's Brexit withdrawal – would be settled before the nature of the trade relationships in each sector could even begin to be established.¹³⁹ The implacability of this position raised doubts about whether the withdrawal process stood even a remote chance of consummation not only inside the current Brexit deadline but even before the expiry of a mooted 21-month transition period extending until 31 December 2020.¹⁴⁰ Indeed, the rejection of sectoral negotiations was initially the single biggest reason (according to officials within the EU transport directorate with whom I have spoken) why the future of UK/EU aviation has looked so uncertain for so long.

The airline industry itself, meanwhile, warned both the UK and EU regulators that the industry would need a speedy (and early) sectoral deal by the middle of 2018: if the UK exit were to occur on 29 March 2019 without a negotiated transition period, the widespread industry practice of selling tickets from approximately 300 days in advance of travel would necessitate considerably greater certainty as to the availability of post-Brexit traffic rights between the UK and third countries including the EU27.¹⁴¹

¹³⁹ See *e.g.*, *European Council Guidelines*, *supra* note 60, paras 4-5 (postponing sectoral discussions in phase two of the negotiations pending “sufficient progress” on certain fundamental issues, including a UK/EU financial settlement, in phase one), and Council [of the EU] Directives of May 22, 2017, *supra* note 77, para 9 (referencing European Council guidelines for a phase one “disentanglement” from the EU of all UK rights and obligations). The phase one/phase two dichotomy has been described using another mantra: “first dollars, then trade”. See Jim Brunson & Alex Barker, “Brexit timetable: Brussels takes three-stepped approach to talks”, *Financial Times* (30 March 2017), online: FT <www.ft.com/content/bd046284-1464-11e7-b0c1-37e417ee6c76>.

¹⁴⁰ The proposed transition and implementation period, during which EU law will be generally applicable in the UK, appears in Article 121 of the “Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” 19 March 2018, TF50 (2018) 35 – Commission to EU27, online: EC <ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en>.

¹⁴¹ See Butcher, *Briefing Paper*, *supra* note 12, at 19. Butcher also notes that airlines will want to lock in their flight schedules and seat and cargo inventories at least six months in advance of Brexit. See *ibid.* As several sources have reported, some airlines have been tightening their terms and conditions for advance flight bookings related to the post-Brexit period, warning customers that their flights may not take off and that the airlines will not pay compensation if planes are grounded. See Alistair Smout, “Ryanair to put Brexit clause into ticket sales for summer 2019” *Reuters* (31 January 2018), online: Reuters <www.reuters.com/article/uk-britain-eu-ryanair/ryanair-to-put-brexit-clause-into-ticket-sales-for-summer-2019-idUSKBN1FK1ZC>. Thomas Cook announced that it would have no liability to pay compensation or reimburse expenses for Brexit-related “airspace closures”, but that it would refund ticket costs. *Ibid.* On the insertion of “Brexit clauses” into airline contracts of carriage,

More recent EU negotiation protocols indicate that enough progress has been made in phase one of the UK/EU negotiations, at least partly settling the basic terms of withdrawal with respect to the future rights of UK and EU citizens, a UK/EU financial reconciliation, the status of the internal Irish border, and governance procedures (including dispute settlement) for the withdrawal agreement, to allow progress toward a phase two consideration of a “framework for a future relationship”.¹⁴² Nevertheless, the European Council continues to insist on its original position that the UK cannot expect to “cherry-pick” certain sectors for continued single market participation, and continues to reiterate that “nothing is agreed until everything is agreed”.¹⁴³

Thus, even though the European Council’s March 2018 guidelines for phase two include reference to sustaining UK/EU “connectivity” through “*inter alia* an air transport agreement, combined with aviation safety and security agreements”,¹⁴⁴ the general negotiation guidelines and directives of the European Council and the Council of the European Union, respectively, continue to apply.¹⁴⁵ Even the most generous reading of those documents would not suggest that special preferences for aviation – either substantively or temporally – are part of M. Barnier’s current instructions. If there is to be any prospect of the kind of dramatic deal for air transport proposed in this article, therefore, it is the UK side that will have to be the instigator.¹⁴⁶

I now proceed to suggest how the UK might nudge the EU toward an early-mover deal on aviation that would bring huge benefits to both sides of the negotiation.

see Alistair Smout, *ibid.*

¹⁴² See *European Council Guidelines of 15 December 2017*, EUCO XT 20011/17, at para 1 (authorising move to phase two of the UK/EU Brexit negotiations); see also *Council [of the EU] Directives of 29 January 2018*, XT 21004/18 (confirming progress to a second phase).

¹⁴³ See *European Council Guidelines of 23 March 2018*, EUCO XT 20001/18, at paras 1, 7.

¹⁴⁴ *Ibid* at s 11 (i); see also *ibid* at para 16 (calling on the European Commission to continue “the work on preparedness on all levels”).

¹⁴⁵ See *European Council Guidelines of 23 March 2018*, *supra* note 143, para 2.

¹⁴⁶ See *ibid*, para 6, suggesting an EU willingness to “reconsider” its current negotiating strategy in the event of evolving “UK positions”, but subject (according to para 7) to maintaining “a balance of rights and obligations” and a “level playing field”.

C. THE NEED FOR A DRAMATIC UK OFFER ON THE RIGHT OF ESTABLISHMENT

All of the prospective outcomes and strategies addressed in this article make for an overwhelming regulatory challenge for any country to navigate in a sector that has historically been both substantively complex and politically controversial. No doubt, as IATA General Counsel Jeffrey N. Shane has observed, the optimal policy and political conditions for *any* air transport services agreement, much less one of the magnitude of the 2007 US/EU treaty¹⁴⁷ (and, one can add, the future disposition of UK/EU air transport relations), are extraordinarily difficult to predict and achieve.¹⁴⁸ Given the frequently acerbic tempo of the broader UK/EU negotiations, is there any reason whatsoever to think that the EU would offer the most valuable boon of the single aviation market – a non-discriminatory reciprocal right of establishment – to UK airlines?¹⁴⁹

¹⁴⁷ See *US/EU Air Transport Agreement*, *supra* note 16.

¹⁴⁸ See Jeffrey N. Shane, Under Secretary of Policy, US Department of Transportation, “Air Transport Liberalization: The US Experience”, Speech at the ICAO Global Symposium on Air Transport Liberalization, (18 September 2006) (copy on file with author). But the 2007 Agreement is a good precedent nevertheless. While, as noted above, the fundamentals of the Agreement sit largely within the comfort zone for open skies agreements, the parties to that Agreement (the United States and all of the EU Member States as well as the EU itself acting through the Commission) eventually devised and implemented a number of unique enhancements to the existing open skies template – notably inserting rarely-granted seventh freedom rights (see *supra* note 78, explaining the seventh freedom of the air) that allow all EU airlines to fly to the United States from any EU airport so long as they are majority-owned and effectively controlled by the citizens of any EU Member (or indeed by any Member State). This grant of seventh freedom rights (not reciprocally accorded to US carriers in the EU, incidentally) was necessary to resolve the issues of discrimination among EU-licensed carriers raised before the CJEU in the *Open Skies* series of cases. See *supra* note 117; see also Havel, *supra* note 44, at 57-63 (tracking how the European Commission’s mandate to pursue US negotiations flowed from the ECJ’s ruling).

¹⁴⁹ Although the putative UK/EU air services treaty would exclude CJEU jurisdiction, both sides would insist on workable and effective dispute settlement and treaty interpretation provisions. In that regard, a role might usefully exist for the dispute resolution (and even interpretive) capabilities of ICAO. For an interesting critique of ICAO’s dispute settlement system and its potential evolution, see Roman Sankovych, “ICAO Dispute Resolution Mechanism, Deepening the Current Framework in Lieu of a New One” (2017) 16:2 *Issues in Aviation Law and Policy*. Further compromises would have to be reached on the application – and possible adaptation – of the EU’s air transport legislative *acquis* (see *supra* note 106), but mechanisms such as the Joint Committee that is included in the US/EU Air Transport Agreement and under the ECAA procedures could be harnessed to develop common approaches to air transport policy and regulation. See European Parliament, *Overview of Air Services Agreements*, *supra* note 102, at 14 (discussing how Joint Committee structures can facilitate future regulatory convergence between bilateral partners to air services agreements). There is, after all, a legacy of many decades of shared UK/EU expertise and action in the aviation sector to draw upon.

After all, none of the European Commission's existing or proposed vertical mandates has yielded a reciprocal right of establishment between the negotiating partners; each treaty is distinguished more by the character of its diplomatic *dramatis personae* (in particular, having a supranational organisation as one of the parties). In terms of substance, however, for the most part the negotiations and the eventual agreements have been firmly planted on traditional open skies terrain (cabotage and the ownership/control rules still prevail¹⁵⁰), although occasionally there are important, and novel, initiatives on the distribution of traffic rights¹⁵¹ and future areas of regulatory cooperation.¹⁵² In settings like these, surprise gambits can never be excluded. To take a vivid example, would the EU and its Member States, sitting across from their UK counterparts, demand limitations on UK powers to regulate the UK residency of EU nationals generally as the price for the right of air transport establishment in the EU?

The UK's aviation negotiators should be alert to the possibilities for deflecting or neutralising surprises by offering even more radical change.¹⁵³ Now, when everything is scrambled and uncertain, is the moment for experiment. Accordingly, the UK should announce that it will agree, on a reciprocal basis, to abolish any domestic restrictions on foreign

¹⁵⁰ See generally Havel, *supra* note 44, at 86-87 (discussing proposed substantive enhancements to the original 2007 US/EU Air Transport Agreement, see *supra* note 16).

¹⁵¹ See *supra* note 78 (describing how all EU air carriers won seventh freedom rights to all US airports from any originating EU airport).

¹⁵² See e.g., "The 17 Keynote Ideas of the 2007 [US/EU Air Transport] Agreement", in Havel, *supra* note 44 at 79 (*inter alia* referencing provisions on security, competition law, subsidies, the environment, consumer protection, and traffic uplift preferences). The subsequent EU/Canada air transport agreement in 2009, see *supra* note 135, added a labour provision and also, as noted *ibid.*, the distant possibility of a progressive elimination of the traditional rules against foreign inward investment in domestic airlines.

¹⁵³ In anticipating the UK's post-Brexit aviation future, UK CAA chief Andrew Haines accurately claimed that Britain has historically punched above its weight in international aviation. See Haines, *supra* note 17. Recalling an example that still matters profoundly, the UK delegation finessed a potentially ruinous division in 1944 at the Chicago Conference - the gathering that produced the Convention on International Civil Aviation, the constitutive charter for global air transport, see *supra* note 42 - between the United States, which sought unrestrained open skies and Schumpeterian competition, and the quasi-socialist plan of the Australian-New Zealand delegation to unite all carriers into a single world airline. See Brian F Havel & John Q Mulligan, "International Aviation's Living Constitution: A Commentary on the Chicago Convention's Past, Present, and Future" (2015) 15:1 *Issues in Aviation Law and Policy* at 11-12 (discussing the diplomatic struggles at the Chicago Conference). In the present author's view, the UK, faithful to its historical role, should use the policy re-set forced by Brexit to pursue bold innovations in international air transport regulation.

ownership or control of UK airlines, and propose that restrictive foreign ownership and control clauses should be excluded from any bilateral air services agreements that the UK negotiates in the future with third countries like the United States and Canada or with the EU in its unique role as a regional supranational organisation negotiating on behalf of its 27 Member States. The UK would, in effect, be offering a full airline right of establishment, modelled on Articles 7 and 8 of the ECAA Agreement, on a reciprocal basis to any partners with which it enters an air services agreement.¹⁵⁴

UK Government policy is primarily focused at present on the tactical goal of “grandfathering” existing traffic rights, including domestic and possibly even third-country seventh freedoms, for UK airlines within the EU.¹⁵⁵ That might be a sound short-term approach if it proves remotely feasible. But that may not be the case given the apparent desire of the EU not to allow any sector of the UK economy to *improve* its commercial position as a result of Brexit.¹⁵⁶ It is also true, as noted above, that

¹⁵⁴ Chile and New Zealand have previously eliminated limitations on inward foreign investment in their airlines (although apparently on an essentially non-reciprocal basis). See CAA, *Discussion Paper*, *supra* note 100, s 5.

¹⁵⁵ See Chris Grayling, UK Secretary of State for Transport, in testimony to the House of Commons Transport Committee, October 2017:

As to the future, whether we choose further liberalisation, on areas such as ownership, is a matter for after we have left. Right now, I am not looking to do significant renegotiation of existing agreements. We simply want to grandfather those arrangements, so that there is a smooth transition. After that, we can look at other things that we want to do, on further liberalization, for example.

Transportation Committee, Oral Evidence: *Policy Priorities for the Department for Transport*, HC 430, 16 October 2017, Qq 118 & 126. Note, however, that the UK Government’s July 2018 White Paper, see *supra* note 2, does refer to the possibility of a future approach to the ownership and control rules that would “avoid introducing additional barriers to businesses”, see para 130, citing the EU/Canada agreement of 2009, see *supra* note 67, as a possible precedential model. The White Paper also emphasises “reciprocal liberalized aviation access”. See White Paper, *supra* note 2, at para 130. While the language of the White Paper is understandably vague, it does suggest that UK negotiators could rely on the White Paper as a credible initial premise for advancing the proposal suggested in this article.

¹⁵⁶ See Tom Kibasi (Director of the UK Institute for Public Policy Research), “Britain is still clueless about the EU’s motives in Brexit negotiations”, *The Guardian* (6 March 2018), online: www.theguardian.com/commentisfree/2018/mar/06/britain-eu-motives-brexit (explaining EU’s desire for “containment” of the UK, preventing it from enjoying “rights without responsibilities” and thereby fueling “exit contagion”). UK airlines would at the very minimum *improve* their commercial position by retaining their existing portfolio of pan-EU traffic rights without having to comply with the single aviation market *acquis*. See *supra* note 106 (discussing the idea of the *acquis*). Moreover, the UK airline industry has been warned that boardrooms across Europe are brimming with ideas on how to use Brexit to secure an edge on the UK competition. See, e.g., Simon Calder, “Brexit: UK Will Be ‘Screwed Into The Floor’ In EU Withdrawal Talks, Warns Ryanair Boss” *Reuters* (22 November 2016),

authentic liberalisation is not solely a matter of adopting a right of establishment but implicates complex considerations of safety, security, regulatory convergence, and even the choice of whether to pursue unilateral, bilateral, or multilateral reform.¹⁵⁷ But none of these issues will pre-empt the necessity, in the hothouse of Brexit negotiations, for a big offer like a willingness to dismantle the investment restrictions that have hamstrung the international air transport industry system for seven decades.

Such an announcement would not be inconsistent, in my view, with the liberalising instincts of the UK Civil Aviation Authority since it published its famous study on the worldwide application of the ownership and control rules in 2006.¹⁵⁸ Further, the UK would be

online: The Independent <www.independent.co.uk/travel/news-and-advice/brexit-ryanair-aviation-michael-o-leary-a7431816.html>. Some Member States (and the European Commission) have solicited airlines from the EU27 to submit position papers setting forth their post-Brexit vision for the EU industry. The Commission has apparently taken note of a joint submission by Lufthansa, Air France/KLM, and SAS that reportedly opposes allowing UK airlines to operate seventh freedom flights on the EU mainland and insists that UK nationals are treated no differently from third country (*i.e.*, other non-EU) nationals in applying the rules of the single aviation market on foreign ownership and control. UK nationals, therefore, could not own and control an EU airline, nor could EU nationals be majority owners and in control of any UK airline. And even while asking the European Commission to deny premium traffic rights to UK carriers, the EU carriers also urge the Commission to insist upon full UK regulatory convergence with the single aviation market, including UK acquiescence to the jurisdictional competence of the European Court of Justice in matters involving the market rules. See Heather Farmbrough, "Turbulence ahead for airlines as Brexit uncertainty continues" *Forbes* (25 November 2017); Phil Davies, "European airlines push for restrictions on UK carriers in Brexit talks" *Travel Weekly* (1 September 2017). Other reports have suggested, in explaining the robust tone of the joint submission, that the EU carriers intend to exploit Brexit to squeeze out UK-based budget carrier rivals such as EasyJet and Ryanair. See Alan Barker, "UK airlines risk losing flying rights, says leaked Brexit paper" *Financial Times* (23 November 2017). On 24 September 2018, as this article went to press, the UK government confirmed its essentially "status quo" approach by stating that it planned to give EU-based airlines rights to continue to fly into the UK post-Brexit and "would expect EU countries to reciprocate". To the dissatisfaction of the EU, the UK government had apparently written to certain EU Member State governments seeking reciprocal aviation service arrangements, including the possibility of new or revived aviation bilateral agreements with those states (see discussion *supra* text accompanying note 60). Alan Dron, "EC unimpressed with UK's Brexit "No Deal" aviation plan" (26 September 2018), *ATW Online*, online: [ATW Online <http://atwonline.com/aeropolitics/ec-unimpressed-uk-s-brexit-no-deal-aviation-plan>](http://atwonline.com/aeropolitics/ec-unimpressed-uk-s-brexit-no-deal-aviation-plan).

¹⁵⁷ See *supra* note 149 (mentioning the possibility of using a Joint Committee to consider these issues in a UK/EU context).

¹⁵⁸ See CAA, *Discussion Paper*, *supra* note 100, §§ 26, 30 (concluding that "the "economic advantages of liberalising ownership and control are clear" and "essential to the healthy development of a truly global industry", while noting also that it is important that countries are "incentivized to offer reciprocal concessions" on ownership and control).

signalling its intent to authorise full-scale mergers between UK and non-UK airlines that will potentially draw more capital to UK airlines from hitherto inaccessible foreign investors such as the Gulf airlines. In terms of the development of the current global airline alliances and other airline partnerships, the UK would be indicating an intent to sanction long-contemplated but so far legally impermissible mergers between alliance or joint venture partners like Virgin Atlantic Airways and Delta Air Lines or British Airways and American Airlines. The UK would also be serving notice of its willingness to recognise permanent combinations initiated by EU carriers such as Lufthansa with its Star Alliance co-founder United Airlines or a complete Air France union with its Skyteam alliance stablemate, Delta Air Lines.¹⁵⁹

D. A PROPOSAL MATCHED TO THE EU'S EXTERNAL AVIATION STRATEGY

This is by no means a fanciful proposal. The premise for making the UK offer already appears in the European Commission's 2015 blueprint, *An Aviation Strategy for Europe*.¹⁶⁰ The EU, or more specifically the European Commission, rejecting criticism of a "progressively shaky" commitment to full air transport liberalisation,¹⁶¹ has never stepped away from its own stated intent to eventually abolish the ownership and control rules and to exchange full rights of establishment with third countries.¹⁶² Moreover, despite mixed results, the EU has pursued this intent in the wider context of a comprehensive Open Aviation Area (OAA) with the United States, a concept first designed by EU air transport official (and

¹⁵⁹ In advocating this UK initiative, I recognise, of course, that by the very nature of the pervasive ownership and control rules, other countries could still deny traffic rights under existing restrictive nationality clauses in their own bilateral agreements (the United States, for example, could deny access to an American Airlines-owned British Airways if a post-Brexit UK/US bilateral agreement were to adhere to old rules). See *supra* notes 102 & 135 (discussing third country responses to the EU single aviation market abolition of the nationality rule). But, in urging UK/EU dismantlement of the ownership and control rules, I am also anticipating a cascade of like-minded States that will respond positively (and therefore reciprocally) to the initial UK *démarche*. A new UK/EU bilateral agreement, dropping ownership and control restrictions between the parties, would also be less intimidating for potential major partners like the United States to accept initially than past efforts by the EU to scrap the nationality rule between all of the 28 EU Member States and the United States. See Havel, *supra* note 44 at 74-75.

¹⁶⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Aviation Strategy for Europe*, COM(2015) 598 final (7 December 2015) [European Commission, *Aviation Strategy*].

¹⁶¹ European Parliament, *Overview of Air Services Agreements*, *supra* note 102 at 25.

¹⁶² See *supra* note 135.

McGill Institute of Air and Space Law graduate) Kees Venstra at the turn of the millennium.¹⁶³ The EU has pursued the same dream in its relations with Canada¹⁶⁴ and with any other third country partner that would be willing to sign a comprehensive agreement.

An OAA, a single aviation market for the world, would be a congenial place for advocates of a more systemic air transport liberalisation: reciprocal open direct investment, full market access without the anachronisms of the air “freedoms”, full regulatory harmonisation or convergence, common systems of safety and security (the tragic Germanwings flight in 2015 and the recent temporary US laptop ban demonstrated embarrassing and potentially dangerous inconsistencies in international air transport safety and security¹⁶⁵), a common airline competition code, strict subsidy rules, and tough environmental controls. The OAA promises, in effect, the level playing-field for global air transport competition that ICAO has sought in its efforts to compensate for the “missing chapter” (the chapter on economic regulation) in the Chicago Convention.¹⁶⁶

Moreover, the European Commission has described the EU single aviation market and its principles and rules – including the right of establishment – as a “game-changer” for global air transport regulation and wants to export it to the world and not just to the UK.¹⁶⁷ Indeed, global

¹⁶³ See generally Association of European Airlines (AEA), “Towards a Transatlantic Common Aviation Area”, AEA Policy Statement (1999) (copy on file with author).

¹⁶⁴ See *supra* note 135 (describing regulatory innovations in the EU/Canada air transport agreement).

¹⁶⁵ See, e.g., Jon Ostrower & Andy Pasztor, “Germanwings plane crash throws spotlight on cockpit security” *The Wall Street Journal* (26 March 2015), online: WSJ <<https://www.wsj.com/articles/germanwings-crash-throws-spotlight-on-cockpit-security-1427377457>>; Tom Bachelor, “US laptop ban: increased security measures announced for America-bound flights from 105 countries” *The Independent* (28 June 2017), online: Independent <<https://www.independent.co.uk/news/world/americas/us-laptop-ban-airline-airport-security-donald-trump-terrorism-flights-105-countries-a7813451.html>>; Reuters, “US unveils new airline security measures to avoid laptop ban” *The Guardian* (28 June 2017), online: The Guardian <www.theguardian.com/world/2017/jun/28/new-us-airline-security-measures-no-laptop-ban>.

¹⁶⁶ See David Mackenzie, *ICAO: A History of the International Civil Aviation Organization* (University of Toronto Press, 2010) at 107. ICAO, nevertheless, has continued to involve itself in many aspects of the economic aspects of international air transport even without a comprehensive economic mandate in the Convention. See *ibid.*

¹⁶⁷ European Commission, *Aviation Strategy*, *supra* note 160, at 15. The right of establishment in an OAA would be operationalised through a vehicle resembling the “common EU carrier” or “common ECAA carrier” concept that underpins the Single Aviation Market. An EU or ECAA air carrier is an airline that is licensed respectively by an EU or ECAA Member State

promotion of the single aviation market in negotiations with key partners through an “ambitious” EU external aviation policy is precisely what the Commission’s Aviation Strategy declares as EU policy.¹⁶⁸ The UK should recognise and facilitate the power dynamic that is implicit in the Commission’s confidence in the single aviation market. Former UK Prime Minister Tony Blair once observed that the EU as a whole is no longer about *peace*, it is about *power*.¹⁶⁹ And, Blair added, it is also about wielding “genuine influence”.¹⁷⁰ The EU’s power dynamic is reflected in the *holistic* mindset that informs the European Commission’s thinking on aviation, and indeed “holistic” is the very word that the Commission uses in its 2015 strategy document to describe its whole approach to aviation.¹⁷¹ To show that holistic is the *mot juste*, one only has to look at the EU’s (or, more accurately the Commission’s) record in this field: sweeping deregulation of one of the world’s most highly regulated industries,¹⁷² a 36-member common aviation regulatory area (the ECAA),¹⁷³ comprehensive air transport agreements with major aeropolitical powers like the United States and Canada,¹⁷⁴ the Single European Sky,¹⁷⁵ the European Aviation Safety Agency,¹⁷⁶ and so on.

By no means are any of these trivial achievements. On the contrary, *holistically* they display a principled, cohesive, autonomous, interlocking structure for EU air transport. One might say, in Blairite terms, that the rise of the single aviation market and of its external emanations such as

and is majority owned and effectively controlled respectively by nationals of an EU or ECAA member State or by an EU or ECAA Member State. See generally “Briefing: EU External Aviation Policy”, *European Parliament* (May 2016), online: European Parliament <www.europarl.europa.eu/RegData/etudes/BRIE/2016/582021/EPRS_BRI%282016%29582021_EN.pdf>. While the EU has made progress toward this goal within the ECAA, integrating small neighbourhood adherents like Bulgaria or Montenegro into the single aviation market does not in the least approximate to the scale of the EU’s ambition.

¹⁶⁸ See *ibid* (*inter alia* advocating that “these principles [of the single aviation market] must also be pursued globally”).

¹⁶⁹ See Tony Blair, “The case for Europe is power, not peace”, Speech to the European Policy Centre, (3 June 2014), online: EURACTIV <www.euractiv.com/section/social-europe-jobs/opinion/blair-the-case-for-europe-is-power-not-peace/>.

¹⁷⁰ *Ibid*.

¹⁷¹ See European Commission, *Aviation Strategy*, *supra* note 160, at 14.

¹⁷² See generally Pablo MJ Mendes de Leon, *An Introduction to Air Law*, 10th ed (Wolters Kluwer, 2017).

¹⁷³ See discussion of ECAA, *supra* text accompanying note 104.

¹⁷⁴ See European Parliament, *Overview of Air Services Agreements*, *supra* note 102, Part I, s 3 & 4.

¹⁷⁵ See *supra* note 22.

¹⁷⁶ See *supra* note 17.

the ECAA involved one massive power move after another.¹⁷⁷ This happened, moreover, even though the EU institutions have always had to manage a careful balance of competence with the EU Member States over both the internal and external aspects of air transport.¹⁷⁸ The success of EasyJet, Ryanair, and other low-cost carriers within the single aviation market has also ensured that the EU received much popular credit for its liberalisation of the European air transport industry. The EU greatly prizes these achievements.¹⁷⁹

E. A PROPOSAL THAT COULD CHANGE GLOBAL CIVIL AVIATION

The world lacks, as many airline leaders have noticed, a common forum for producing the next regime of global air transport liberalisation. Setting to one side the European Commission's idea for an OAA, not a single government has advanced a coherent vision of how to displace the restrictive septuagenarian bilateral regime that has governed international aviation since the time of the McDonnell Douglas DC3.¹⁸⁰ Yet aviation stakeholders are well aware that the task of reform is essential. I have often had occasion to quote the (possibly apocryphal) remark attributed to former KLM Chief Executive Leo van Wijk that if Hollywood had been run like the airlines, we would still be watching silent movies.¹⁸¹ So far, the collective endeavour of the world's aviation regulators has brought us to a place where liberalisation is sputtering under the threat of protectionism,¹⁸² and where the most innovative industry practices like code-sharing and alliances – and even the application of contentious legal provisions like antitrust immunity¹⁸³ – have had to be invented or

¹⁷⁷ The EU has a reputation for never moving backwards, like the crocodile. That, at least, was the insight of former Russian Ambassador to the EU, Vladimir Chizkov. See Georgi Gotev, Russian Ambassador: 'EU is like a crocodile', *EURACTIVE* (30 May 2012), online: EURACTIV <www.euractiv.com/section/global-europe/news/Russian-ambassador-eu-is-like-a-crocodile/>.

¹⁷⁸ See generally the *Open Skies* cases, *supra* note 117 (with respect to division of external negotiation competences between the Member States and the European Commission); see also Havel, *supra* note 44 at 58.

¹⁷⁹ See *infra* note 190.

¹⁸⁰ See Wikipedia, "Douglas DC-3", online: Wikipedia <en.wikipedia.org/wiki/Douglas_DC-3>.

¹⁸¹ Having heard this remark quoted at a conference, the author has sought in vain to find a published source. The alleged remark is worth mentioning, however, even if it has to be tagged as "apocryphal".

¹⁸² See *supra* text accompanying note 38 (discussing rise in protectionist attitudes among major EU airlines).

¹⁸³ See *supra* note 72.

activated by the industry players themselves with the primary aim of deflecting the severity of the traditional ownership and control rules.¹⁸⁴ With so many airlines outside the ranks of companies with consistent investment-grade status, any capital starvation that flows from the regulatory environment itself seems utterly perverse.

The hope for the 2007 US/EU Air Transport Agreement, as expressed by some of those who were involved most directly in the negotiations, was that there would be a perceptible “mix-it-up” effect on the transatlantic marketplace.¹⁸⁵ This recalls a similar expectation at the time of US airline deregulation – 24 October 2018, marks 40 years since the Airline Deregulation Act became law under President Jimmy Carter¹⁸⁶ – that several hundred airlines would bloom in the domestic US market.¹⁸⁷ Neither the US/EU agreement nor the deregulation statute led to these hoped-for outcomes, but disruption has nevertheless been a frequent presence in the post-deregulation air transport industry.¹⁸⁸ Economists and lawyers should be wary of prophesy, of course,¹⁸⁹ but that is a quite different proposition from urging that the regulatory airspace should better accommodate the normal operation of market forces. The EU’s single aviation market – even if somewhat unwittingly – supplied the necessary regulatory thrust for EasyJet, Ryanair and others to invent the low-cost airline sector, and the European Commission takes justifiable

¹⁸⁴ See generally Brian F Havel & Gabriel S Sanchez, “The Emerging Lex Aviatica” (2011) 42:3 *Georgetown Journal of International Law* (tracking how code-sharing, alliances, and even antitrust immunity for global alliances have all evolved from private “law-generating” sites such as industry innovation before being absorbed by official legislation and regulation).

¹⁸⁵ Author’s telephone interview with Paul Gretch, former Director of International Aviation, US Department of Transportation (16 February 2017).

¹⁸⁶ See generally Stuart E Eizenstat, *President Carter: The White House Years* (Thomas Dunne Books, 2018) at 370 (attributing success of airline deregulation effort in 1978 to a “determined president” (Jimmy Carter), a “gifted regulator” (Civil Aeronautics Board chairman Alfred E Kahn), and “an effective member of Congress” (Senator Edward M Kennedy).

¹⁸⁷ See “Report of the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary” (the “Kennedy Report”), 94th Congress, 1st Session (1975), at 63, fn 128.

¹⁸⁸ The rise of a seemingly paradoxical business model, that of the long-haul low-cost carrier – AirAsia X and Norwegian Air are prominent examples – is the latest disruptive trend in the global industry. See Panel Discussion, “Finding a New Regime on the North Atlantic as Regulatory and Operating Norms Change”, *Center for Aviation, Americas Aviation Summit*, (April 2018), online: Centre for Aviation <www.centreforaviation.tv/americas-aviation-summit-16-17-apr-2018/finding-a-new-regime-on-the-north-atlantic-as-regulatory-and-operating-norms-change/>.

¹⁸⁹ See, e.g., Dominic T Armentano, *Antitrust: The Case for Repeal*, 3rd ed (Ludwig Von Mises Inst, 2007) at 53 (arguing that “the actual competitive process is one of discovery and adjustment: it is not a static state of affairs”).

pride in that history.¹⁹⁰ The next step for reform is at hand, a reform that can have a global impact on the governance of civil aviation, and Brexit could serve as the unexpected catalyst.

VI. CONCLUSION

Former chief US air transport negotiator John R. Byerly declared at an event celebrating the 10th anniversary of the US/EU Air Transport Agreement that the process of negotiating that agreement had made the United States more ambitious in air transport, and hungry to avoid what he called “mini-deals”.¹⁹¹ His EU counterpart, Daniel Calleja, agreed at the same event that the 2007 agreement has had a similar effect on the EU as it looked for new external opportunities.¹⁹² The same can surely be said for the UK civil aviation authorities who defied the will of their own airlines and signed the 2007 US/EU treaty agreement after decades of intransigence reflected in the Bermuda II “Fortress Heathrow” international aviation policy.¹⁹³

Instead of passively allowing a resurrection of Bermuda II after Brexit, the UK could unleash a new enthusiasm for regulatory reform in the global air transport industry. Andrew Haines has declared that “we will negotiate a good Brexit”.¹⁹⁴ But an optimised Brexit is also imaginable. The UK could flatter the European Commission and boost the single aviation market by offering a dramatic third country agreement for reciprocal unlimited investment. It is time to aspire to bold strokes and smart regulation, rejecting the inertia of grandfather rights and the related implication that the future of UK (and EU) aviation post-Brexit will not be “wildly different” at all. To the contrary, that future could be wildly radical.¹⁹⁵

It remains conceivable that a bespoke UK/EU air services agreement will steer both sides away from a cliff-edge Brexit in air

¹⁹⁰ See, e.g., European Commission, “EU aviation: 25 years of reaching new heights”, online: European Commission <ec.europa.eu/transport/modes/air/25years-eu-aviation_en>.

¹⁹¹ Byerly & Calleja, *Reflections*, *supra* note 63 at 169.

¹⁹² See *ibid.*

¹⁹³ See Simon Calder, “Is Europe Running Out Of Profitable Air Routes?”, *The Independent* (22 August 2016), online: The Independent <www.independent.co.uk/travel/news-and-advice/is-europe-running-out-of-profitable-air-routes-a7198866.html>.

¹⁹⁴ Haines, *supra* note 17.

¹⁹⁵ While I would prefer to see the rules evolve through the normal processes for change led by ICAO and others, without a dramatic intervention the prospects for global abolition of the ownership and control rules over the next decade remain exceedingly modest to entirely bleak.

transport. The agreement that emerges might prove to be a basic open skies arrangement including some additional intra-EU traffic rights for UK low-cost carriers. With the right instincts, however, the UK and EU could forge a transformative deal that not only preserves the investment opportunities, connectivity, competition, and consumer choice of the single aviation market for both sides, but that also finally propels global air transport regulation into the jet age.