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Aviation regulatory update 2022/2023

Developments in Aviation Regulation

The year 2022 has seen several significant developments in respect of aviation regulation, with the UK Government launching a number of aviation policy reforms and consultations focused on the recovery of the aviation sector, implementing the lessons learned and experiences gained from the pandemic, and preparing the sector for a more sustainable future to reach net zero carbon emissions by 2050. The pipeline of regulations and legislative measures for 2023 is likely to include the implementation of the outcomes and responses to these various consultations on consumer rights and protections, sustainability, the recovery of aviation (e.g., airline licensing and slots), and the development and growth of the sector (in particular relating to air navigation, unmanned aircraft, and digital and technical advancements).

Key developments

BREXIT	
End of Saving Provisions under the European Union (Withdrawal) Act 2018	The European Union (Withdrawal) Act 2018 contained certain exemptions and saving provisions that allowed, <i>inter alia</i> , the Civil Aviation Authority (" CAA ") to continue to recognise various EASA-issued licences, approvals, and certificates for the operation and maintenance of UK-registered aircraft. ¹ However, these saving provisions were temporary and came to an end on 31 December 2022. From 1 January 2023, the CAA will no longer recognise EASA approvals, licences, and certificates, and this will impact pilots, cabin crew, maintenance engineers, maintenance organisations, non-EASA foreign airlines as well as EU airlines. A full list of personnel and organisations impacted by the legislation change can be found here , together with details on how to apply to the CAA for the relevant licences, approvals, and certificates to continue operating on UK-registered aircraft. In some circumstances, the CAA has provided a simplified application procedure to expedite applications and reduce the administrative burden.
CAA and FAA: Maintenance Implementation Procedure	In 2020, the CAA and the Federal Aviation Administration (" FAA ") entered into a Special Arrangement to allow the continuity of services following the exit of the UK from the European Union. This Special Arrangement, which included a procedure for recognition of EASA, FAA, and CAA validations, ended on 1 January 2023. The CAA and the FAA have now agreed to a revised version of the Maintenance Implementation Procedures ² for the approval of monitoring of maintenance alterations, which will be used until 31 December 2024, as part of a transition period. The UK CAA now encourages US-based organisations to apply for UK CAA approval when they renew their EASA Part 145 approval. In line with these changes, the Maintenance Agreement Guidance has also been updated to reflect the developments.
PASSENGER RIGHTS AND CASE DEVELOPMENTS	
Regulation (EC) No 261/2004 – latest cases	Regulation (EC) No 261/2004 (" EU261 ") is retained and amended in UK law under the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (" UK261 "). The provisions in UK261 closely mirror those in

¹ Schedule 8 of the European Union (Withdrawal) Act 2018

² See [International Co-operation | Civil Aviation Authority \(caa.co.uk\)](#)

EU261. It remains to be seen whether the UK Government will decide to make any changes to UK261 as part of the Aviation Consumer Policy Reform process (see below).

Key decisions from the English Courts:

- The Supreme Court (reversing the decision of the Court of Appeal) held that a law firm making compensation claims against an airline under EU261 on behalf of a passenger (often on a "no win, no fee" basis with an agreement that the passenger will pay up to 25% of the fixed EU261 compensation to them for their legal services rendered) is, in spite of their work being largely process driven, still providing legal services "*which significantly contribute*" to the recovery of money, and as such, an airline on notice that a law firm had been retained is required to pay the compensation to the law firm so that it can first deduct its legal fees (called an equitable lien over the settlement payment) and not bypass them and pay the compensation directly to the passenger. The decision does not prevent airlines from encouraging passengers to contact them directly before instructing lawyers ([Bott & Co Solicitors Ltd v. Ryanair DAC \[2022\] UKSC 8](#)).
- The Court of Appeal found that a cancellation of a flight due to the non-attendance of the captain, who became ill while off duty and not at his place of work and was determined unfit to fly, is an inherent part of an air carrier's activity and therefore cannot be regarded as extraordinary circumstances. In its judgment, the court found (among other things) that an investigation into when and how a staff member falls ill is too granular and contrary to the scheme of EU261 "*...the consumer's right to compensation under the Regulation cannot depend on when and where the member of staff ate the suspect prawn sandwich.*" An appeal to the Supreme Court is pending and due to be heard in the winter of 2023 ([Lipton and another v BA City Flyer Limited \[2021\] EWCA Civ 454](#)).
- The CAA brought enforcement proceedings against Ryanair for its failure to compensate passengers under EU261 arising out of flights cancelled due to union-led pilot strikes in 2018. Taking an approach that is consistent with the view of the Court of Justice of the European Union on strikes³, the Court of Appeal held that the strikes in question, regardless of whether they were wildcat strikes or union-led strikes, did not amount to extraordinary circumstances and that as a result, Ryanair was liable to pay out EU261 fixed compensation to the passengers. Ryanair secured permission to appeal the decision to the Supreme Court, but the CAA and Ryanair reached an out-of-court settlement ([The Civil Aviation Authority v. Ryanair DAC \[2022\] EWCA Civ 76](#)).

Key decisions from the Court of Justice of the European Union ("CJEU"):

With effect from the end of the Brexit implementation period on 31 December 2020, decisions of the CJEU are no longer binding on UK courts and tribunals, but may still be persuasive.

- If a passenger suffers a long delay on a "connecting flight", where flights are operated by different operating carriers who do not have a special legal relationship, but which flights have, through a travel agency, been amalgamated into a single ticket, departing from an EU airport to a final destination outside the EU, and the final flight leg which is the subject of a long delay takes place entirely outside the territory of the EU, the passenger is entitled to compensation for the delay on the

³ See in particular: [Krüsemann & Others v TuiFly GmbH \(Joined Cases C-195/17, etc\)](#); [Airhelp Ltd v SAS \(Case C-28/20\)](#); and [CS v Eurowings GmbH \(Case C-613/20\)](#)

	<p>basis that such transport operation must be regarded as a single reservation and therefore the last flight is a "connecting flight" (flightright GmbH v American Airlines, Case C-436/21);</p> <ul style="list-style-type: none"> • Where a passenger on a connecting flight, comprising two legs and subject to a single booking by an EU carrier (in this case Lufthansa), departs from an airport in the EU and arrives at an airport in a third country via another airport in a third country (i.e. both in the US in this case), and there is a delay of more than 3 hours on the second leg of the flight, but the operation of that flight is conducted by a non-EU carrier, a passenger is nonetheless entitled to compensation from the non-EU carrier (in this case United Airlines) which operated the entirety of that flight acting on behalf of the EU carrier (Q, R, S v. United Airlines, Case C-561/20); • If a booking of connecting flights under a single reservation only has a stopover in the EU, EU261 will not apply to the booking (AirHelp Ltd v Austrian Airlines AG, Case C-451/20); and • Member States in the EU can authorise national enforcement bodies responsible for the enforcement of EU261 to compel air carriers to pay compensation where an individual complaint has been made to the national body by the passenger, provided both the passenger and the air carrier can seek a remedy from the national courts (LOT v. Budapest Consumer Protection Inspectorate, Case C-597/20).
<p>Pure nervous shock and the Montreal Convention</p>	<p>The CJEU has radically re-interpreted the concept of "bodily injury" under Article 17(1) of the Convention for the Unification of Certain Rules for International Carriage by Air (the "Montreal Convention"), and held that pure psychological injuries in the absence of a bodily injury that have "<i>an adverse effect on [the passenger's] psychological integrity of such gravity or intensity that it affects his or her general state of health and that it cannot be resolved without medical treatment</i>" (para 33 of the CJEU judgment) are to be compensated in the same way as a physical injury. It remains to be seen whether this latest decision will result in a wave of claims, although these will at least be limited by the requirement for medical evidence or proof of medical treatment and a two-year limitation period for bringing claims under the Montreal Convention (BT v Laudamotion GmbH, Case C-111/21).</p> <p>In June 2022, the CJEU revisited the definition of "accident" in terms of Articles 17(1) and 20 of the Montreal Convention and held that a passenger's fall, slip, and trip during the course of a flight, or during embarkation or disembarkation, constitutes an accident, even where there is no identifiable external cause of the fall. Where there is a fall, that is enough to constitute an "accident" under Article 17 of the Montreal Convention, despite the air carrier having fulfilled its own diligence and safety obligations. The burden of proof then shifts to the carrier to prove contributory negligence on the part of the passenger (Article 20 of the Montreal Convention) (JR v Austrian Airlines Case C-589/20).</p>
<p>Persons with reduced mobility ("PRMs")</p>	<p>In a letter to the industry dated 9 June 2022, the CAA expressed concerns about the increase in reports it had received of significant service failings and asked all airports to write to the CAA by 21 June 2022, setting out the further measures they have taken to protect PRMs. The CAA is now working on new guidance for airlines on PRMs and in December 2022, it consulted with 12 airlines and 7 disability groups to obtain their views on what the guidance should contain. The new guidance is</p>

expected in 2023 and it is anticipated that it will be substantially similar to the guidance on PRMs currently in place for airports. The CAA has also indicated that it will be publishing an Airline Compliance Report that will include rankings of airlines.

CONSULTATIONS FOR REGULATORY REFORM

Policy Reform

- Since our article on **Aviation Consumer Policy Reform** ([see here](#)), the consultation launched by the UK Department for Transport ("**DfT**") closed on 27 March 2022. The DfT proposed enhancements to the regulatory enforcement powers of the CAA and the Competition and Markets Authority (the "**CMA**"), enabling them to decide on breaches of consumer law by airlines and the appropriate remedy for any breach. The DfT was meant to provide their response within 3 months of the consultation closing, but none has been delivered yet.
- On 26 May 2022, the DfT published the '**Flightpath to the Future**' [report](#). The report reflects the changes to the aviation landscape since the publication by the DfT of its "Aviation 2050" strategy, and in particular reflects the challenges and opportunities around Brexit, the effects of the pandemic including recovery and building future resilience, advances in technology, and decarbonisation. The report is a strategic framework for aviation, presented as a 10-point strategic plan that outlines proposals to strengthen and support the industry over the next decade, focusing on four key areas: sustainable recovery, embracing innovation, realising benefits for the UK, and user experience. The overarching objective is to rebuild consumer confidence, support jobs, and build a workforce in the aviation industry in the UK that is fit for the future. The plan is supported by the creation of a new body called the Aviation Council to oversee progress in the sector, which is led by the Minister for Aviation and made up of representatives from airlines, airports, other parts of the aviation industry, and civil servants. Certain consultations have already begun on the delivery of the commitments in the 10-point plan, for instance on slots, ATOL, the Jet Zero Strategy, and consumer rights.
- On 17 July 2022, the UK Government published a new '**Aviation Passenger Charter**', setting out passengers' rights and responsibilities when flying, the obligations on airlines, best practices, and guidance on disputes. The Charter has been developed by the Government, in cooperation with consumer bodies and the travel industry. It is not intended to be a legally enforceable document but does outline the existing legally enforceable rights for passengers. Although the DfT has asked airlines to include a link to the Charter in their passenger communications and on their websites, this is optional, and to date, only a few seem to have done so.

Independent Review of the CAA

In August 2022, the UK Government announced an [independent review](#) of the CAA. The then Secretary of State, Grant Shapps, stated that the focus will be on ensuring that the UK's civil aviation regulator is the world leader in security and safety. The review will consider the CAA's effectiveness, accountability, efficiency, and governance in delivering its services currently and for the future. The review coincides with the industry recovering from the effects of the Covid-19 pandemic, with passenger and flight numbers returning close to pre-pandemic levels in late 2022. It forms part of a wider programme of review of public bodies across the UK Government and will run in parallel, but separate to, the International Civil Aviation Organisation ("**ICAO**") safety audit due to take place. The call for evidence on the independent review was launched on 28 November 2022

	<p>with a short response deadline of 29 January 2023. Within three months of the consultation closing, the DfT will provide a summary of the responses received and outline the next steps.</p>
ATOL	<p>In May 2022, the CAA published a summary of the 305 consultation responses it received on proposed changes to the Air Travel Organisers' Licensing Scheme ("ATOL") during a consultation period between 29 April 2021 and 16 August 2021. This was the largest consultation engagement with a regulator to date. The consultation was focused on proposed changes to ATOL, including in particular on the way license holders are funded and how they should hold customer funds in the future, as well as the regulatory and insurance requirements and infrastructure needed to ensure that ATOL holders are able to refund customers in the event of a cancellation. The majority of responders to the consultation agreed that the CAA's proposals for mandatory segregation of client money (separating operational cash balances from customer funds, with no access to customer funds until the customer is back from its holiday) or mandatory bonds (extending the current practice of applicants who do not meet certain financial criteria to obtain bonds to all ATOL holders) were unworkable in practice, and they favoured the adoption of a more flexible, individual approach instead. The CAA was due to start a second consultation in late 2022 to address specific and detailed proposals, however, this has now been delayed to the early part of 2023.</p>
Slots	<p>To ease the impact of the Covid-19 pandemic on airlines, both the UK and EU adopted slots usage alleviation measures. For the Summer 2022 season, the UK allowed airlines to use only 70% of their allocated slots on a 'use it or lose it' grandfathering rights basis (compared to the EU's 64% usage threshold). The UK Government extended the airport slot alleviation measures to the Winter 2022 season and also allowed a pre-season hand-back option for up to 10% of the slots held. The European Commission has similarly extended the slots relief for the Winter 2022 season, setting the threshold at 75%.</p> <p>The current set of alleviation measures are due to expire at the end of the Winter 2022 season on 25 March 2023, and the UK Government is considering whether a further slot alleviation is necessary for the Summer 2023 season. The DfT's proposal envisages a return to the pre-pandemic 80:20 usage ratio, with a 5% pre-season hand-back facility where airlines can claim alleviation on a proportion of slots handed back before the start of the season. Such a change would be in line with the EU's 80% threshold set for the Summer 2023 season. The deadline for responses to the DfT proposal was 15 December 2022, and the DfT is yet to report back on the responses received.</p>
Air Navigation	<p>The CAA's guidance on the regulatory process for changing the notified airspace design and planned and permanent redistribution of air traffic is set out in CAP 1616, the fourth edition of which was published in March 2021. The change process enshrined in the current regulatory regime is a lengthy process that has been going on for a considerable time. The deployment of the Free Route Airspace initiative ("FRA"), which started well before 2018, has a completion date expected in 2027. The UK was behind its European counterparts, but it is now catching up and has introduced FRA over the North Sea, Scotland, North Atlantic, Northern Ireland and a small portion of northern England in December 2021. FRA will be deployed to the West airspace in 2023. It ties in with sustainable aviation by removing traditional air routes in the upper airspace above 25,000ft and allowing aircraft to fly the route they want, point-to-point between a defined entry and exit point, including over international borders.</p>

	<p>On 5 January 2023, the CAA proposed simplifying the guidance in CAP 1616 to help improve the process for airports, air navigation services providers and others affected by airspace change. The CAA's intention is to make the guidance easier to understand and the requirements of the stages and steps to request airspace change clearer. The consultation on this proposal will close on 5 March 2023.</p>
Airline licensing	<p>On 3 March 2022, the European Commission opened a public consultation on the revision of the Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (the "Air Services Regulation") to ensure it is fit for purpose post-Covid-19 and that it addresses the objectives set out in the European Green Deal and the Sustainable and Smart Mobility Strategy, in order to make aviation more sustainable, resilient, digitally smarter, and socially responsible. The responses to the consultation, which closed on 5 June 2022, have shown positive support by the industry to revise the Air Services Regulation, and a common priority area for several interested parties (including Ryanair, easyJet, IAG, and ACI⁴) is that the rules on ownership and control should be changed. As airlines meet the challenge of recovering from the pandemic and at the same time face the challenge of meeting expectations and targets on sustainability and decarbonisation, the concept of 'nationality' of ownership is now seen as outdated, not least because there is a need for airlines to be able to get wider access to capital, which is a need recognised by the European Commission.</p> <p>The Air Services Regulation was amended and retained in UK law by the Operation of Air Services (Amendment etc) (EU Exit) Regulations 2018 (the "UK Air Services Regulation"). There is currently no indication from the DfT and/or the CAA of any plan to review the UK Air Services Regulation in a similar manner, or that the DfT will follow any changes adopted by the European Commission in due course. However, the UK has always favoured a liberal approach to airline ownership and control, as borne out by its removal of the nationality requirement for an operating licence under the UK Air Services Regulation.</p>
SUSTAINABILITY	
COP 27 and the progress made by the aviation industry since COP 26	<p>From 6 – 18 November 2022, the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP27") took place in Egypt. COP27 looked to build on the objectives set out at the 26th Conference ("COP26") in the previous year, aimed at tackling the climate emergency and, for the aviation industry, progressing towards its "aspirational" goal of achieving net zero carbon emissions by 2050. For further information on the outcomes of COP27, the following article published in November 2022 explores the progress made by the aviation industry since COP26, with a particular focus on the UK: "COP27 and the flight path to Net Zero: progress made by the aviation industry since COP26 (shlegal.com)".</p>
AIRPORT SECURITY	
Shake-up of airport security rules for liquids	<p>On 15 December 2022, the UK Government and the CAA announced one of the biggest shake-ups of airline security rules of the last decade, which will see an end to the 100ml allowance on liquids in hand luggage at large airports and allow passengers to leave liquids and large electrical items in their luggage as they go through security. The rules are set to change by June 2024</p>

⁴ [Feedback from: easyJet \(europa.eu\)](#); [Feedback from: ACI EUROPE \(europa.eu\)](#); [Feedback from: IAG - International Airlines Group \(europa.eu\)](#); and [Feedback from: Ryanair \(europa.eu\)](#)

<p>and carry-on baggage</p>	<p>with the installation of new technology (3D scanners) at major airports across the UK. However, until then, passengers must continue to follow the existing security rules. The deadline of June 2024 for airports to have introduced the new 3D scanners is not currently codified in law, and therefore may be subject to further change. This change in security rules was first announced by the UK Government in August 2019 with an intention to roll out the 3D scanners by December 2022, however, the Covid pandemic delayed the implementation.</p> <p>Trials of the new scanning technology have been underway at London Heathrow Terminals 2 and 5 since 2019, and at London City Airport. It is not entirely clear how the airports will fund the change in screening equipment to new 3D scanners. For some airports, the cost could be significant, as it may require large infrastructure changes, and this will inevitably impact the timing. It remains to be seen whether airports will pass the costs to their users by way of airport charges.</p>
<p>DRONES AND UNMANNED AIRCRAFT SYSTEMS</p>	
	<p>Drones and unmanned aircraft systems have received a lot of attention in the past year. In 2022, in collaboration with the DfT and the Department for Business, Energy and Industrial Strategy ("BEIS"), PwC issued its 'Skies Without Limits v2.0' report, which predicts that by 2030, commercial drones could be commonplace in the UK, contributing up to £45 billion to the UK economy, reducing carbon emissions by 2.4m tons, and creating up to 650,000 jobs. Subsequently, in November 2022, the CAA consulted on a refreshed draft Airspace Modernisation Strategy ("AMS"). AMS includes detailed initiatives that the UK's aviation industry must deliver to achieve the government's objective of modernising UK's airspace through making changes to UK's airspace design, the implementation of new operational concepts, and new technologies. The CAA expects to publish a refresh AMS 2023-2040 Parts 1 and 2 in early 2023.</p> <p>In June 2022, Ofcom, as the body responsible for managing UK's radio spectrum, published a consultation on the Spectrum for Unmanned Aircraft Systems⁵. In collaboration with the CAA, Ofcom proposes to introduce a new spectrum licence for drone operators, which would allow them to use a range of technologies in drones which currently are not permitted, such as mobile and satellite terminals for control and transmission of data and video. It remains to be seen what substantive changes these consultations bring about in 2023.</p>
<p>SPACE</p>	
<p>Blast-off for UK Space Regulator and first UK space launch</p>	<p>On 29 July 2021, the CAA became the UK's Space Regulator pursuant to Regulation 3 of the Space Industry Regulations 2021. In this capacity, the CAA will be responsible for, among other things, issuing licences to UK and international companies that want to carry out space-related activities in the UK, although in each case, the Secretary of State for Transport will have the final say on whether a licence should be granted.</p> <p>On 16 November 2022, the CAA granted its first-ever UK spaceport operator licence to Spaceport Cornwall, located in Newquay, allowing it to operate as a site from which spacecraft or carrier aircraft can be launched horizontally. Spaceport Cornwall will be the UK base of operations for Virgin Orbit. On 21 December 2022, the CAA announced that it had granted</p>

⁵ See [Consultation: Spectrum for Unmanned Aircraft Systems \(UAS\) \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/uas/uas_consultation/)

	<p>Virgin Orbit launch and range control licences to allow it to go ahead with its first launch. On 9 January 2023, Virgin Orbit launched the first ever satellite mission from the UK, using the Cosmic Girl aircraft, but the mission was ultimately unsuccessful. Further launches are expected to take place later in 2023, and the CAA is also considering whether other places in the UK, such as Lamba Ness in the Shetland Islands, might be suitable spaceport locations.</p>
<p>HAGUE COURT OF ARBITRATION FOR AVIATION</p>	
<p>Aviation specific arbitration court established in the Hague</p>	<p>On 21 July 2022, a new court of arbitration and mediation for the aviation sector was established: the Hague Court of Arbitration for Aviation ("HCAA"). This private, non-governmental institute administered by the Netherlands Arbitration Institute aims to promote aviation-centric arbitration and mediation, with its own set of rules and a focus on contractual disputes in areas including commercial and private aircraft operations, trading, leasing and finance, maintenance, repair and overhaul, and disputes relating to drones, advanced air mobility, and space. The HCAA will provide access to arbitrators, mediators, and experts with relevant industry-specific technical and law expertise.</p>

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