

2007 No. 3556

CIVIL AVIATION

**The Civil Aviation (Allocation of Scarce Capacity)
Regulations 2007**

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| <i>Made</i> - - - - | <i>17th December 2007</i> |
| <i>Laid before Parliament</i> | <i>21st December 2007</i> |
| <i>Coming into force</i> - - | <i>31st January 2008</i> |

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 7(1) and (2) and 102(2)(b) of and Parts II and III of Schedule 13 to, the Civil Aviation Act 1982(a) and by section 2(2) of the European Communities Act 1972(b);

She is a Minister designated (c) for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to air transport;

She has consulted the Administrative Justice and Tribunals Council in accordance with section 8 of the Tribunals and Inquiries Act 1992(d):

Citation and Commencement

1. These Regulations may be cited as the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007 and come into force on 31st January 2008.

Interpretation

2. In these Regulations—

“the Act” means the Civil Aviation Act 1982;

“air service agreement” means an agreement between the United Kingdom and a third country governing aviation relations which is described in article 1 of Council Regulation (EC) No. 847/2004 of the Council and the European Parliament on the negotiation and implementation of air service agreements between member States and third countries(e);

“applicant” means a qualifying carrier who has applied for a scarce capacity allocation certificate;

(a) 1982 c.16.

(b) 1972 c.68; the enabling powers of section 2(2) of this Act were extended by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51).

(c) S.I. 1993/2661.

(d) 1992 c. 53.

(e) O.J. No. L157, 30.04.2004, p.7.

“party” means any person who has exercised the right to be heard in accordance with regulation 13(1) and any person the CAA decides to hear pursuant to regulation 13(3);

“qualifying carrier” means—

- (a) an undertaking which has been granted an air transport licence in accordance with section 65 of the Act; or
- (b) a community air carrier as defined in section 69A(8) of the Act, which has either obtained its operating licence from the CAA, or is established in the United Kingdom in accordance with Article 43 of the Treaty establishing the European Community;**(a)**

“relevant traffic rights” means the traffic rights granted to the United Kingdom under or by virtue of an air service agreement;

“scarce capacity” means the capacity which exists for providing air services where the relevant traffic rights are insufficient to enable all qualifying carriers who would wish to operate services on a route, to provide all the services they would wish to provide;

“scarce capacity allocation certificate” means a certificate issued in accordance with regulation 19;

“third country” means a State other than a member State.

Consequential amendments

3. In the Civil Aviation Regulations 1991**(b)**—

- (a) regulation 3(5),
- (b) in regulation 20(1), proviso (ii)(b), and
- (c) regulation 27(9),

are omitted.

Capacity constrained routes

Notification of scarce capacity

4.—(1) Where the Secretary of State believes that within 6 months there will be scarce capacity on a route, she must notify the CAA of that belief.

(2) Notification under paragraph (1)—

- (a) must state why the Secretary of State believes there will be scarce capacity on the route,
- (b) may state what issues the Secretary of State believes the CAA will be asked to determine, and
- (c) may describe the route in any manner the Secretary of State thinks fit.

(3) The Secretary of State may not give notification under paragraph (1) unless she has formed her belief after considering representations from qualifying carriers about the capacity they plan to provide.

(4) The CAA must, not later than one month after it receives the notification, publish in its Official Record a notice stating—

- (a) the date from which it considers that it will be necessary to allocate scarce capacity on the route, and
- (b) that it proposes to invite applications for the allocation of scarce capacity and, if necessary, hold a hearing for the purpose of determining those applications.

(5) The notice must specify—

(a) O.J. No. C325, 24.12.2002, p.33.

(b) S.I. 1991/1672. Regulation 3(5) and 20 were amended by S.I. 1992/2662.

- (a) what information will be required by the CAA in connection with the application for the allocation of scarce capacity; and
- (b) the closing date for applications.

(6) For the purposes of these Regulations a route becomes a capacity constrained route on the date specified under paragraph (4)(a) and remains as such until the date specified in the notice published under regulation 5(2).

Route ceasing to be capacity constrained route

5.—(1) Where the Secretary of State considers that there is no longer scarce capacity on a route she must notify the CAA.

(2) The CAA must, not later than one month after it receives the notification, publish in its Official Record a notice stating that, with effect from the date specified in the notice, the route is no longer a capacity constrained route.

Allocation of scarce capacity on capacity constrained routes

Scope of regulations 7 to 24

6. Regulations 7 to 24 apply where a qualifying carrier operates or wishes to operate an air service on a capacity constrained route.

Restrictions on carriage for reward

7. No person shall use an aircraft for the carriage for reward of passengers or cargo on a capacity constrained route unless—

- (a) the qualifying carrier operating the air service holds a scarce capacity allocation certificate authorising him to operate aircraft on the route in question; and
- (b) the terms of the scarce capacity allocation certificate are complied with insofar as they relate to that route.

Prescribed function of the CAA

8.—(1) The function of allocating scarce capacity on a capacity constrained route is prescribed as a function of the CAA for the purposes of section 7(2) of the Act.

(2) The function of deciding to grant, refusing to grant, revoking or varying (otherwise than on the application of the holder) a scarce capacity allocation certificate is prescribed as a function of the CAA for the purposes of section 7(1) of the Act.

(3) The quorum of the CAA for the purposes of the functions carried out pursuant to section 7(1) of the Act is two members unless—

- (a) the CAA has specified less than 21 days for serving an objection or representation; or
- (b) the parties to the hearing have consented to a quorum of the CAA being one member;

in which case the quorum is one member.

CAA functions in allocating scarce capacity

9.—(1) The CAA must allocate scarce capacity in accordance with this regulation.

(2) Section 4 of the Act (general objectives of the CAA) does not apply to the allocation of scarce capacity.

(3) The CAA must allocate scarce capacity in a manner which it considers is best calculated—

- (a) to secure that qualifying carriers provide air transport services which satisfy all substantial categories of public demand at the lowest charges consistent with a high

- standard of safety in operating the services, whilst giving an economic return to efficient qualifying carriers on the sums invested in providing the services;
- (b) to further the reasonable interests of users of air transport services;
 - (c) to secure the effective provision of civil air transport to and from the United Kingdom;
 - (d) to ensure that qualifying carriers compete as effectively as possible with other airlines in providing air transport services on international routes; and
 - (e) to ensure the most effective use of airports within the United Kingdom.
- (4) When allocating scarce capacity the CAA must have regard—
- (a) to the effect on existing air transport services provided by qualifying carriers; and
 - (b) in any case—
 - (i) where the existing services are similar (in terms of route) to the proposed new service; or
 - (ii) where two or more applicants have applied for a scarce capacity allocation certificate, indicating that they propose to provide a new but similar service, to any benefits which may arise from enabling two or more airlines to provide the service in question.
- (5) In exercising its functions under paragraphs (3) and (4), the CAA must have regard to the need to minimise so far as reasonably practicable—
- (a) any adverse effects on the environment; and
 - (b) any disturbance to the public;
 - from noise, vibration, atmospheric pollution or any other cause attributable to the use of the aircraft for the purposes of civil aviation.
- (6) In performing the function of allocating scarce capacity, the CAA must have regard to any advice received from the Secretary of State.

Application for the grant, revocation or variation of a scarce capacity allocation certificate

- 10.**—(1) A qualifying carrier wishing to operate on a capacity constrained route must apply in writing to the CAA for a scarce capacity allocation certificate.
- (2) A qualifying carrier may apply in writing to the CAA for the variation or revocation of a scarce capacity allocation certificate which that carrier holds.
- (3) The CAA may refuse to consider an application for the grant, revocation or variation of a scarce capacity allocation certificate unless—
- (a) in the case of an application for a grant or variation of a scarce capacity allocation certificate, the application is served on the CAA not less than four months before the scarce capacity allocation certificate (or the variation) is intended to have effect;
 - (b) the applicant has furnished all the information and documents required; and
 - (c) the applicant has paid any applicable charge under section 11 of the Act.
- (4) As soon as reasonably practicable after an application has been received in accordance with this regulation the CAA must—
- (a) publish in its Official Record—
 - (i) such particulars of the application as it thinks necessary for indicating the substance of the application; and
 - (ii) the period within which objections or representations in respect of the application must be made, provided that the CAA may not specify a period of less than 21 days unless it is satisfied that for reasons of urgency it is necessary to do so;
 - (b) make a copy of the application available at its principal office for inspection by any person at any reasonable time.

(5) Where the CAA has received an application, it must notify the holder of all other scarce capacity allocation certificates relating to the route to which the application relates.

(6) The CAA may direct that an application be treated as being such number of separate applications as it may specify, and each such application will be treated accordingly.

Grant, revocation or variation of a scarce capacity allocation certificate without application being made

11.—(1) The CAA may grant, vary or revoke a scarce capacity allocation certificate otherwise than in pursuance of an application under regulation 10.

(2) Where the CAA proposes to grant, vary or revoke a scarce capacity allocation certificate under paragraph (1) it must publish in its Official Record—

- (a) the particulars of the proposal,
- (b) the reasons for the proposed grant, revocation or variation, and
- (c) the period within which objections or representations in respect of a proposal must be made.

(3) The CAA may not specify a period of less than 21 days for serving an objection or representation unless it is satisfied that for reasons of urgency it is necessary to do so.

(4) Where the CAA proposes to vary or revoke a scarce capacity allocation certificate under paragraph (1), it must notify—

- (a) the holder of the scarce capacity allocation certificate, and
- (b) the holders of all other scarce capacity allocation certificates relating to the route to which the proposal relates.

Objections and representations

12.—(1) Any person may serve on the CAA an objection to, or a representation about—

- (a) an application for the grant, revocation or variation of a scarce capacity allocation certificate, or
- (b) a proposal under regulation 11(2).

(2) Any objection or representation must—

- (a) be served within the period published by the CAA in its Official Record, and
- (b) state whether the person making it wishes to be heard.

(3) Where the person making an objection or representation is a qualifying carrier, he must within 24 hours after the objection or representation has been served on the CAA, serve a copy of it on every applicant.

(4) Where the person making an objection or representation is not a qualifying carrier, the CAA must—

- (a) (if the objection or representation is in respect of an application under regulation 10) serve a copy of it on every applicant within 7 days after the day on which the objection or representation has been served on the CAA, and
- (b) indicate to an applicant whether the person making the objection or representation wishes to be heard.

(5) If the applicant has had an objection or representation served on him in accordance with paragraph (3), the applicant must, if so required in writing by the person making the objection or representation, serve him with a copy of the application within 3 working days after receiving such a request.

Hearings

13.—(1) The following persons have a right to be heard—

- (a) the applicant;
- (b) any other qualifying carrier who has served an objection or representation under regulation 12; and
- (c) any person who—
 - (i) has served an objection or representation under regulation 12,
 - (ii) appears to the CAA to be representative of persons who have expressed the views of passengers or shippers of cargo, and
 - (iii) wishes to be heard.

(2) If a person with a right to be heard requests a hearing, before the CAA decides whether to grant, refuse to grant, vary or revoke a scarce capacity allocation certificate, it must hold a hearing.

(3) If any other person has—

- (a) served an objection or representation under regulation 12,
- (b) requested a hearing, and
- (c) stated that he wishes to be heard

the CAA may, if it thinks fit, hold a hearing and permit that person to be heard at the hearing.

Preliminary meetings

14.—(1) Before the date fixed for the hearing, the CAA may hold a preliminary meeting to discuss the conduct of the hearing.

(2) The CAA must give to every party notice of the date, time and place of the preliminary meeting.

(3) Any party may attend in person or be represented by any person whom he may have authorised to represent him.

Notice of hearing and providing of information by the CAA

15.—(1) No hearing may take place unless the CAA has—

- (a) served on every party notice of the date, time and place of the hearing (which must be not less than 14 days after the date of the notice); and
- (b) published in its Official Record a notice stating the date, time and place of the hearing (which must be not less than 7 days after the date of the notice).

(2) Subject to paragraph (3), with notice of the hearing under paragraph (1) the CAA must serve on every party a copy of, or a summary of, any information in the possession of the CAA which—

- (a) has been provided in connection with the hearing; or
- (b) in the CAA's opinion will be referred to at the hearing.

(3) The CAA must not serve any information under paragraph (2)—

- (a) if it is provided by the Secretary of State and the CAA, having consulted with the Secretary of State, considers it to be exempt information within the meaning of section 84 of the Freedom of Information Act 2000(a); or
- (b) if it is provided by any other person and the CAA, having consulted that person, considers that it—
 - (i) relates to the commercial or financial affairs of that person; and
 - (ii) it cannot be disclosed to the prospective recipient without unwarranted disadvantage to the person who provided it.

(a) 2000 c.36.

Procedure at hearings

16.—(1) Hearings will be conducted by the CAA, sitting with such employees of the CAA acting as advisers as it thinks fit.

(2) At a hearing every party may—

- (a) appear in person, or be represented by any other person whom he may have authorised to represent him;
- (b) produce oral and written evidence; and
- (c) examine any other party and his witnesses.

(3) Any person who has served an objection or representation, but who does not wish to be heard, may make a written submission which he must submit to the CAA not less than 3 working days before the date fixed for the hearing of the case.

(4) The CAA must serve on every party, as soon as reasonably practicable, a copy of any submission served on him under paragraph (3) and must have regard to it when making its decision.

(5) Every hearing must be held in public except where the CAA is satisfied that, in the interests of public order, national security, or where it considers that publicity would prejudice the interests of justice.

(6) The CAA, with the consent of the parties, may permit any person to attend a hearing, (whether or not it is in public).

(7) The failure of the CAA or of any person—

- (a) to give notice or publish any particulars in the time or manner provided for in these regulations; or
 - (b) any other minor procedural irregularity;
- will not invalidate any decision taken by the CAA.

(8) The CAA, may if it considers that any person may have been prejudiced, take such steps as it thinks fit before reaching its decision to cure the irregularity (whether by the giving of notice or otherwise).

(9) All the proceedings at a hearing in accordance with this regulation must be recorded in writing.

(10) A copy of the transcript of the proceedings must be made available to any person on the payment of a reasonable fee, except where a decision has been taken to hold the hearing in private pursuant to regulation 16(5), in which case a transcript must only be made available to those present at the hearing.

Grant, refusal variation or revocation of a scarce capacity allocation certificate

17.—(1) The CAA must decide whether to grant, refuse to grant, revoke or vary a scarce capacity allocation certificate as soon as reasonably practicable—

- (a) where there has been a hearing in relation to the application, after the hearing;
- (b) where there has not been a hearing in relation to an application, after the closing date for applications specified in regulation 4.

(2) The CAA must give notice of its decision to—

- (a) the applicant, and
- (b) every party.

(3) A notice under paragraph (2) must state the reasons for its decision and must be published in the Official Record.

Notices

18.—(1) This regulation has effect in relation to any notice required by any provision of these regulations to be given to any person.

(2) Any such notice may be given to any person either—

- (a) by delivering it to him in person,
- (b) by leaving it at his proper address,
- (c) by sending it by post to him at that address,
- (d) by sending it to an e-mail address which that person has previously notified to the CAA and not withdrawn, in which event the notice shall be regarded as given when one would normally expect it to be received, or
- (e) by sending it to him by that address by fax, or other similar means to a number which that person has previously notified to the CAA and not withdrawn, and on production by the CAA of a copy document containing the text of the communication and confirmation of successful transmission, the notice shall be regarded as given when it is sent.

(3) For the purpose of this regulation the proper address of any person is, in the case of a body corporate, the registered or principal office of that body and in any other case shall be the last known address of the person to be served.

Scarce capacity allocation certificates

19.—(1) Where the CAA decides to grant a scarce capacity allocation certificate or (in the case of a variation) to re-issue a scarce capacity allocation certificate, it must send the scarce capacity allocation certificate to the qualifying carrier to whom it relates with the notice in regulation 17(2).

(2) A scarce capacity allocation certificate may be in such form as the CAA reasonably decides and must include—

- (a) the routes to which it relates,
- (b) the services it authorises,
- (c) any conditions or restrictions to which a route or service is subject, and
- (d) the date on which it takes effect.

(3) A scarce capacity allocation certificate remains in force until—

- (a) it is revoked by the CAA,
- (b) it is varied by the CAA, or
- (c) every route to which it relates ceases to be a capacity constrained route.

Enforcement

Enforcement by the CAA

20. These regulations will be enforced by the CAA.

Prevention of take-off

21.—(1) Where the CAA has reason to believe that an aircraft is intended to be used on a flight in contravention of regulation 7, the CAA may—

- (a) give to the operator or commander of the aircraft a direction that he must not cause or permit the aircraft to take off until further notice; and
- (b) having given the direction, detain the aircraft until it is satisfied that it will not be used on a flight in contravention of regulation 7.

(2) For the purposes of this regulation, “commander” will have the same meaning as in the Air Navigation Order^(a)

Offences

22.—(1) Any person who without reasonable excuse contravenes regulation 7 is guilty of an offence.

(2) Any person who, having been given a direction under regulation 21(a), without reasonable cause contravenes that direction is guilty of an offence.

(3) Any person guilty of an offence under this regulation will be liable —

- (a) on summary conviction, to a fine not exceeding the statutory maximum; and
- (b) on conviction on indictment, to a fine, or to imprisonment for a term not exceeding two years.

Offences by bodies corporate

23.—(1) Where a body corporate is guilty of any offence under these Regulations, and that offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of —

- (a) any director, manager, secretary or other similar person of the body corporate, or
 - (b) any person who was purporting to act in such capacity,
- he, as well as the body corporate will be guilty of the offence and will be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

Defence of due diligence

24. It is a defence for a person charge with an offence under regulation 22 or 23 to show that he took all reasonable steps to avoid commission of the offence.

Signed by authority of the Secretary of State for Transport

17th December 2007

Jim Fitzpatrick
Parliamentary Under Secretary of State
Department for Transport

(a) S.I. 2005/1970, to which there are amendments not relevant to these Regulations.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision to comply with article 5 of Regulation 847/2004 of the European Parliament and Council on the negotiation and implementation of air service agreements between Member States and third countries (OJ No L157, 30.04.2004, p.7). Article 5 of that regulation provides that a Member State shall ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure. These regulations set out the regime for distributing these traffic rights where scarce capacity exists.

Provision is made for definitions (regulation 2) and consequential amendments to secondary legislation (regulation 3). Regulation 4 places a duty on the Secretary of State to notify the CAA when she considers that scarce capacity will arise within 6 months.

Regulation 5 makes provision for the situation where scarce capacity no longer exists and regulation 6 sets out the scope of regulations 7 to 23. Regulation 7 places a restriction of using an aircraft for the carriage for reward of passengers or cargo on a capacity constrained route, without the qualifying carrier holding a scarce capacity allocation certificate.

Regulation 8 prescribes the function of allocating scarce capacity as a function of the CCA and regulation 9 sets out the duties to which the CAA must have regard when allocating scarce capacity. Regulation 10 contains the requirements which the applicant must fulfil when applying for a scarce capacity allocation certificate and places notification requirements on the CAA.

Provision is made in regulation 11 for revoking or varying a scarce capacity allocation certificate without application being made and regulation 12 makes provision for the making of an objection or representation in respect of an application for a scarce capacity allocation certificate. Regulation 13 states who has a right to be heard at a hearing and regulation 14 deals with preliminary hearings.

Regulation 15 contains notice provisions relating to the hearing which the CAA must comply with and what information they must provide in connection with the hearing. Regulation 16 sets out the procedure which must be followed at the hearing.

Regulation 17 requires the CAA to act with due speed when deciding whether to grant, refuse to grant, revoke or vary a scarce capacity allocation certificate and when notifying the applicant of their decision. Regulation 18 contains notice provisions and regulation 19 sets out requirements on the form of the scarce capacity allocation certificate and how long it shall remain in force.

Regulations 20 to 23 are enforcement provisions. Regulation 20 provides that the regulations will be enforced by the CAA and regulation 21 empowers the CAA to serve a direction detaining an aircraft if it has reason to believe that it will be used in contravention of regulation 7. Regulation 22 makes it an offence to contravene regulation 7, or a direction under regulation 21. Regulation 23 makes provision for offences by a body corporate.

These Regulations are made under powers contained in the Civil Aviation Act 1982, except in their application to regulation 7 (restrictions on the carriage for reward) and the provisions relating to offences (regulations 22 and 23) where the power is provided by section 2(2) of the European Communities Act 1972.

A full regulatory impact assessment has not been provided for this instrument as no impact on the private or voluntary sectors is foreseen.

STATUTORY INSTRUMENTS

2007 No. 3556

CIVIL AVIATION

**The Civil Aviation (Allocation of Scarce Capacity)
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£3.00

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E1880 1/2008 181880T 19585

