

**EXPLANATORY MEMORANDUM TO**  
**THE AIR NAVIGATION (SINGLE EUROPEAN SKY) (PENALTIES) ORDER 2009**

**2009 No. 1735**

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This instrument introduces offences and penalties for non-compliance with certain Single European Sky regulations and associated implementing rules.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 The legislative basis for the Single European Sky (“SES”) was laid in April 2004 with the coming into force of the four SES foundation regulations: Regulation (EC) No 549/2004 laying down the framework for the creation of the Single European Sky (“the framework regulation”), Regulation (EC) No 550/2004 on the provision of air navigation services in the Single European Sky (the “air navigation service provision regulation”), Regulation (EC) No 551/2004 on the organisation and use of the airspace in the Single European Sky (the “airspace design and management regulation”), and Regulation (EC) No 552/2004 on the interoperability of the European Air Traffic Management network (the “interoperability regulation”). Further implementation measures have flowed from these regulations, including a common charging scheme, common requirements for air navigation service provision, and airspace and interoperability measures. Further measures are under development.

4.2 Member States are required to ensure compliance by industry with SES legislation. Under Article 9 of the framework regulation Member States must lay down sanctions for infringements of the SES regulations and implementation rules made under them which shall be "effective, proportional and dissuasive". The term “penalties” will be substituted for “sanctions” in Article 9 above when a Regulation amending the SES foundation regulations comes into force later in 2009. The title of this instrument has been amended accordingly.

**5. Territorial Extent and Application**

5.1 This instrument applies to the whole of the United Kingdom.

**6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution and does not amend primary legislation, no statement is required.

## 7. Policy background

- *What is being done and why*

7.1 The Single European Sky is a European Commission initiative launched in late 1999 as a response to worsening European air traffic management delays. The main SES objectives are to improve and reinforce aviation safety, to restructure European airspace to accommodate air traffic flow more efficiently and cost-effectively without the constraints imposed by national borders, and to create a uniform and interoperable air traffic management system.

7.2 The effective and expeditious implementation of the SES and realisation of its envisaged system-wide benefits to the industry and passengers alike depends on obligations set out in the SES regulations and their implementing rules being met uniformly across Europe by Member States in a timely fashion. To this end, provision has been made within the SES legislative framework to oblige Member States to introduce robust sanctions regimes to ensure compliance.

7.3 Following analysis of SES legislation, twenty obligations and associated offences in the following four published SES regulations were identified:

- The air navigation service provision regulation
- The interoperability regulation
- Regulation (EC) No 2096/2005 of 20 December 2005 laying down common requirements for the provision of air navigation services (the “common requirements regulation”)
- Regulation (EC) No 1794/2006 of 6 December 2006 laying down a common charging scheme for air navigation services (the “common charging scheme regulation”)

7.4 Following an evaluation of options (see section 8), and discussions with the Ministry of Justice, it was decided to introduce a criminal sanctions regime for SES offences. A broadly two-tier system of criminal penalties, consistent with current practice for offences under other EU civil aviation safety legislation, has been adopted. The higher tier penalty is, on summary conviction, a fine not exceeding the statutory maximum, and on conviction on indictment a fine or imprisonment for a term not exceeding two years or both. The lower penalty is, on summary conviction, a fine not exceeding level 4 on the standard scale. The higher tier penalty is applied to offences where the obligation is wholly, or partly safety-critical. The safety critical offences relate to the certification and designation of air navigation service providers under the service provision regulation, use of forged, altered, revoked or suspended declarations of conformity or EC declarations of verification under the interoperability regulation and compliance with the common requirements for air navigation service provision. The relevant articles are: 3, 4, 6, 8 (insofar as it applies to the common requirements), 9, 11(1)(a) to (d) and 11(2)(a) and (b). The lower penalties apply to other breaches of Single European Sky requirements which are not safety critical, such as the provision of costs information in the interests of transparency to users under the common charging scheme regulation: articles 7, 8 (insofar as it applies to the common charging scheme regulation), 10, 11(4)(a) to (d) and 11(5). Following discussions with the Ministry of Justice, two offences under Article 9 of the service provision regulation were downgraded from the higher tier penalty to a middle tier penalty: on summary conviction a fine not exceeding the statutory maximum and on conviction on indictment a fine. See articles 5, and 11(3)(a) and (b).

- **Consolidation**

7.5 This is a stand alone instrument and as such does not involve amendments to any other instrument.

## **8. Consultation**

8.1 The following three options were identified and assessed:

Option 1 – do nothing

Option 2 – introduce an administrative sanctions regime

Option 3 – introduce a criminal sanctions regime.

8.2 The “do nothing” option was considered because the CAA already has the power to revoke an air navigation service provider’s certificate which in theory could deter non-compliance with SES legislation. However, SES legislation requires continuity of service, so revocation of a certificate would be a major step and very much an action of last resort. Furthermore, it would not apply to certain minor offences, such as non-compliance with the common charging regulation. We concluded, therefore, that the UK needed to introduce further sanctions.

8.3 The second option considered was the introduction of administrative sanctions as an alternative to prosecution. After detailed discussion with the CAA it was concluded that the enforcement mechanisms for the SES legislation should be consistent with the current framework of criminal sanctions that applies in relation to aviation safety. In addition to the CAA’s concerns about the possible adverse effects of administrative sanctions on the open reporting culture, we were concerned that the adoption of a new approach would add unacceptable delay to the implementation of a sanctions regime. The Department and the CAA have, however, agreed to carry out further work on the adoption of administrative sanctions in future.

8.4 The Department concluded, therefore, that a criminal sanctions regime was the only viable option in the interests of timely implementation, consistency and simplicity. One of the criteria in the Government’s code of practice on consultation states that it should take place at a stage when there is scope to influence the policy outcome. The existence of only one credible option did not offer this opportunity.

## **9. Guidance**

9.1 An information paper was sent out in October 2008 to the limited audience who are affected by the proposals, namely air navigation service providers and air traffic management equipment manufacturers who must already comply with the requirements to which the offences relate. The paper set out the Government’s plans to introduce a criminal sanctions regime for offences under the SES legislation including the rationale behind the Government’s approach, enforcement aspects, obligations in the SES legislation, offences identified, and the penalty levels to be applied.

## **10. Impact**

10.1 The impact on business is limited to air navigation service providers and manufacturers of air traffic management equipment. They are already required to comply with the obligations in the SES legislation and bear the compliance costs of doing so. The

sanctions regime does not of itself add further compliance costs. There is no impact on charities or voluntary bodies.

10.2 The impact on the public sector is limited to those air navigation service providers that are publicly owned: 5 out of 67.

10.3 An Impact Assessment has not been prepared for this instrument because a criminal sanctions regime was deemed to be the only viable option at this point in time so the relative impacts of a range of options could not be explored.

## **11. Regulating small business**

11.1 The legislation applies to small businesses to the extent that out of 67 air navigation service providers, 62 would be classed as Small and Medium Enterprises (SMEs), and out of 15 air traffic management equipment manufacturers, 10 would be classed as SMEs. However, the sanctions regime applies equally to all providers and manufacturers in the UK irrespective of size.

11.2 The CAA would treat all providers and manufacturers in the same way, irrespective of size. In the event of prosecution it would be for the courts to decide on any penalty and costs to be imposed.

11.3 Recipients of the information paper were invited to submit written comments if they so wished. No responses were received from air navigation service providers and air traffic management equipment manufacturers that could be classed as SMEs.

## **12. Monitoring & review**

12.1 The Department and the CAA have agreed to carry out further work on the adoption of administrative sanctions in future. The operation of the SES criminal sanctions regime will be reviewed by the DfT and CAA in its first five years of operation to determine its effectiveness.

## **13. Contact**

Caroline Wall at the Department for Transport; Tel: 020 7944 6243 or email: [caroline.wall@dft.gsi.gov.uk](mailto:caroline.wall@dft.gsi.gov.uk) can answer any queries regarding the instrument.