

EXPLANATORY MEMORANDUM TO
THE OPERATION OF AIR SERVICES IN THE COMMUNITY REGULATIONS 2009
2009 No. 41

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

2.1 This instrument enables the effective implementation and enforcement of regulation EC 1008/2008 on Common Rules for the operation of air services in the Community (recast) (“the EC regulation”). The instrument establishes the respective roles of the Civil Aviation Authority (CAA) and Secretary of State in relation to the issue of airline operating licences, the approval of aircraft leases and ensuring access to intra-Community routes. It also sets out offences and penalties for non-compliance.

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

3.1 The JCSI will have an interest as the instrument will come into force seven days after being laid before Parliament, rather than the conventional 21 days. This is to ensure that it comes into force as soon as practicable after the date on which the EC regulation entered into force. The EC regulation was published in the Official Journal of the European Union on 31st October, and came into force the following day, 1st November 2008.

3.2 The final text of the EC regulation was formally approved by the European Parliament at second reading on 9th July 2008. Although the Department commenced work on this instrument in advance of that date it was not possible to complete the necessary implementation work by the date on which the EC regulation entered into force. Indeed, the date for the publication of the EC regulation in the Official Journal was only confirmed to the Department in early September.

3.3 Since the EU regulation was published in the Official Journal, the Department and the CAA have been carefully considering important legal and policy necessary to finalise the instrument. The two most significant were:

- a) The respective roles of the Secretary of State and CAA in taking decisions on ownership and control in connection to operating licences. While the Secretary of State took such decisions under the previous arrangements (see para 4.1 below), it has been agreed that under the new instrument CAA should have this function, with a right of appeal for applicants or existing licence holders to the Secretary of State.
- b) Power for the CAA to provisionally suspend operating licences in cases where urgent action was thought necessary. The usual procedures for the suspension of licences

would be difficult to apply in these circumstances. After discussion, it was agreed that no such powers should be included in the instrument because it has not been possible to identify a proportionate approach that both effectively protects the rights of the licence holder and reflects the regulators concerns.

In each case the Department had to consider how best to accommodate differing, and on occasion competing, policy requirements and legal considerations, in circumstances where the economic situation has meant these particular provisions of the instrument have assumed greater importance.

3.3 Since the CAA is a statutory corporation, in the absence of the clear legal authority provided by this instrument it has not since 1st November been able to issue, vary or revoke airline operating licences, or issue the safety approvals necessary for the use of leased aircraft under the EC regulation. A number of such applications are currently awaiting determination, so disadvantaging the air carriers concerned at a time where the air transport industry in general is being affected by the difficult economic and financial circumstances. Moreover, revocation of an airline's licence might also be required at short notice if it were in financial difficulties and therefore unable to meet the financial requirements of the EC regulation. The current economic and financial conditions make this particularly pertinent. A number of airlines have recently faced financial difficulties, including XL airways which became insolvent in September 2008 directly affecting some 80,000 passengers. Providing for a period of less than 21 days between the instrument being laid and its coming into force will limit the period during which the commercial activities of the airline industry are subject to disruption and any consequences for its passengers.

4. Legislative Background

4.1 The instrument enables the implementation of Chapters I to III and V of regulation EC 1008/2008 on Common Rules for the operation of air services in the Community (recast). This regulation consolidates and revises three previous EC regulations enacted in 1992 that finally established the single market in air services in the Community. These three regulations are: EC 2407/92 on the licensing of air carriers; EC 2408/92 on access for community air carriers to intra community air routes; and EC 2409/92 on fares and rates for air services, together known as the "third aviation package". These regulations were implemented in the UK by three corresponding SIs, the "third aviation package SIs", namely the Licensing of Air Carrier Regulations 1992 (SI 1992/ 2992); the Access for Community Carriers to Intra-Community Air Routes Regulations 1992 (SI 1992/ 2993) and the Air Fares Regulations 1992 (SI 1992/ 2994).

4.2. The purpose of the instrument is to implement the EC regulation in the UK, for example by enabling airline operating licences to be granted, maintained and revoked, and to allow the approval of certain arrangements for leasing aircraft by the airlines that are licensed under the instrument. The legislation also allows the Secretary of State to restrict access to intra-Community routes (see section 7 for further details). The approach in this instrument follows, wherever relevant and practical, the approach used in the third aviation package SIs. Accordingly, the respective roles of the CAA and the Secretary of State in considering applications for airline operating licences are maintained, as is the mechanism under which an unsuccessful applicant can appeal to the Secretary of State. Offences and penalties for breach of the instrument's provisions have also been carried forward unchanged.

4.3 This instrument does not address Chapter IV of the EC regulation on pricing. That Chapter sets out new provisions not in the third aviation package regulations. The Department is considering with CAA the best approach to implement these provisions.

4.4 An Explanatory Memorandum (EM 11829/060) was submitted to Scrutiny Committees about the proposed EC regulation in August 2006. Both Committees considered it in October 2006 and did not clear it pending the receipt of further information. A Ministerial letter, together with a Regulatory Impact Assessment, was sent to both committees in May 2007. Both Committees cleared the proposal in June 2007, but were kept informed of further negotiations, in particular consideration by the European Parliament, by Ministerial letters in July and November 2007.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Rt Hon Paul Clark MP, the Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights:

In my view the provisions of The Operation Of Air Services In The Community Regulations 2009 are compatible with the Convention rights.

7. Policy background

7.1 The third aviation package regulations established a single liberalised market for air services in the European Community, with the aim of promoting greater efficiency and affordability in the provision of air services so encouraging competition. The package did this by removing many of the previous restrictions on the provision of intra-EC air services and by setting Community-wide rules regarding: airline operating licences for Community air carriers; the approval of arrangements for leasing aircraft by these air carriers; access to intra-Community routes; and air fares. As noted above, each of the third package regulations was implemented in the UK by a corresponding SI, to ensure their effective application and enforcement in the UK.

7.2 In 2006, the European Commission published proposals to update, revise and consolidate the third aviation package regulations in light of experience with their operation, taking into account developments in the market for air services since 1992, and the need to ensure a more consistent application across the EU. Following negotiation in the Council and discussions in the European Parliament, a new EC regulation completed the Community legislative process in July 2008. The Department for Transport therefore needs to put in place a revised implementing instrument to continue the effective application and enforcement of Community law in relation to the single market in air services. This instrument provides the legal framework for UK airlines and other UK stakeholders to continue to participate in the liberalised market for air services in the Community.

7.3 In summary, the instrument implements the provisions of the EC regulation in the following ways. As regards licensing, the CAA is designated as the competent licensing

authority in the UK for the relevant provisions of the EC regulations. This is a change from the previous arrangement where the Secretary of State took decisions on questions of ownership and control of airlines in relation to operating licences rather than the CAA as previously. The revised approach means that the CAA now takes decisions on all aspects of operating licences, with a right of appeal for licence holders to the Secretary of State. The instrument makes provision for the date on which a licensing decision by the CAA takes effect and for the circumstances under which an appeal can be made to the Secretary of State against decisions by the CAA, including not to grant or to revoke a licence. There is no right of appeal in cases where the European Commission requests the CAA to revoke or suspend a licence using its powers in the new EC regulation. The instrument establishes offences and penalties to enforce the licensing regime; for example, it is an offence for a person to knowingly or recklessly carry air passengers for remuneration or hire without the appropriate operating licence.

7.4 The CAA is also designated as the competent licensing authority for the approval of certain aircraft leasing arrangements for safety purposes, while the Secretary of State is designated as responsible for approving certain leases where there are economic policy considerations. The instrument makes it an offence to operate a leased aircraft without the necessary approvals.

7.5 The instrument designates the Secretary of State as competent authority for all but one of the Access to Routes articles of the EU regulation. The Secretary of State may, therefore, impose Public Service Obligations (PSOs) on economically or socially necessary routes in the UK which are not commercially viable, potentially restricting competition on these routes. The instrument gives the Secretary of State a duty to air carriers in taking decisions in relation to PSOs.

7.6 Finally, the instrument allows the Secretary of State to serve a written notice requiring air carriers to provide information required by the Commission in applying and monitoring the application of the EC regulation. It also sets out penalties under UK law for offences under the instrument.

7.7 The instrument makes consequential changes to one piece of primary legislation, the Civil Aviation Act 1982, and two pieces of secondary legislation, namely the Civil Aviation Authority Regulations 1991 (SI 1991 No 1672) and the Air Navigation Order 2005 (SI 2005 No 1970). These reflect the repeal of the third aviation package regulations and their replacement by the EC regulation. The Department's current programme of secondary legislation anticipates that both The Civil Aviation Authority Regulations 1991 and the Air Navigation Order 2005 will be consolidated in the next 12 months.

7.8 The provisions of the instrument are unlikely to attract public attention, given that they are mainly technical in nature and apply directly only to businesses in the air transport sector, the CAA and Government.

8. Consultation Outcome

8.1 As noted above, the Department for Transport consulted stakeholders on the draft proposal for the EC regulation for 12 weeks in late 2006 and early 2007. The principal stakeholders are UK airlines, UK airport operators, consumer groups and devolved administrations. Particular areas of concern identified by stakeholders were addressed in

negotiations over the text of the draft proposal, for example relating to proposed changes to certain aircraft leasing provisions that would have been too restrictive for the business models of some UK airlines.

8.2 Given the approach to implementation set out in section 4 above, the Department did not undertake a stakeholder consultation on the instrument, although the CAA has been closely involved in its preparation. The Department is considering consultation requirements for implementing the new pricing provisions in Part IV of the EC regulation.

9 Guidance

9.1 The Department for Transport wrote to stakeholders informing them that the EC regulation would come into effect on 1 November, and that UK implementing legislation was under preparation that sought to maintain arrangements under the third aviation package SIs wherever possible.

9.2 The CAA is expected to revise its official guidance about airline licensing arrangements to reflect the contents of the EC regulation in due course. Similarly, revised guidance for stakeholders on the approval of leasing arrangements is also in preparation by the CAA.

10 Impact

10.1 The impact on business, charities or voluntary bodies from the instrument is expected to be minimal or nil in light of the approach to implementation taken, as discussed above.

10.2 The impact on the public sector is unlikely to be significant for the same reasons.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is as for all businesses to which the legislation applies, namely to seek as far as practical and where relevant to maintain implementation arrangements that have been in place for over 15 years.

12. Monitoring & review

12.1 The intention is for the instrument to have the minimum necessary effect on the air transport industry compared to the implementation arrangements in the third aviation package SIs. The Department for Transport will regularly monitor the effect of the instrument, with advice from the CAA.

13. Contact

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