

EXPLANATORY MEMORANDUM TO
THE AIR NAVIGATION (AMENDMENT) ORDER 2017
2017 No. 1112

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Transport (“the Department”) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments (“the JCSI”).

2. Purpose of the instrument

- 2.1 The Air Navigation (Amendment) Order 2017 (“this instrument”) makes amendments to the Air Navigation Order 2016 (“the ANO”) to implement the requirements of the EASA Air Traffic Controller Licensing Regulation¹ and the EASA Air Operations Regulation². The Order also amends the maximum criminal fine for loss of communication with Air Traffic Control (“ATC”) and corrects defects in the 2016 Order.

3. Matters of special interest to Parliament

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

- 3.1 The JCSI identified in its Tenth Report of Session 2016-17 a number of amendments that should be made to the ANO. A correction slip has been published by the SI Registrar for minor amendments. Amendments identified in paragraphs 3.3 to 3.10 of the report have been addressed in this instrument as follows.
- 3.2 The amendment to article 38(1) identified in paragraph 3.3 is implemented in Article 12 of this instrument.
- 3.3 The amendment to article 49(2) identified in paragraph 3.4 is implemented in Article 14 of this instrument.
- 3.4 The amendment to article 61(3) identified in paragraph 3.5 is implemented in Article 15 of this instrument.
- 3.5 The amendments to articles 127(4) and 128(1) identified in paragraph 3.6 are implemented in Articles 27 and 28 of this instrument.
- 3.6 The amendments to article 231 identified in paragraph 3.7 are implemented in Article 39 of this instrument.
- 3.7 The amendments to article 235(3)(e) identified in paragraph 3.8 are implemented in Article 33 of this instrument by amending Article 175(3)(a) to establish the obligation

¹ Commission Regulation (EU) No 2015/340 of 20th February 2015 laying down technical requirements and administrative procedures relating to air traffic controllers’ licences and certificates pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, amending Commission Implementing Regulation (EU) No 923/2012 and repealing Commission Regulation (EU) No 805/2011 (O.J. No. L 63, 6.3.2015, p.1).

² Commission Regulation (EU) No 965/2012 of 5th October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (O.J. No. L 296, 25.10.2012, p.1).

to possess certain documents that are required to be preserved under Article 175(4) and that must be produced on a request from an authorised person under Article 235.

- 3.8 The amendment to article 238(2) identified in paragraph 3.9 is implemented in Article 40 of this instrument.
- 3.9 Breaches of provisions identified in paragraph 3.10 are implemented as follows in this instrument:

| ANO 2016 provision | Implementation in this instrument |
|---------------------------|---|
| Article 44(5) | Article 52(b) |
| Article 47(3) | Article 56(a) |
| Article 54(1) | Article 52(c) |
| Article 55 | Article 52(c) |
| Article 63(1) | Article 49(b) |
| Article 63(2) | Article 49(b) |
| Article 63(6) | This is considered to be unsuitable for an offence because the Civil Aviation Authority (“the CAA”) has other sanctions available to encourage compliance with the requirement. If the owner or operator does not provide the required documents, etc., for the airworthiness review or following the issue of such certificate, the CAA would either not certify the owner or operator, or suspend the issued certificate. |
| Article 78(2) | This is no longer relevant because Article 78 is omitted from the ANO under this instrument. |
| Article 123 | This is considered to be unsuitable for an offence because a breach of this provision would be a breach of article 122(2) which is an offence under Part 2 of Schedule 13. |
| Article 149(1) | Article 56(b) |
| Article 187(1) | Article 56(c) |
| Article 188(2) | Article 56(d) |
| Article 188(3) | This is no longer relevant because Article 188(3) is omitted from the ANO under this instrument. |
| Article 200(8) | The requirement to submit to a test is considered to be unsuitable for an offence because the CAA has other sanctions available to encourage compliance with the requirement. If the person does not comply, the CAA would suspend their licence or certificate until they complied. |
| Article 203(6) | The requirement to submit to a test is considered to be unsuitable for an offence because if the person does not comply, the CAA would suspend their licence or certificate until they complied. |
| Article 206(13) | Article 49(d) |
| Article 206(14) | Article 49(d) |
| Article 206(15) | Article 49(d) |

- 3.10 The Department acknowledges the JCSI’s recommendation to carry out a detailed review of the ANO as part of any further consolidation, and will consider this when such opportunity may arise in future.

- 3.11 As this instrument includes provisions correcting defects in the ANO, this instrument is being issued free of charge to all known recipients of the ANO.

Other matters of interest to the House of Commons

- 3.12 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Part III of the Civil Aviation Act 1982 provides for the regulation of civil aviation in the United Kingdom. This confers power on Her Majesty to make by Order in Council provision for regulating air navigation including (but not limited to) registration of aircraft, airworthiness, regulation of aerodromes and licensing of pilots.
- 4.2 This instrument also makes consequential amendments arising from the application of the EASA Air Traffic Controllers Licensing Regulation.
- 4.3 This instrument also provides for offences relating to Special Operations (“SPO”) and Non Commercial Operations (“NCO”) under the EASA Air Operations Regulation to enable the CAA to enforce compliance when necessary. The EASA Air Operations Regulation contains operating rules for European aviation under a number of different categories. This instrument introduces new offences under Part-SPO that are called ‘special operations’ (e.g. aerial photography, surveys, pipe line inspection, parachuting). This Regulation is directly applicable in the UK. However, this Regulation does not provide for penalties for operators who act outside the rules, and require national implementation for such enforcement to be effective through the UK courts.
- 4.4 The ANO contains offences for the loss of two-way communication with ATC. The current maximum fine available for the offence is £2,500. In March 2016 the Department consulted on a proposal to permit unlimited fines in England and Wales as magistrates deem proportionate e.g. offences in circumstances within the pilot’s control. This instrument changes the level of penalty to allow for unlimited fines in England and Wales, and a maximum of £5,000 in Scotland or Northern Ireland (see also paragraph 7.2).
- 4.5 In June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom, to UK registered aircraft wherever they may be, and to non-UK aircraft within UK airspace.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

- 7.1 This instrument implements amendments reflecting EU changes to standards in aviation and air navigation safety. It also includes relevant provisions to permit unlimited fines in England and Wales for loss of communication with ATC. This is a change to domestic legislation required to mitigate against the disruptive intrusion of aircraft with their flight communication system turned off or otherwise inoperable. Each year on average, over 100 aircraft in UK airspace lose two-way communication with ATC causing, post 9/11, considerable security concerns.
- 7.2 The current maximum fine available for the offence is £2,500. The increase to the maximum fine from Level 4 to Level 5 applies exclusively to the Standardised European Rules of the Air regulations on communicating with ATC. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides for all Level 5 fines to be made unlimited in England and Wales. That Act does not apply in Scotland or Northern Ireland, where the penalty for such offences increases to a maximum Level 5 (£5,000).
- 7.3 While a majority of these cases are resolved before aircraft enter UK airspace, they can still on occasion require expensive military interceptions that could be potentially lethal. On the occasions where the CAA prosecutes a potential offence, it is important they have the correct powers available to them to initiate appropriate enforcement action. CAA for its part is also bound by the statutory Regulators Code³ to act in a fair and proportionate manner with regard to enforcement. The courts will have the power to apply unlimited fines in the event of conviction in England and Wales. The CAA is likely to use this enforcement power on rare occasions in cases of the most egregious infringements. The impact of these offences is serious, and for these reasons the Department believes that the extra deterrence of increased fines makes them desirable from an enforcement perspective.

Consolidation

- 7.4 This is the first amendment to the ANO so a consolidation at this stage is not appropriate.

8. Consultation outcome

- 8.1 The EU derived changes for Air Traffic Controllers (“ATCO”) and SPO/NCO are routine, small in scale and do not go beyond minimum EU requirements. Due to this, these measures do not require consultation in the manner of domestic regulation given they do not go beyond minimum EU requirements and are technical changes to areas of regulation that were already previously established in UK law.

- 8.2 In March 2016 the Department consulted (<https://www.gov.uk/government/consultations/rules-of-the-air-increased-fines-for->

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf

infringements) on the domestic requirement to permit unlimited fines for loss of communication offences e.g. offences in circumstances within the pilot's control. The consultation generated a total of 58 responses, of which six were in favour, one neutral and 51 against. This represents a very low response rate given that the document was sent to or made available to all commercial airlines operating in the UK, 50 airports in the National Aviation Security Programme and around 30,000 UK-registered GA owners through their representative organisations. The 6 positive responses received were from the Department for Regional Development in Northern Ireland, NATS (the national air traffic services provider), Heathrow and Humberside airports, Thomson Airlines and one individual. Of the remaining 51 negative responses 9 of those were companies such as Virgin, IAG and Egypt Air or representatives bodies (BALPA, British Gliding Association) and 42 were individuals, mostly general aviation pilots.

- 8.3 Respondents' concerns were centred mostly on the belief that the current level of fines were sufficient or else the change was insufficiently justified. There were also concerns raised around fairness given the discrepancy between the ways the offence is treated in different parts of the UK. Finally there were concerns that the high fine would either discourage flying or be used as a money making scheme by the CAA or the Department. It is the court that determines the fine based on its sentencing guidelines, but it is important to consider that CAA policy does require them to have regard for the financial circumstances of the individual concerned when reviewing its prosecution cases.
- 8.4 The Department recognises that, of the very low number of respondents, the majority of opinion was against these proposals. Responding to the various points outlined in paragraph 8.3 on justification the Department must consider the impact of the incidents that occur and whether the deterrent provided for in law is sufficient. The Department has looked at the arguments put forward and come to the conclusion that the extra deterrent of increased fines in this area is warranted. This decision was taken after weighing the responses against the disruptive and expensive impacts of the offences when they do occur, and noting that, if the Royal Air Force has to launch aircraft because of a loss of communication, there are significant potential safety and security implications of such aircraft operating in crowded airspace and possibly taking executive action to remove a suspected or actual threat. This instrument makes it clear that the maximum fines available for loss of communication are being amended. It does not automatically lead to the imposition of disproportionately higher fines. Magistrates will still need to consider relevant factors and to demonstrate proportionality in their decisions. On the second point about discrepancy of approach in the UK, the Department wishes to use every method available to reduce the volume of loss of communication offences, so it is still desirable to introduce this amendment. On the point about an unintended consequence of discouraging flying, pilots are trained in the European Rules of the Air⁴, which they must obey when entering controlled airspace for both safety and security reasons and be aware of the consequences if they do not. For this reason we do not expect the change to discourage flying by law abiding pilots. In terms of the revenue and its use neither the CAA nor Department will have access to any of this money, which is given over to the Treasury's Consolidated Fund.

⁴ <https://www.caa.co.uk/Commercial-industry/Airspace/Rules-of-the-air/Standardised-European-Rules-of-the-Air/>

8.5 In summary, the Department has considered the arguments put forward, and after weighing these against the benefits of increased deterrence, has decided to implement this policy without modification.

9. Guidance

9.1 None.

10. Impact

10.1 The impact on business, charities or voluntary bodies is £0.4m.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 The EU SPO/NCO and ATCO measures will have negligible impact on business, so no mitigations are therefore proposed. On the offences for the loss of two-way communication with ATC, it would not be appropriate to include mitigations for small businesses. This is because for this policy to be effective this policy would have to apply to all pilots.

12. Monitoring & review

12.1 The CAA will monitor the UK aviation industry to ensure compliance with the standards which are set out in the Order and related EU legislation. The Department will continue to review the need to make further amendments to the Order as necessary.

12.2 The ANO includes a review provision which requires the Secretary of State to review the operation and effect of the ANO and publish a report within five years after it comes into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether this Order should remain as it is, or be revoked or be amended.

13. Contact

13.1 Andy Kirby at the Department for Transport Telephone: 020 7944 5894 or e-mail: Andy.Kirby@dft.gsi.gov.uk can answer any queries regarding the instrument.