

## EXPLANATORY MEMORANDUM TO

### THE AIR SERVICES (COMPETITION) (AMENDMENT AND REVOCATION) (EU EXIT) REGULATIONS 2019

2019 No. 1224

#### 1. Introduction

- 1.1 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 revokes a previous S.I. (the Air Services (Competition) (Amendment) (EU Exit) Regulations 2019, S.I. 2019/309). The previous S.I. made corrections to Regulation (EC) No 868/2004, which has since been repealed and replaced by Regulation (EU) 2019/712. The new instrument makes the changes needed to the version of Regulation (EU) 2019/712 that is retained in UK law by the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”), which provides for measures in response to anti-competitive practices made by non-European Union countries which cause, or threaten to cause, injury to Union air carriers.

#### *Explanations*

##### What did any relevant EU law do before exit day?

- 2.2 Regulation (EU) 2019/712 laid down rules on the conduct of investigations by the European Commission and on the adoption of redressive measures, relating to practices distorting competition between Union air carriers and third-country air carriers and causing, or threatening to cause, injury to Union air carriers.

##### Why is it being changed?

- 2.3 This instrument makes technical changes to the version of Regulation (EU) 2019/712 retained by the European Union (Withdrawal) Act 2018 so that it continues to function after the UK has left the EU.

##### What will it now do?

- 2.4 The policy content of the retained Regulation (EU) 2019/712 will remain substantially unchanged. The effect of the changes made is that the Regulation will apply where practices distorting competition by countries other than the UK cause injury to the UK aviation industry. Further detail is set out below in Section 7.

#### 3. Matters of special interest to Parliament

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

- 3.1 The Government has given careful consideration to the appropriate procedure for progressing this instrument. This instrument is an important part of the Government’s no deal preparations for aviation.
- 3.2 If this instrument is not in place by exit day, then SI 2019/309, which makes amendments to the now repealed EC Regulation 868/2004, would come into force on

exit day, which risk uncertainty for industry as the EU legislation it intended to amend would no longer be retained. Consequently, the EU would have a measure it could use effectively against the United Kingdom if the UK were deemed to have offered undue support to UK carriers, but the UK would not have an equivalent power to take measures against third country carriers if they did the same to the detriment of UK carriers. Therefore, there would not be a level playing field until the instrument was introduced, and a need to ensure that the instrument is in place for exit day.

3.3 The Government considers it important to have this instrument in place by exit day, to give the confidence and certainty to industry that the reciprocity outlined above provides, as well as to ensure the effective functioning of the statute book after exit.

3.4 The Government has concluded that the ‘made affirmative’ procedure provided in the European Union (Withdrawal) Act 2018 ensures that this instrument is in place for exit day.

3.5 Using the ‘made affirmative’ procedure still allows for parliamentary scrutiny, and Parliament will need to approve its making for it to remain in force.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

3.6 The territorial application of this instrument includes Scotland and Northern Ireland.

#### **4. Extent and Territorial Application**

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

#### **5. European Convention on Human Rights**

5.1 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Air Services (Competition) (Amendment and Revocation) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

#### **6. Legislative Context**

6.1 These Regulations are made in exercise of powers in section 8 of the Withdrawal Act.

6.2 The Withdrawal Act makes provision for repealing the European Communities Act 1972 and will preserve direct EU law, as it stands at the moment of exit, in United Kingdom law. It enables the creation of a new body of domestic legislation by bringing the texts of directly applicable EU legislation into domestic legislation, as well as saving EU-derived domestic legislation which was made to implement the United Kingdom’s obligations as a member of the EU.

6.3 The Act also contains temporary power to make secondary legislation to enable Ministers and the devolved administrations to make secondary legislation to correct legislation that would no longer operate appropriately once the United Kingdom has left the EU, so that the domestic legal system continues to function correctly outside the EU.

## 7. Policy background

### *What is being done and why?*

- 7.1 Regulation (EU) 2019/712, on safeguarding competition in air transport, repealed Regulation (EC) No 868/2004, which provided for redressive measures to be imposed where subsidisation and unfair pricing practices by third country air carriers caused injury to EU air carriers. The Regulation applied to routes between third countries and EU Member States where both third country carriers and EU carriers could be offering services.
- 7.2 The preamble of the new 2019/712 Regulation noted that Regulation (EC) 868/2004 had proved to be ineffective, and failed to provide complementarity with air transport or air services agreements to which the Union is a party.
- 7.3 The new Regulation provides the European Commission with the power to conduct an investigation where there is prima facie evidence of practices causing or threatening to cause injury to Union air carriers, and to adopt redressive measures where necessary.
- 7.4 It indicates various examples of where discrimination could occur, such as: the prices of / access to groundhandling services, airport infrastructure, air navigation services, the allocation of slots, administrative procedures, arrangements for selling and distribution of air services, and other ‘doing business issues’, such as burdensome customs clearance procedures. Should an investigation into possible unfair practices conclude that redressive measures are an appropriate action, the purpose of their application would be to offset the injury that occurs due to the unfair practices, such as through financial duties or other measures that represent a measurable pecuniary value.
- 7.5 Redressive measures are not a necessary outcome of an investigation. For example, it may be the case that proceedings would be suspended when the offending party has taken decisive steps to eliminate the relevant practice distorting competition or the ensuing injury or threat of injury.
- 7.6 As the Government’s Explanatory Memorandum for the previous Statutory Instrument (which related to Regulation (EC) No 868/2004) explains, the emergence of this new EU Regulation has been expected, having been under development for some time.
- 7.7 Many of the changes this instrument makes to the retained Regulation (EU) 2019/712 are technical. For example, throughout the Regulation, this instrument substitutes references to “Union”, where appropriate, with references to “United Kingdom”. The effect of this type of change is that, instead of applying where there has been injury to European Union air carriers, redressive measures can be imposed where there has been injury to UK air carriers. Similarly, where Regulation (EU) 2019/712 refers to countries and country entities outside the EU when it mentions a “third country” or “third-country entity”, the effect of the changes in this instrument is that the retained Regulation will apply to a country other than the UK. It is also the UK’s Civil Aviation Authority (“CAA”) rather than the European Commission that will examine the complaint. The CAA will inform the Secretary of State rather than all EU Member States about the investigation, and details will be published in the Official Record of the CAA rather than the Official Journal of the European Union. The CAA’s Official Record can be located on its website, located at <https://www.caa.co.uk/home/>. A hard

copy of the notice may be obtained by writing to the Department for Transport at Great Minster House, 33 Horseferry Road, Westminster, London SW1P 4DR.

- 7.8 Some of the changes this instrument makes to the retained Regulation follow from the fact that the responsibilities of EU institutions do not neatly map onto those of UK institutions. In Regulation (EU) 2019/712, it is the Commission that both conducts the investigation and then, if appropriate, pursues redressive measures. The effect of the changes in this instrument is that the CAA will make a recommendation to the Secretary of State following its investigation, and the Secretary of State may then decide to adopt redressive measures. Such redressive measures will be adopted by regulations in a Statutory Instrument, subject to the affirmative procedure in Parliament. Additionally, it is important to note that while the investigatory power of the instrument will lie with the CAA, it is possible that the Department for Transport will play a supporting role. For example, point 19 of the preamble to the EU Regulation notes how a dispute may be settled through an air services agreement, which will involve DfT's International Aviation Division.
- 7.9 In a no-deal scenario where the UK was considered a "third country" by the EU or EU Regulation, the EU Regulation could be applied to the UK or its carriers were they to engage in the practices described in the Regulation. The changes being made by this SI to the version of the Regulation retained in UK law mean that it could be applied to any other country or their carriers, including EU Member States, were they to engage in these practices on routes to and from the UK.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

## **9. Consolidation**

- 9.1 There are no plans to consolidate the legislation covered by this instrument.

## **10. Consultation outcome**

- 10.1 Department for Transport Ministers and officials have regular engagement with the aviation industry, travel industry and consumer representatives. Through specific meetings and workshops on EU Exit, and at long-established stakeholder forums, a number of issues related to the UK's withdrawal from the EU have been addressed. This includes plans for making secondary legislation to ensure that the statute book continues to function irrespective of the outcome of negotiations, which stakeholders have supported.

## **11. Guidance**

- 11.1 The Department for Transport is not producing any specific guidance on the amendments provided for in this instrument.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the changes provided for in this instrument are limited to minor familiarisation costs.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is for it to be monitored in the course of normal departmental business.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

## **15. Contact**

- 15.1 Sarah Browne (Telephone: 07977 423874 or email: sarah.browne@dft.gov.uk) or Mark Bosly (Telephone: 07979 307232 or email: mark.bosly@dft.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Mike Alcock, Deputy Director for Technology and International Aviation at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister of State at the Department for Transport, Chris Heaton-Harris MP, can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018

### Part 1

#### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.  State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

## **Part 2**

### **Statements required when using enabling powers under the European Union (Withdrawal) Act 2018**

#### **1. Appropriateness statement**

- 1.1 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Air Services (Competition) (Amendment and Revocation) (EU Exit) Regulations 2019 does no more than is appropriate.”.

- 1.2 This is the case because: the changes this instrument makes to the retained version of Regulation 2019/712 are limited to what is needed to ensure that the legislation functions correctly after the UK has left the EU.

#### **2. Good reasons**

- 2.1 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action.”.

- 2.2 These are: ensuring that the retained version of Regulation 2019/712 functions correctly in UK law after the UK has left the EU.

#### **3. Equalities**

- 3.1 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement:

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 3.2 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Chris Heaton-Harris, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

#### **4. Explanations**

- 4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.



## **5. Urgency**

5.1 The Minister of State at the Department for Transport, Chris Heaton-Harris MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view, by reason of urgency, it is necessary to make the Air Services (Competition) (Amendment and Revocation) (EU Exit) Regulations 2019 without a draft of the instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament.”

This is in order for the Regulations to come into force on exit day. The reasons for urgency are set out in paragraphs 3.1-3.5 of the Explanatory Memorandum.