

EXPLANATORY MEMORANDUM TO
THE OPERATION OF AIR SERVICES (AMENDMENT) (EU EXIT)
REGULATIONS 2020

2020 No. 1632

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) in order to address deficiencies in retained EU law in the field of the operation of air services which arise from the withdrawal of the United Kingdom from the European Union (the “EU”). Further details are set out in the explanations in paragraph 2.2.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (“the Regulation”) provides the basis for the EU internal market in air services. In May 2020, Regulation (EU) 2020/696 amended the Regulation in response to the ongoing impacts of the COVID-19 outbreak on the aviation industry. These amendments inserted temporary provisions allowing airlines in financial difficulty to retain their operating licences and Member States to impose flight restrictions if necessary. They also inserted provisions allowing airports to urgently replace their groundhandling service provider should it suddenly go bankrupt. These provisions were due to expire at the end of the year. However, the amendments also inserted powers for the Commission to extend the provisions by way of a delegated act.
- 2.3 In November 2020 the Commission announced that it would extend the provisions relating to operating licences and the selection of ground handlers by one year. The necessary amendments were made by Commission Delegated Regulations (EU) 2020/2114 and (EU) 2020/2115 in December 2020. Regulation (EU) 2020/696 also inserted provisions allowing ground handlers whose contracts expire before the end of 2021 to keep them until 2022.

Why is it being changed?

- 2.4 The Regulation will become retained EU law after the end of the transition period and will be amended at that time by the Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1392) (“the 2018 Regulations”) to fix deficiencies which arise as a result of the UK leaving the EU. Since the 2018 Regulations were made, the Regulation has been amended by Regulation (EU) 2020/696 and Commission Delegated Regulations (EU) 2020/2114 and (EU) 2020/2115 as noted

above. As a result, it is necessary to make further amendments to the Regulation to fix deficiencies introduced as a result of these recent EU amendments.

What will it now do?

- 2.5 The temporary COVID-19 provisions in the Regulation which continue beyond the end of the transition period will continue to operate effectively until they expire. These allow airlines in temporary financial difficulty to retain their operating licences, airports to urgently replace their groundhandling service provider should it go bankrupt, and ground handlers to temporarily retain their contracts on expiry.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made using the urgent ‘made-affirmative’ procedure. The Ministerial statement in Part 2 of the Annex to this Explanatory Memorandum explains why use of the made-affirmative procedure is necessary.

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)

- 3.2 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 Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding Human Rights:
“In my view the provisions of the Operation of Air Services (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The key legislative context for this instrument is set out in paragraphs 2.2 and 2.3 above.
6.2 The Withdrawal Act (as amended by the European Union (Withdrawal Agreement) Act 2020) makes provision for repealing the European Communities Act 1972 and will preserve EU law, as it stands at the end of the transition period, 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 UK’s obligations as a member of the EU.
6.3 The Act also contains temporary powers to make secondary legislation to enable Ministers and the devolved administrations to make secondary legislation to correct legislation that no longer operates appropriately after EU exit and the end of the transition period, so that the domestic legal system continues to function correctly after the end of that period.

7. Policy background

What is being done and why?

- 7.1 Under Article 9(1) of the Regulation, Member States' competent licencing authorities must revoke or suspend the operating licence of an EU air carrier in financial difficulties and may replace it with a temporary operating licence. Due to the COVID-19 pandemic some EU air carriers, which were financially healthy before the pandemic, started facing liquidity problems that could trigger the suspension or revocation of their operating licence, or its replacement by a temporary licence, without there being a structural economic need for this to occur. Regulation (EU) 2020/696 therefore inserted a new paragraph 1a into Article 9 which allows competent licencing authorities (the Civil Aviation Authority in the UK) not to revoke or suspend operating licences in the period from 1 March to 31 December 2020 if a financial viability assessment has been carried out during that period, safety is not at risk and there is a realistic prospect of a satisfactory financial reconstruction within the following 12 months.
- 7.2 Under Article 11(1)(e) of the EU's Groundhandling Directive (96/67/EC), where a supplier of groundhandling services ceases its activity before the end of the period for which it was selected by tender in accordance with that Article, it must be replaced using that same procedure. The COVID-19 pandemic may lead to possible insolvencies of suppliers of groundhandling services resulting in cessation of their activity. This could result in a situation where one or several suppliers cease to provide their services before a new supplier can be selected. To ensure the continuity of the service, a fast replacement of the supplier would be necessary. Regulation (EU) 2020/696 therefore inserted a new provision into the Regulation at Article 24a(2) which allows the managing body of the airport, for the period from 1 March 2020 until 31 December 2020, to choose a service provider directly, without tender, to provide the services for a maximum period of six months or for a period until 31 December 2020, whichever is the longer.
- 7.3 In November 2020 the Commission announced that it would extend the periods for which the above provisions apply by 12 months until 31 December 2021. Subsequently, Commission Delegated Regulations (EU) 2020/2115 and (EU) 2020/2114 entered into force on 18 December 2020 and made the necessary amendments to Articles 9(1a) and 24a(2) of the Regulation respectively.
- 7.4 The 2018 Regulations therefore need to be amended so that they include fixes for further deficiencies arising from the amendments made by Regulation (EU) 2020/696 and Commission Delegated Regulations (EU) 2020/2114 and (EU) 2020/2115. For instance, references in Article 9a(1a) to "Union air carrier" are replaced by "UK air carrier". In Article 24a(2), references to the Groundhandling Directive are replaced by references to the Airports (Groundhandling) Regulation 1997 (S.I. 1997/2389) which transposed the Directive. The provisions in these Articles and Articles 25a and 25b relating to the exercise of the Commission's delegated powers are revoked because they confer functions on EU entities which no longer have functions in relation to the UK.
- 7.5 Regulation (EU) 2020/696 also made two other COVID-19 related amendments to the Regulation. New Article 21a was inserted to supplement Article 21 of the Regulation which allows Member States to refuse, limit or impose conditions on the exercise of traffic rights within the single market. Until 31 December 2020 it allows Member

States to impose such restrictions without needing to satisfy some of the procedural requirements under Article 21. The Commission has decided not to extend this provision and consequently it will cease to apply at the end of 2020. Even if were extended, Article 21a would have no practical application in relation to the UK after the end of the transition period because the Regulation as retained in UK law only applies to the UK and does not grant any traffic rights to or within the EU. Consequently, Article 21a will be revoked by the 2018 Regulations. Regulation (EU) 2020/696 also inserted new Article 24a(1) which provides that contracts of suppliers of groundhandling services that expire between 28 May 2020 and 31 December 2021 may be prolonged until 31 December 2022. The Commission has also decided not to extend this provision. It will become retained EU law at the end of the transition period and will continue to apply in the UK until it expires at the end of 2022.

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 Withdrawal Act 2018 in order to address failures of retained EU law to operate effectively and 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 for consolidation.

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. There was support amongst stakeholders for continuity in terms of the rules applicable to providers of ground handling services. The Department also works closely with the Civil Aviation Authority (CAA) on all aviation matters, including the preparation of this instrument. The CAA strongly supports the continuity of the rules relating to operating licences.

11. Guidance

11.1 No guidance is necessary.

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 it makes only minor changes to address deficiencies in retained EU law. The impact on businesses and the public sector is limited to minor familiarisation costs.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 The impact on businesses is limited to minor familiarisation costs, therefore no specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

- 14.1 No specific monitoring arrangements are needed.
- 14.2 As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

- 15.1 James Gilderoy at the Department for Transport; telephone: 07500 573585 or email: james.gilderoy@dft.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jasmine Banghard, Deputy Director for Europe and International Aviation at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rachel Maclean MP, Parliamentary Under Secretary of State for Transport at the Department for Transport 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	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
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) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Operation of Air Services (Amendment) (EU Exit) Regulations 2020 do no more than is appropriate.”

1.2 This is the case because the instrument only corrects those deficiencies and makes those amendments necessary to ensure that the legislation functions correctly after the end of the transition period. It leaves technical requirements unchanged and only makes changes to the regulatory framework for civil aviation which are necessary for the legislation to operate effectively. The specific changes are set out in the ‘Policy Background’ section in paragraphs 7.1 – 7.5.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean 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 legislation regulating the operation of air services continues to function correctly after the end of the transition period; and
- Ensuring that there is clarity for air carriers, airport operators and groundhandling providers on the legislative provisions that will apply after the end of the transition period.

3. Equalities

3.1 The Parliamentary Under Secretary of State for Transport, Rachel Maclean 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 Parliamentary Under Secretary of State for Transport, Rachel Maclean MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Rachel Maclean MP, 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 Parliamentary Under Secretary of State, Rachel Maclean 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 Operation of Air Services (Amendment) (EU Exit) Regulations 2020, without a draft of the instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament.”

- 5.2 This is because: Commission Delegated Regulations (EU) 2020/2114 and (EU) 2020/2115 which amended the Regulation to extend the provisions relating to operating licences and the selection of ground handlers by one year did not enter into force until 18 December 2020. Only once these Delegated Regulations had entered into force and had made the necessary amendments to the Regulation was it possible to determine precisely what amendments this instrument needed to make in order to fix any deficiencies. Consequently, it was not possible to make this instrument any earlier. In order to ensure that the deficiencies are fixed and these provisions continue to operate effectively once they become part of retained EU law at the end of the transition period, it is essential that this instrument comes into force and makes the necessary amendments to the 2018 Regulations before then.
- 5.3 The impacts of the COVID-19 pandemic on the finances of air carriers and ground handling providers will continue into 2021. Therefore, it will be necessary for the UK Civil Aviation Authority to retain their discretion not to revoke or suspend air carrier operating licences or to impose temporary operating licences where an airline is in financial difficulty due to the impact of the COVID-19 pandemic. It is also necessary to give airports additional flexibility in replacing ground handling providers at short notice, where one or more provider has ceased trading, to ensure continuity of service.