

EXPLANATORY MEMORANDUM TO

THE AVIATION SECURITY (AMENDMENT) REGULATIONS 2022

2022 No. 497

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.

2. Purpose of the instrument

- 2.1 This instrument amends Regulation (EU) 2015/1998 of 5 November 2015 laying down detailed measures for the implementation of the common basic standards on aviation security (“the Implementing Regulation”). The amendments remove the requirement in retained EU law that explosive detection dogs (“EDDs”) may only be used as a supplementary means of examination of vehicles, and permit the use of existing technologies for the purpose of evaluating methods of aviation security screening. This instrument also removes from retained EU law the requirement that certain background checks need to be completed before new employees undergo initial security training. Such provisions are replicated in the requirements imposed on industry by directions under Part 2 of the Aviation Security Act 1982 (c. 36) (“the ASA 1982”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The provisions of these Regulations relating to background checks come into force on 30th April 2022, which does not allow for the standard 21-day period of scrutiny. This is because the provisions relating to background checks (regulations 2(3) and 2(4)) need to be in force urgently to ensure the Secretary of State can, where appropriate, grant alleviations to assist the industry to overcome short-term staffing problems following recovery from the Covid pandemic.
- 3.2 These provisions permanently remove from the Implementing Regulation the requirement for a background check to be completed before training with access to security sensitive information. While the retained EU law requirements are removed, the need to complete background checks will still be a requirement in UK aviation security regulation as set out in the Single Consolidated Direction (“the SCD”), issued under Part 2 of the ASA 1982.). It makes no change to the requirement for national security checks which are required for those undertaking aviation security functions. The effect of this amendment will be to enable the Secretary of State to issue directions which will allow temporary alleviation from the requirement to complete background checks before training commences.
- 3.3 The decision on whether to grant any such alleviations would be made on the basis of a risk assessment. Alleviations are likely to be time limited. Any delay to the coming into force of regulations 2(3) and (4) will increase the likelihood of air passenger disruption, already happening at some airports, due to staff shortages.

- 3.4 Publication of the SCD or other directions issued under the Act would be contrary to the interests of national security as it would provide hostile actors with information which could be used to undermine or circumvent security measures.
- 3.5 The remaining provisions relating to the use of EDDs will commence on 20th May 2022.
- 3.6 This explanatory memorandum has been updated to include additional information and has been re-laid to replace the original one.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security (“the Common Rules Regulation”) sets out basic standards to be applied in the field of aviation security. Article 4(3) of the Common Rules Regulation authorised the Commission to adopt detailed measures for the implementation of the basic standards. The Commission did so through the Implementing Regulation. When the Common Rules Regulation was retained at the end of the Implementation Period, Article 4(3) was amended by the Aviation Security (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/547) so as to confer the power to make detailed measures for the implementation of the basic standards on the Secretary of State, exercisable by statutory instrument. This instrument, amending the Implementing Regulation, is made in exercise of that power.
- 6.2 The Implementing Regulation provides detailed measures for implementing aviation security standards. This includes provision as regards the use of EDDs as a security screening method. It also includes provisions on the requirement for new employees whose training includes access to security sensitive information to undergo background checks prior to beginning such training. These detailed measures are supplemented in the UK by the SCD and other directions issued to industry by the Secretary of State in reliance on Part 2 of the ASA 1982.
- 6.3 The Implementing Regulation was itself supplemented by Commission Implementing Decision C (2015) 8005 (“the Commission Decision”). This decision set out additional and more detailed aviation security measures which, if made publicly available, would give adversaries or those seeking to cause harm to civil aviation, potential insights into how security measures could be exploited or circumvented. As such, the Commission Decision was made subject to the requirements of Commission Decision (EU, Euratom) 2015/444 which sets out the confidentiality requirements for EU materials with security sensitivities. The Commission Decision was to be distributed only on a “need to know” basis, subject to appropriate security controls. At

the end of the Implementation Period, the Commission Decision was revoked by the 2019 Regulations, thereby preventing it from being retained into UK law with the consequences that would have for its publication.

- 6.4 The relevant content of the Commission Decision was instead transposed into the SCD. As with the Commission Decision, publication of the SCD or other directions issued under the ASA 1982 would be contrary to the interests of national security as it would provide hostile actors with information which could be used to undermine or circumvent security measures. In passing the ASA 1982, Parliament recognised the national security implications of the Directions. The ASA 1982 does not require Directions to be published. Instead, it requires (through section 23) the Secretary of State to produce an annual report on the number of Directions issued under the relevant provisions of Part 2 and to lay that report before each House of Parliament, seeking to strike a balance between national security and Parliamentary accountability.

7. Policy background

What is being done and why?

- 7.1 Point 1.4.3.2 of the Annex to the Implementing Regulation imposes limitations on the use of EDDs and explosive trace detection equipment (“ETDs”) requiring that, when screening vehicles entering security restricted areas at airports, they may only be used as a supplementary method of examination. The decision was made by the Commission at the time that the Implementing Regulation was adopted but we are unable to locate publicly available information as to the rationale for the decision. Regulation 2(2) of this instrument removes this restriction as regards EDDs, by substituting a new version of point 1.4.3.2 in terms which apply only to ETDs. The use of EDDs remains subject to additional requirements imposed on industry by directions under Part 2 of the ASA 1982.
- 7.2 DfT has been undertaking extensive trials, gathering evidence to demonstrate the effective use of EDDs for screening vehicles. The removal of the restriction in retained EU law does not automatically permit the use of EDDs as a primary method of screening vehicles. The use of EDDs remains subject to restriction imposed by the SCD. This will allow the Secretary of State to permit the use of EDDs as a primary method of screening vehicles should this be deemed appropriate, and in conjunction with other methods in ways that will be specified in the SCD, on the basis of the evidence produced by the trials and in accordance with a risk assessment provided by the Civil Aviation Authority (“the CAA”) and officials. The use of EDDs in this way in the UK will reflect an expansion of detection capabilities and the intention is that they will be used in conjunction with other methods in a way that will enhance rather than decrease the security outcome.
- 7.3 Point 12.8.1 of the Annex to the Implementing Regulation authorises the Secretary of State to permit the use of new screening technologies, not otherwise set out in the Implementing Regulation, for the purpose of evaluating the new method of screening. Regulation 2(6) of this instrument amends point 12.8.1 to ensure that the Secretary of State may permit the use of new or existing methods of screening, notwithstanding any restriction in the Implementing Regulation on that method’s general use, provided it is for the purpose of evaluating that screening method’s effectiveness and subject to existing safeguards that it does not negatively affect the overall level of security being attained.

- 7.4 Point 11.1.5 of the Annex to the Implementing Regulation requires that the background checks mentioned in paragraph 3.1 are to be completed before the person undergoes initial security training. The initial security training is carried out by industry providers and the length of training varies considerably depending on the specific function into which the recruit will be deployed. The content of a background check is publicly available at point 11.1.3 of the Annex to the Implementing Regulation and includes (i) a check to establish the person's identity on the basis of documentary evidence; (ii) a criminal records check in all states of residence during at least the preceding 5 years; and (iii) confirmation of the applicant's employment, education and any gaps during at least the preceding 5 years.
- 7.5 Regulation 2(3) of this instrument omits this requirement, and regulation 2(4) omits the related cross-reference in point 11.5.1 which will no longer be necessary. The SCD includes an equivalent provision requiring background checks to be completed before such training begins. Now that the requirement has been removed from retained EU law, the Secretary of State may grant alleviations against that requirement through amending the SCD. Prior to the making of this instrument, he would not have been able to do so, as the requirement in Regulation 2015/1998 would have continued to apply notwithstanding the changes to the SCD. This will allow the Secretary of State to grant alleviations against the requirement to complete background checks before beginning security training, in accordance with developing situations and in accordance with risk assessments. While it would be inappropriate to comment in detail on the risk assessments, it should be noted that any alleviation may be accompanied by additional or alternative security measures so as to provide adequate mitigation against any risk that may have been assessed.
- 7.6 The background check process can often take months to complete and the aviation industry has faced recruitment challenges which have caused clear and significant operational difficulties at airports as they respond to the rapid increase in demand following the near shut-down of aviation during the Covid-19 pandemic, with severe consequences for passengers. Queues for security checkpoints have on occasion stretched outside of airport terminals, taking hours to pass through security and occasionally resulting in missed flights. In a normal year, recruitment would begin in January but due to the uncertain pandemic recovery, forward planning has proven difficult. A delay in enabling these alleviations to be granted will have consequences for the new recruits' training. Any alleviations granted to industry by the Secretary of State in respect of commencing training prior to the completion of the background check will only have been granted following a risk assessment provided by the CAA's aviation security team, and will only apply to specific training modules.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no plans to consolidate legislation in this subject area.

10. Consultation outcome

- 10.1 The Department has not formally consulted on this instrument. However, the changes to background check requirements are being made following numerous requests from

across the aviation industry, requesting a greater degree of flexibility in the timing of the check's completion during the training stages of recruitment. The Department has been engaging with industry throughout the course of the policy's development and industry has been supportive of the proposals, pushing for the measures to be brought into force at the earliest opportunity.

11. Guidance

- 11.1 The CAA will prepare, and issue to industry, guidance on the changes to the use of EDDs by airports. The changes do not impose additional requirements on industry. Instead they remove restrictions contained in retained EU law on the use of specific technologies for aviation security screening. The use of those technologies remains subject to requirements imposed on industry by directions issued under the ASA 1982 and, should those requirements change, guidance will be issued to industry as necessary.
- 11.2 The changes to the requirement to complete background checks before beginning security training do not impose additional requirements on industry. Instead the intention is that they will temporarily remove restrictions contained in retained EU law. As with other temporary alleviations from aviation security requirements there will not be any guidance produced on this policy.

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 A full Impact Assessment has not been prepared for this instrument as the amendments do not place additional obligations on industry and so the instrument is expected to have an annual net impact of less than £5 million.

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 Department, along with the CAA, will monitor the impact of the changes to ensure that the legislation continues to support the policy objective.
- 14.2 The instrument does not include a statutory review clause and in line with the requirements of the Small Business, Enterprise and Employment Act 2015 (c. 26), Robert Courts MP, Parliamentary Under Secretary of State at the Department for Transport, has made the following statement:

“It would not be appropriate in the circumstances to make provision for a review. A review would be disproportionate taking into account that the changes made are expected to have an annual net impact of less than £5 million.”

15. Contact

- 15.1 Richard Rose at the Department for Transport, telephone: 020 7944 2569, email: Richard.Rose@dft.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Sarah Nacey, Deputy Director for Aviation Security Strategy & Policy, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under Secretary of State for Transport, Robert Courts MP can confirm that this Explanatory Memorandum meets the required standard.