

EXPLANATORY MEMORANDUM TO

THE AIRPORTS SLOT ALLOCATION (ALLEVIATION OF USAGE REQUIREMENTS) (NO. 2) REGULATIONS 2023

2023 No. 1133

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument amends airport slot usage rules for slot coordinated airports for the slot scheduling season which runs from 29th October 2023 until 30th March 2024 (sometimes referred to as the “Winter 2023” season), as a result of the lasting impact of the COVID-19 pandemic. The UK has eight slot coordinated airports: Birmingham, Bristol, Gatwick, Heathrow, London City, Luton, Manchester and Stansted.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 An explanatory memorandum on this subject was first laid on 18 July 2023. This amended explanatory memorandum was laid to respond to feedback received from the House of Lords Secondary Legislation Scrutiny Committee. The policy background section from paragraphs 7.2 to 7.8, and the consultation outcome section from paragraphs 10.5 to 10.10 have been expanded.
- 3.2 This instrument is being made as soon as practicable in order to come into force on 28th October 2023. It is not desirable to allow a longer period before coming into force of the instrument because of the need to ensure that, if possible, the new rules are in force before the start of the Winter 2023 season on 29th October 2023. It would not have been possible to lay the draft instrument before Parliament earlier because of the need to obtain data about the reduction in the level of air traffic and the likelihood that this will persist in the Winter 2023 season (in order to comply with statutory requirements for making the instrument), and the need to consult the industry about the appropriate response to that reduction (see section 10 below).

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Scotland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales and Scotland.
- 4.3 Aerodromes are a devolved matter in relation to Northern Ireland and, as there are currently no slot coordinated airports there, the Northern Ireland Executive agreed that it was not necessary for the powers in section 12 of the Air Traffic Management and

Unmanned Aircraft Act 2021 (c. 12) to extend to, or apply in relation to, Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State, Baroness Vere of Norbiton, has made the following statement regarding Human Rights:

“In my view the provisions of the Airports Slot Allocation (Alleviation of Usage Requirements) (No. 2) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 An airport ‘slot’ is a permission to use all necessary airport infrastructure to operate an aircraft at a specified date and time for take-off or landing. Allocation of airport slots is governed by Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at United Kingdom airports (“Regulation 95/93”) (which is retained EU law). This provides for the allocation of slots to air carriers at congested airports based on neutral, transparent and non-discriminatory rules. Articles 8(2) and 10(2) set out the ‘80:20 rule’ that, provided an airline has used a series of slots at least 80% of the time in the preceding season (either winter or summer), it is entitled to the same series of slots in the upcoming equivalent season. Article 14(6) provides for the slot coordinator to withdraw slots from an air carrier if the carrier cannot achieve the required percentage usage rate. Article 10(4) makes provision for other cases where airlines can demonstrate that it is justifiable not to have used slots.
- 6.2 Because of the reduction in passenger demand during the COVID-19 pandemic, the 80:20 rule was waived for the Summer 2020 slot scheduling season (see Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020), the Winter 2020 season (see Delegated Regulation (EU) 2020/1477 of 14 October 2020), and the Summer 2021 season (see the Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2021, S.I. 2021/185).
- 6.3 The powers under which these alleviations were granted were, however, time limited, and were therefore replaced by section 12 of the Air Traffic Management and Unmanned Aircraft Act 2021 (c. 12) (“the 2021 Act”). Section 12 inserted into Regulation 95/93 a new Article 10aa, which provides a wider range of powers to amend Regulation 95/93 for specified periods, if the Secretary of State considers that as a result of COVID-19 there is a reduction in the level of air traffic, compared to the corresponding period in a relevant previous year, which is likely to persist. The procedure for making such regulations is set out in Article 13, which was substituted by the Airports Slot Allocation (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/276) and amended by section 12 of the 2021 Act. Regulations made under the new Article 10aa are subject to the affirmative resolution procedure.
- 6.4 Regulations were made under the new Article 10aa for the Winter 2021 season (see S.I. 2021/1200), the Summer 2022 season (S.I. 2022/368 and 2022/822), the Winter 2022 season (S.I. 2022/1107) and the Summer 2023 season (S.I. 2023/325). The present instrument, setting the rules for the Winter 2023 season, is similarly made under the powers contained in Articles 10aa and 13(3) of Regulation 95/93.

7. Policy background

What is being done and why?

- 7.1 Airport slots have significant competitive, operational, and financial value to the airlines which hold them. Under ordinary circumstances, the 80:20 rule helps to encourage efficient use of scarce airport capacity whilst allowing airlines a degree of flexibility in their operations. However, the COVID-19 pandemic has had a significant impact on aviation passenger demand which has warranted alleviation of the 80:20 slot usage rule since March 2020. The existing alleviation measures currently run until 28th October 2023.
- 7.2 All UK travel restrictions were lifted in March 2022, and, by mid-June 2023, UK air traffic had recovered to around 88% of its level in the corresponding period prior to the pandemic. Following an increase in COVID-19 cases in China, some restrictions were reintroduced from 5th January 2023 for passengers flying from mainland China to England. Although testing is no longer required for entry into the UK, restrictions remain in place for travel for some countries. While there is a range of potential future demand outcomes, the Department expects that the level of UK air traffic is likely to remain below pre-pandemic levels for the Winter 2023 season at least. Both demand (returning passengers) and supply (aircraft availability, staff etc) side factors are adding to a ‘long COVID tail’ in rebuilding resilience in the sector. Difficulties acquiring spare parts, due to global supply chain issues, are resulting in aircraft spending much longer in maintenance and overhaul than would normally be the case. These factors are likely to remain throughout 2024 and are attributable to the long-term impact of the pandemic on the resilience of the sector.
- 7.3 In light of this and bearing in mind the long-term disruption to the aviation sector as a result of COVID-19, it is therefore considered necessary to provide some further relief and amend the slot allocation rules for the Winter 2023 season, to provide additional flexibility to manage the long-term impacts of COVID-19. Although the level of air traffic and the demand for flying is recovering, it remains below 2019 levels. The recovery in demand varies considerably at different airports and across different markets with those that maintained COVID-19 restrictions the longest showing the slowest recovery. There also remains a risk of a renewed weakening of passenger demand, for example in the event of a virulent new COVID-19 variant. This is intended to protect the resilience of the sector; to minimise disruption to passengers; to discourage inefficient slot use by mitigating the risk that empty or near-empty ‘ghost flights’ will be operated in order to retain airlines’ historic rights to their slots, and the negative impact such flights would have on the environment; and to protect future connectivity, that is existing route networks and connections.
- 7.4 These Regulations make two changes in relation to slots allocated for the Winter 2023 season, which will affect reallocation of the same slots for the equivalent period from 27th October 2024 to 29th March 2025 (also known as “Winter 2024”).
- 7.5 First, for the Winter 2022 and Summer 2023 seasons, the list of reasons on the basis of which non-utilisation of slots can be justified, which appears in Article 10(4) of Regulation 95/93, was expanded to include certain government-imposed measures related to COVID-19 which severely reduce the viability of or demand for travel on the route in question. Regulation 2(2) of these Regulations extends this same approach to the Winter 2023 season. In order to benefit from this provision, all four of the following conditions must be satisfied:

- a. The measures must be imposed at either end of the route in question.
- b. The measures must take any one of the forms listed in the provision. These include flight bans or border closures, quarantine or self-isolation requirements, a requirement to obtain a negative COVID-19 test result before travelling by air or entering the relevant territory, official government advice against all but essential travel, and certain other measures such as severe or total closure of airports or hotels. In addition, the provision covers significant restrictions on onward travel booked along with the flight as part of a package – for example where a flight is sold as part of a flight and cruise package, or a flight and coach travel. In this last instance, the close connection between the flight and the onward travel means that any significant restrictions on the onward travel are covered, even if those do not reach the “severe” threshold which has been set in the case of closure of accommodation or surface travel more generally.
- c. The measures must (for part or all of the period to which the slots relate) severely reduce demand for passenger travel on the route or the viability of the route itself. This requirement is necessary since otherwise airlines could justify not using slots where passenger demand is undiminished (for example this might be the case where quarantine, self-isolation or testing requirements are subject to exemption for vaccinated passengers). The provision for measures which severely reduce the viability of the route may be more relevant where the restrictions take the form of airport closures (which might not reduce passenger demand but might make the route unviable).
- d. The measures must have been in effect at the date the slots were due to be operated, up to three weeks before that date (this three week period is intended as a “buffer” to give air carriers sufficient time to resume services when travel restrictions are lifted), or earlier where the government imposing the measures made an official announcement relating to their duration which made it reasonable to expect that they would remain in effect until that date and the air carrier made the slots available to the coordinator for reallocation.

7.6 Second, regulation 2(3) ensures that carriers will be treated as having operated up to 5% of the slots they hold at an airport if they handed these back, during the period from 1st September 2023 until 14th September 2023, for reallocation to other carriers. This option for pre-season handback gives airlines a flexible means by which they can adjust in advance to ensure a deliverable schedule, without losing the right to the slots the following year. It also helps to address the link between the knock-on effects of the COVID-19 pandemic and aviation resourcing and supply chain issues. The dates of 1st September 2023 until 14th September 2023 for pre-season handback have been set by reference to the international slot scheduling calendar and give carriers a period of 14 days during which to return slots after the international slot historic baseline date of 31st August (the date by which carriers must otherwise hand back slots they do not wish to use).

7.7 It will also be a condition that during the period from 1st September 2023 until 21st September 2023 they did not request any slots or any re-timing of slots. This is to prevent airlines handing slots back to benefit from the new rules, and then immediately requesting the same slots on an ad hoc basis before other airlines have had a chance to request them, or requesting that the slots they retain are re-timed. This ensures a period of at least 7 days during which the slots could be requested by other carriers, making it less likely that the original carrier would return slots which they want to operate solely to avoid the slot usage rule.

7.8 Without these temporary relief measures, airlines could have to take challenging commercial decisions on whether to bear the costs of operating near-empty aircraft or risk losing their slots on any route where restrictions were in place. The required percentage usage rate, however, is not being reduced and will therefore remain at 80% for the Winter 2023 season. This package is considered to strike an appropriate balance between protecting the resilience of the sector, protecting connectivity, and minimising short-notice disruption to passengers and other potential adverse impacts on new entry and competition between airlines. The European Union has adopted a similar approach whereby the usage rate will remain at 80% for the Winter season unless the Commission decides to lower the rate by delegated act. The Commission published updated slots regulations in October 2022 which covers the period to the end of the Summer 2023 season. This revision introduced a number of measures through the justified non-utilisation of slots provisions that go much broader than relating to the pandemic, in particular in response to the Ukraine war and closure of airspace that resulted. Other countries and jurisdictions are considering their approaches.

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 current 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 this engagement, officials have collated industry views as to the possible approaches to alleviation of the airport slot usage rules in the Winter 2023 slot scheduling season.

10.2 The Department for Transport also carried out a targeted industry consultation with airports, air carriers and industry bodies to seek views on possible relief measures, which ran from 22nd May to 12th June 2023.

10.3 The Department for Transport received 40 responses to the consultation from 25 air carriers, 7 airports, and 8 trade representative and other bodies. This included nearly all slot coordinated airports in the UK and the major airlines that operate from them. Almost all respondents agreed that some form of alleviation from slot usage rules is needed to support the aviation industry in dealing with the impact of COVID-19.

10.4 A majority of airlines and four airports supported the Department's proposal to retain the enhanced definition of justified non-utilisation of slots, (which applied in Summer 2023) as set out in paragraph 7.5 above. A number of airlines sought more generous justified non-utilisation provisions. One airline and three airports supported more restrictive justified non- utilisation provisions than were offered in Summer 2023.

10.5 The Department did not propose to offer a pre-season handback for Winter 2023 but sought views on if there should be one and if so what level it should be set at. The Department was mindful of finding the right balance between supporting the sector through sensible and proportionate measures to aid its recovery, and the counterfactual risk of offering excessive alleviation, which could unduly protect

incumbent airlines, potentially distorting competition and connectivity offered by new entrants who might otherwise gain improved access to slots. Most airlines and one airport supported the proposal set out in paragraph 7.6 above to allow airlines to hand back a proportion of slots before the start of the season in the same way as in Winter 2022 and Summer 2023, although most airports were opposed to it. For Winter 2022 airlines were able to hand back up to 10% of slots, 27,589 slots out of a total of 476,304, or 5.8%, were returned before the start of the season. For Summer 2023 airlines were able to hand back up to 5% of slots. 27,180 slots out of 951,750, or 2.9% were returned before the start of the season. This measure for Summer 2023 was considered to have had a material benefit in terms of the resilience of airline operations as they recovered from the COVID-19 pandemic.

- 10.6 Respondents gave a range of views as to the appropriate level of handback for Winter 2023, with evidence presented supporting 10%, 5% or none. A number of airline responses highlighted the continuing impact of COVID-19 on recruitment to different parts of the sector and supply chain problems relating to aircraft maintenance and fleet availability, stemming specifically from the pandemic which are affecting maintenance schedules, the resilience of operations, and creating greater uncertainty and the risk of short notice cancellations. Almost all airlines reported a similar story. A particular issue with aircraft laid up during the pandemic has been the appearance of corrosion which has necessitated additional time and resource to get aircraft back into routine operation. The effect of these challenges is that aircraft are out of service for extended periods of time which is affecting the ability of airlines to operate their schedules and their resilience as and when things go wrong. These supply-side challenges add to the existing demand-side factors considered as part of this decision making. Responses highlighted that airlines could struggle to manage the cumulative impact of these ‘COVID tail’ risks, particularly when combined with other challenges such as bad weather, the impact of the war in Ukraine and other global issues.
- 10.7 Most airlines supported the principle of a limited pre-season handback, as did one slot coordinated airport. Returning slots before the start of the season gives airlines greater flexibility to manage these kinds of risks in season. By way of example, during the winter season, airlines are likely to reduce their planned schedules on national holidays (Christmas, Thanksgiving, New Year) when fewer passengers want to travel, and demand will be low. This gives airlines greater flexibility to manage, for example, a higher number of aircraft being out of service due to the COVID-related supply chain problems highlighted. Without handback, if disruption did cause them to cancel flights, then one way for airlines to mitigate the risk of losing slots would be to fly on those holidays with potentially very low load factors.
- 10.8 Since the consultation for Winter 2023 was launched, we have seen examples of these resilience challenges during the Summer 2023 season, as evidenced by easyJet’s decision to cancel 1,700 flights at Gatwick in order to improve its ability to deliver a realistic schedule in the face of air traffic control and airspace challenges. We have also had feedback that some airlines have amended their maintenance plans to maintain services during the summer, potentially causing a greater number of aircraft to be out of service over the winter.
- 10.9 In the event, Ministers have decided to offer pre-season handback limited to 5% of an air carrier’s slots at an individual airport. This is to give carriers additional flexibility with slots so they can better plan schedules in advance, reducing the risk of short

notice cancellations becoming necessary during the Winter 2023 season, without having to return full series of slots.

- 10.10 The Department's consultation also proposed that the required usage ratio for airport slots should remain at 80% but sought consultees' views on this. A majority of airlines and most airports supported retaining the usage requirement at 80% though some airlines noted that their support for the usage ratio remaining at 80% was dependent on a 5% handback also being on offer. Five airlines supported a ratio of less than 80%. Overall most airports and airlines agreed with the Department's proposal to retain the 80% requirement. Ministers have decided to proceed with that approach, as explained in paragraph 7.8 above.

11. Guidance

- 11.1 The Department for Transport is not producing any specific guidance on the amendments provided for in this instrument. We will write to consultees notifying them of the results of the consultation and final slot alleviation policy for the Winter 2023 season.

12. Impact

- 12.1 The impact on business is not easily quantifiable, but in the Department's view the benefits are likely to significantly exceed the costs.
- 12.2 While there is a range of potential future demand outcomes, we expect that the level of air traffic is likely to remain below pre-pandemic levels, for the Winter 2023 season at least. In the absence of government intervention to provide temporary relief for Winter 2023, there is a risk that, in markets where COVID-19-related travel restrictions are reintroduced, airlines would lose existing slot rights, undermining their financial viability and threatening connectivity, or that they would operate loss-making and environmentally damaging empty or near-empty flights in order to meet the airport slot usage rules so as to retain the slots for the Winter 2024 season. When slot values are compared to the cost of operating flights, there can be an incentive for airlines to operate the flights necessary to retain their historic rights, even with limited numbers of passengers, particularly at Heathrow. To retain their historic rights to the most valuable slots, airlines may also seek, in the absence of alleviation, to consolidate their operations at Heathrow in particular, with adverse consequences for other smaller airports from where they would otherwise operate.
- 12.3 The main benefits of relief are therefore that it will mitigate the risk that airlines with existing slot holdings would have to fly loss-making flights in order to preserve those rights, and therefore also mitigate the risk of the negative environmental impacts (including carbon emissions) associated with airlines running such flights.
- 12.4 There is also a continuing risk of disruption to air services as a result of changes to staffing and supply chain challenges caused by the COVID-19 pandemic, which could lead to disruption including queuing, longer waits for baggage, flight delays or short notice cancellations. Together with other separate measures being undertaken by the aviation industry to ensure that they have sufficient capacity to operate scheduled services over the summer, the provision for 5% pre-season handback will provide additional flexibility for airlines to mitigate this risk.
- 12.5 The main costs of relief are expected to be that airlines seeking to accumulate new slot rights could find it more difficult to acquire historic rights to slots at congested

airports, as incumbent airlines are more likely to retain their existing historic rights as a result of the measures provided for in this instrument. This could negatively impact new entry and competition amongst airlines. To the extent that the proposed relief results in airlines operating fewer flights, affected airports may also suffer a loss in airport charge income (and perhaps commercial income).

- 12.6 Air passengers are expected to benefit from the proposed relief through the preservation of historic levels of connectivity once aviation demand fully recovers (existing route networks and connections having been incrementally developed over many years) but may suffer from the possible negative impact of less competition from new entrants.
- 12.7 There is no, or no significant, impact on charities or voluntary bodies.
- 12.8 The impact on the public sector is expected to be a relatively minor impact on publicly-owned airports and on taxation revenues.
- 12.9 A full Impact Assessment has not been prepared for this instrument because it makes provision which is to have effect for a period of less than 12 months.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses (small air carriers).
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that, as the measure provides alleviation from a regulatory requirement (the 80:20 slot usage rule) for a single slot scheduling season as a result of the COVID-19 pandemic, no additional specific action is required at this stage. However, the Department will continue to consult all sections of the industry, including small businesses, on the approach to be taken in future slot scheduling seasons.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is: Monitoring of the policy content of the retained version of Regulation 95/93 on common rules for the allocation of slots at United Kingdom airports will take place in the course of normal departmental business.
- 14.2 In accordance with section 28(3) of the Small Business, Enterprise and Employment Act 2015 (c. 26), this instrument does not include a statutory review clause as it makes provision which is to cease to have effect before the end of the period of 5 years beginning with the commencement date.

15. Contact

- 15.1 Tim May at the Department for Transport (Telephone: 07920 710991 or email: tim.may@dft.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Erin Cowburn, Deputy Director in the Aviation, Maritime and Security Group at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Vere of Norbiton, Parliamentary Under Secretary of State at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.