EXPLANATORY MEMORANDUM TO

THE AIR SERVICES (COMPETITION) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 309

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument makes the changes needed to the version of Regulation (EC) 868/2004 as retained in UK law by the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") which provides for redressive measures to be imposed on air carriers where unfair pricing practices or subsidies by third countries, i.e. non-EU countries, to and from the EU cause injury to the EU aviation industry.

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) 868/2004 provides for redressive measures to be imposed on air carriers where unfair pricing practices or subsidies by third countries, i.e. non-EU countries, cause injury to the EU aviation industry.

Why is it being changed?

2.3 This instrument makes technical changes to the version of Regulation (EC) 868/2004 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 (EC) 868/2004 will remain substantially unchanged. The effect of the changes made is that the Regulation will apply where unfair pricing practices or subsidies by countries besides the UK cause injury to the UK aviation industry. Further detail of the changes is set out below in paragraphs 7.1-7.9.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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, Baroness Sugg has made the following statement regarding Human Rights:

"In my view the provisions of the Air Services (Competition) (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 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.

6.4 Regulation (EC) 868/2004 envisages provisional measures being imposed under the procedure in Article 15(2) of the Regulation, and definitive measures being imposed under Article 15(3) of the Regulation. These procedures are replaced by a power for the Secretary of State to impose provisional or definitive measures by Regulations.

7. Policy background

What is being done and why?

7.1 Regulation (EC) 868/2004 provides for redressive measures to be imposed where subsidisation and unfair pricing practices by third country air carriers case injury to EU air carriers. The Regulation applies to routes between third countries and EU Member States where both third country carriers and EU carriers could be offering services.

7.2 The powers in the EU Regulation have never been exercised and it is unlikely that they ever will be. The EU has reviewed the Regulation and proposed a replacement as part of its strategy for the aviation sector. The report on the proposals is available here: https://ec.europa.eu/transport/sites/transport/files/com20170289-proposal-regulation-safeguarding-competition-air-transport.pdf. The report recognises the importance of connectivity and competition in the aviation sector, however it sets out some of the reasons why the Regulation is unlikely to be applied in practice. These include the types of evidence carriers would be required to provide for the Regulation to apply, the fact that the Regulation does not take account of Air Services Agreements between countries through which matters of fair competition are generally dealt with and the fact that only the "Community industry" as opposed to Member States or individual air carriers can raise a complaint with the European Commission under the Regulation.

7.3 To address these issues, a replacement for Regulation (EC) 868/2004 is currently being developed. At the point of laying, a provisional agreement on the replacement regulation had been reached following trilogue negotiations. We do not expect the replacement EU regulation to be in force and applicable by Exit day. The Withdrawal Act will therefore retain the version of Regulation (EC) 868/2004 currently in force and this instrument makes the corrections needed for it to function as domestic UK law after Exit day. As noted above, given the shortcomings of Regulation (EC) 868/2004, it is unlikely that the retained Regulation as amended by this instrument would be applied.

7.4 Many of the changes this instrument makes to the retained Regulation (EC) 868/2004 are technical. For instance, the function in Article 8 of carrying out investigations covering subsidisation and / or unfair pricing practices and injury are transferred from the European Commission to the Civil Aviation Authority (CAA). The obligation on the European Commission to publish notification of the initiation of these proceedings in the Official Journal of the European Union is replaced with an obligation on the CAA to publish notification of the initiation of proceedings in its Official Record. 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.

7.5 Throughout the Regulation, this instrument substitutes references to "Community" with references to "United Kingdom". The effect of this type of change is that, instead of applying where there has been injury to the "Community industry", redressive measures can be imposed where there has been injury to the UK aviation industry.

7.6 Similarly, where Regulation (EC) 868/2004 currently applies where there are unfair pricing practices by "non-Community" air carriers on certain routes to and from the EU, the effect of the changes in this instrument is that the retained Regulation will apply where "non-United Kingdom" air carriers have engaged in unfair pricing practices on routes to or from the UK.

7.7 In relation to subsidisation, the changes are similar. Instead of applying where unfair or discriminatory practices in the form of subsidisation are carried out by a "country not a member of the European Community", this instrument amends the retained Regulation so that it applies where the unfair or discriminatory practices are carried out by "a country other than the United Kingdom".

7.8 In a no-deal scenario where the UK was considered a "third country" by the EU, the current EU Regulation, or its successor could be applied to the UK or its carriers were they to engage in the practices described in the Regulation. From the UK's perspective, this scenario would mean that the Regulation as retained in UK law could be applied to any other country or their carriers, including EU Member States, were they to engage in these practices on certain routes to and from the UK.

7.9 Article 15(2) of Regulation (EC) 868/2004 sets out the process for imposing provisional redressive measures under Article 10 for a maximum of six months. Article 15(3) sets out the process for imposing definitive redressive measures under Article 12. The processes set out in Articles 15(2) and 15(3) are specific to the EU and there is no direct equivalent in the UK. These procedures are therefore replaced by a power for redressive measures to be imposed by the Secretary of State by Regulations. To ensure that any such measures are subject to appropriate Parliamentary scrutiny,

this instrument requires that they be made using the affirmative resolution procedure and approved by a resolution in each House of Parliament.

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 impact on business of 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 Tamara Goodwin at the Department for Transport Telephone: 07464980288 or email: tamara.goodwin@dft.gov.uk or Rosanna Thomson at the Department for Transport Telephone: 07773073594 or email: Rosanna.thomson@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sacha Hatteea, Deputy Director for Technology and International Aviation, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Sugg 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, Baroness Sugg, 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) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because: the changes this instrument makes to the retained version of Regulation 868/2004 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 Parliamentary Under Secretary of State, Baroness Sugg, 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 868/2004 functions correctly in UK law after the UK has left the EU.

3. Equalities

3.1 The Parliamentary Under Secretary of State, Baroness Sugg, has made the following statement(s):

"The draft 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, Baroness Sugg, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Baroness Sugg 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.