EXPLANATORY MEMORANDUM TO

THE AIRPORTS SLOT ALLOCATION (ALLEVIATION OF USAGE REQUIREMENTS) (NO. 3) REGULATIONS 2022

2022 No. 1107

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 the 80:20 airport slot usage rule for the slot scheduling season which runs from 30th October 2022 until 25th March 2023 (sometimes referred to as the "Winter 2022" season), as a result of the persistent reduction in air traffic resulting from the impact of the COVID-19 pandemic.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument is being made as soon as practicable after being approved by Parliament, in order to come into force on 29th October 2022. 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 2022 season on 30th October 2022. 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 2022 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. 3) Regulations 2022 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"). 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.

6.2 Because of the reduction in passenger demand during the COVID-19 pandemic, the 80:20 rule was waived by EU legislation for the Summer 2020 slot scheduling season (see Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020) and for the Winter 2020 season (see Delegated Regulation (EU) 2020/1477 of 14 October 2020). Following transfer of the Commission's powers in this regard to the Secretary of State (see the Airports Slot Allocation (Amendment) (EU Exit) Regulations 2021, S.I. 2021/100), a similar waiver was put in place by the Secretary of State for the Summer 2021 season (see the Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2021, S.I. 2021/185).

6.3 These powers were, however, time limited, and they 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 provide alleviation from the 80:20 rule for specified periods, if the Secretary of State considers there to be a reduction in the level of air traffic, compared to the corresponding period in a relevant previous year, which is likely to persist.

6.4 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 therefore subject to affirmative resolution procedure.

6.5 Regulations were made under the new Article 10aa for the Winter 2021 season (see the Airports Slot Allocation (Alleviation of Usage Requirements) (No.2) Regulations 2021, S.I. 2021/1200) and the Summer 2022 season (see the Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2022, S.I. 2022/368, which were subsequently supplemented by the Airports Slot Allocation (Alleviation of Usage Requirements) (No. 2) Regulations 2022, S.I. 2022/822). The present instrument, setting the rules for the Winter 2022 season, is similarly made under the powers contained in Article 10aa, coupled with the supplementary powers in Article 13 paragraph 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, currently running until 29th October 2022.

7.2 All UK travel restrictions were lifted in March 2022, and, by early May 2022, UK air traffic had partially recovered, to around 80% of its level in the corresponding period prior to the pandemic. The Department for Transport expected the level of air traffic to remain reduced in Summer 2022, compared to the corresponding period in 2019, before the pandemic, and this expectation proved correct. Between May and October 2022, UK air traffic remained broadly within the range 80-85% of corresponding 2019 levels. 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 2022 season at least.

7.3 It is therefore considered necessary to provide some further relief and amend the 80:20 rule for the Winter 2022 season. This is intended to protect the financial health of airlines and 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.

7.4 These Regulations make three changes in relation to slots allocated for the Winter 2022 season, which will affect reallocation of the same slots for the equivalent period from 29th October 2023 to 30th March 2024 (also known as "Winter 2023").

7.5 First, the required percentage usage rate is reduced from 80% to 70% (and the allotted point during the series validity at which the slot coordinator can withdraw the remaining slots if no slots of that series have been used is correspondingly increased from 20% to 30%). 70% has been selected as the appropriate percentage because, when combined with the other alleviation measures set out below, it strikes an appropriate balance between supporting airline financial health, protecting connectivity, and minimising environmental impacts and other potential adverse impacts on new entry and competition between airlines.

7.6 Second, the list of reasons on the basis of which non-utilisation of slots can be justified, which appears in Article 10(4) of the Regulation, is 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. In order to benefit from this provision, all four of the following conditions must be satisfied:

a. First, the measures must be imposed at either end of the route in question.

b. Second, 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. The inclusion of testing requirements is a new addition, which was not included in previous seasons (see further paragraph 10.3 below). 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. Third, 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. Finally, 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.

7.7 Third, carriers will be treated as having operated up to 10% of the slots they hold at an airport if they handed these back, during the period from 1st September 2022 until 7th September 2022, 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. The dates of 1st September 2022 until 7th September 2022 for pre-season handback have been set by reference to the international slot scheduling calendar, and give carriers a period of 7 days during which they were able to return slots after the international slot historics baseline date of 31st August (the date by which carriers must otherwise hand back slots they do not wish to use). Airlines made use of the handback window with a total of around 27,000 or 5.8% of slots at coordinated airports returned.

7.8 In order 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, it is also a condition that during the period from 1st September 2022 until 14th September 2022 they did not request any slots or any re-timing of slots. 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.

7.9 Without this temporary package of 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.

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 80:20 slot usage rule in the Winter 2022 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 a proposed package of relief measures, which ran from 24th May to 20th June 2022.

10.3 The Department for Transport received 42 responses to the consultation from air carriers, airports, and trade and representative bodies. Almost all respondents agreed that some form of alleviation from the slot usage rule is needed to support the aviation industry in dealing with the impact of COVID-19. Respondents supported a variety of different measures. A 60%-70% minimum usage ratio was supported by a large number of airlines while most airports preferred 70%-80%. A small number of airlines supported a lower minimum usage ratio such as 50%. There was support for widening the definition of justified non-utilisation of slots by expanding the list of restrictions covered by the provision to include requirements to test negative for COVID-19 before travelling by air or before entering the relevant territory. In addition, the Department sought views on whether the provision allowing airlines to hand back full series of slots, as was provided for in the Winter 2021 scheduling season, should be reintroduced for Winter 2022. Most airlines supported this measure while airports were opposed to it. In the event, the decision has been made to offer the more limited handback provision explained above, limited to 10% of an air carrier's slots at an individual airport. This is to give carriers additional flexibility with their slots so they can better plan schedules in advance, reducing the risk of in-season short notice cancellations becoming necessary, without having to return full series of slots.

11. Guidance

11.1 The Department for Transport is not producing any specific guidance on the amendments provided for in this instrument. We wrote to consultees notifying them of the results of the consultation and final slot alleviation policy for the Winter 2022 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. Other countries and jurisdictions

are also considering measures to alleviate the slot usage rule for the Winter 2022 season, for similar reasons.

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 2022 season at least. In the absence of government intervention to provide temporary relief for Winter 2022, there is a risk that 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 80% slot usage ratio so as to retain the slots for the Winter 2023 season. When slot values are compared to the cost of operating flights, there is 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 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 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, via the lower utilisation requirement and other provisions. 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).

12.5 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 on competition from new entrants.

12.6 There is no, or no significant, impact on charities or voluntary bodies.

12.7 The impact on the public sector is expected to be a relatively minor impact on publicly-owned airports and on taxation revenues.

12.8 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 Ben Stafford at the Department for Transport (Telephone: 07768 840356 or email: ben.stafford@dft.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Philip Haslam, Deputy Director in the Airports, Infrastructure & Commercial Directorate 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.