EXPLANATORY MEMORANDUM TO

THE CIVIL AVIATION (DENIED BOARDING, COMPENSATION AND ASSISTANCE AND ACCESS TO AIR TRAVEL FOR DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY) (AMENDMENT) REGULATIONS 2016

2016 No. 729

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for 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 amends the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 ("the 2005 Regulations") and the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 ("the 2014 Regulations") by designating CEDR Services Limited and Consumer Dispute Resolution Limited as bodies to whom a passenger can complain about an alleged infringement of Regulation (EC) No 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ("Regulation 261") and Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility ("Regulation 1107"). It further designates the Civil Aviation Authority ("CAA") for the purposes of Article 16(2) of Regulation 261 in place of the Air Transport Users Council.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In its Seventeenth Report of Session 2014-15, the Joint Committee on Statutory Instruments reported the 2014 Regulations for defective drafting in two respects. The first point related to regulation 4(1) which designates the CAA for purposes of the 2014 Regulations and provides that "it and any person authorised to act on its behalf are to have access at all reasonable times to any part of an airport or aircraft for the purposes of carrying out" their functions. The Committee was concerned that there was no means to enforce this right of access. The Department explained in its memorandum to the Committee, published at Appendix 4 of the Seventeenth Report, that the Department did not think any express sanction was required because the 2014 Regulations provide for further steps the CAA may take in order to obtain the information that CAA may have obtained through exercising the right of access. The Department maintains this view and CAA's experience to date has shown that this is not an issue in practice. Accordingly, no amendment to the 2014 Regulations are being made to address this point.

3.2 The Committee's second point related to regulations 8(e) and 17(10)(e) of the 2014 Regulations. The Committee was concerned that these regulations allowed, in each case, a notice to be sent to an email address held out as a contact address, without

excluding an email address which was no longer so held out. The Department has taken the opportunity to amend these regulations to address the Committee's concerns. The regulations now provide that a notice may be sent to an email address which has been held out as an email address at which that person can be contacted and which has not been withdrawn for that purpose.

3.3 As this instrument includes provisions correcting defects in the 2014 Regulations, the instrument is being issued free of charge to all known recipients of that instrument.

Other matters of interest to the House of Commons

3.4 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 Article 16(1) of Regulation 261 requires that Member States designate a body responsible for enforcement of that Regulation and under Article 16(2) passengers may complain to that body or any other competent body designated by a Member State about an alleged infringement of the Regulation 261. Regulation 5 of the 2005 Regulations designates the CAA for the purposes of Article 16(1) and the Air Transport Users Council for the purposes of Article 16(2). This instrument amends regulation 5 to designate the CAA in the place of the Air Transport Users Council. The instrument also designates CEDR Services Limited and Consumer Dispute Resolution Limited for the purposes of Article 16(2).

4.2 Under Article 15(2) of Regulation 1107, a disabled person or a person with reduced mobility may complain to a competent body designated by a Member State about an alleged infringement of the Regulation 1107. Regulation 4 of the 2014 Regulations designates the CAA for the purposes of Article 15(2). This instrument amends regulation 4 to designate, in addition to the CAA, CEDR Services Limited and Consumer Dispute Resolution Limited as competent bodies for the purpose of Article 15(2).

4.3 In each case, the designation of CEDR Services Limited or Consumer Dispute Resolution Limited only applies in so far as any contract entered into by that body with an operating air carrier provides for that body to deal with complaints relating to Regulation 261 or Regulation 1107. An up-to-date list of air carriers that have such contracts in place is displayed on the CAA website[1].

5. Extent and Territorial Application

5.1 The extent of this instrument is all of United Kingdom.

5.2 The territorial application of this instrument is all of United Kingdom.

6. European Convention on Human Rights

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

[1] http://www.caa.co.uk/Commercial-industry/Airlines/Alternative-dispute-resolution/

7. Policy background

What is being done and why

7.1 Regulation 261 establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation and long delay of flights. Article 16 requires Member States to designate a body (1) for enforcement of Regulation 261; and (2) to which consumers can complain about alleged infringements of Regulation 261. Regulation 1107 concerns the rights of disabled passengers and those with reduced mobility when travelling by air and Article 15 states that complaints may be made to bodies designated by Member States.

7.2 Complaints are currently dealt with by the Passenger Advice and Complaints Team (PACT) in the CAA for both of these purposes. Complaints under Regulation 1107 arising in Northern Ireland are handled by the Consumer Council for Northern Ireland, which is designated for that purpose in regulation 4(3) of the 2014 Regulations.

7.3 An EU Directive[2] on Alternative Dispute Resolution ("ADR Directive") came into force in 2013. The Directive obliges Member States to make alternative dispute resolution ("ADR") available for consumers on disputes concerning contractual obligations stemming from sales contracts or service contracts between traders and consumers. It does not make ADR mandatory, though it is open to Member States to make it mandatory. The Government's current position is that the benefits of making ADR mandatory do not justify the cost to business. In addition, the benefits that ADR brings are likely to lead to significant uptake in the airline sector without the need to mandate, especially once there are several providers from which airlines can choose.

7.4 The CAA published their policy statement on ADR and complaint handling reform in the aviation sector in April 2015 after consultation (CAP1286[3]). In this they set out their plan to bring ADR bodies into the aviation sector to enable access to ADR services by air passengers. The policy statement also set out how the CAA as Competent Authority under the ADR Directive approves the ADR bodies and how the CAA will transfer complaints handling functions, including handling of statutory complaints under the Regulations 261 and 1107, from PACT to the ADR bodies.

7.5 To allow the ADR bodies to handle both statutory and contractual disputes, the ADR bodies must be designated by statutory instrument for the purposes of Regulations 261 and 1107. Statutory complaints under these EU Regulations form by far the greatest number of complaints against airlines, and in order to incentivise the industry to sign up to an ADR service, the ADR provider has to be able to handle statutory complaints in place of the CAA's PACT service. Both PACT and ADR schemes charge the industry for the use of their service, and the airlines have indicated they are not willing to pay for two separate complaint handling services.

7.6 This Instrument will designate the ADR bodies that have been approved by CAA to date and which have a contract in place with an airline in the UK as "bodies to which passengers can complain" under the EU Regulations by specifically naming them. This legislation will place no direct burden on industry, nor will it compel airlines to

[2]Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011

[3] CAA's policy on consumer complaint handling and ADR (CAP1286), http://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6712

act. Rather, this is enabling a greater degree of choice for airlines as to how they would like their passengers' statutory complaints to be handled – either through continued participation in the CAA's PACT service, or by concluding a contract with a designated ADR provider. This Instrument therefore introduces an element of choice and competition into the area of air passenger complaint handling and arbitration, where it is arguable CAA previously had a monopoly.

7.7 In order to inform the consumers, and to enhance their awareness of air carriers' complaint handling arrangements, the CAA displays on its website an up-to-date list of airlines that have signed up to an ADR scheme (which has been approved by the CAA) for complaint handling purposes. In situations where a claim is disputed and the airline's internal complaint handling procedure has been exhausted, the ADR Directive requires the airline to inform the consumer of available ADR scheme(s) and the airline's willingness to use them.

7.8 The Government believes that an ADR scheme would lead to a better standard of consumer protection, reducing the consumer's need to take court action in situations where a claim is disputed. ADR bodies, unlike the CAA, are able to issue decisions that are binding on airlines, but not on the consumer. The consumers will still retain the option of taking court action in accordance with the intention of the Regulations, should they be dissatisfied with the outcome of the ADR process.

7.9 The European Commission is supportive of the use of ADR providers for handling these statutory complaints. The CAA, as the Competent Authority under the ADR Directive in the airline sector, has a rigorous application and assessment process for ADR bodies who wish to be approved by them. That approval is a necessary precursor to these bodies being designated. The CAA will keep an up-to-date list of ADR entities they have approved under the ADR Directive on their website.

Consolidation

7.10 There are no plans to consolidate either the 2005 Regulations or the 2014 Regulations at present.

8. Consultation outcome

8.1 Before transposing the ADR Directive into the UK law, two formal consultations were conducted. The first, in December 2011, gathered views on the European Commission's proposal for a Directive on ADR. This informed the UK Government's views throughout negotiations to ensure that the Directive agreed provided a fair and effective framework for business while maintaining high levels of consumer protection. In June 2014, the Department for Business, Innovation and Skills (BIS) ran a further consultation seeking views on the best approach to implementing the Directive, including how best to fulfil our obligation to have ADR available for every consumer dispute. Views were also sought on the feasibility of a broader simplification of the ADR landscape. Eighty-seven responses were received.

8.2 In addition, a number of stakeholder meetings were held to discuss implementation of the Directive, including several with ADR providers on the process and implications for becoming approved ADR entities.

8.3 The Government's response to the comments received is available at https://www.gov.uk/government/consultations/alternative-dispute-resolution-for-consumers.

8.4 Following the Government's consultations, the CAA consulted between early January and late February 2015 on a set of proposals to reform consumer complaints handling in the UK aviation sector and ensure that consumers booking flights serving UK airports have access to high quality complaints handling arrangements.

8.5 The consultation sought views on a number of areas relating to ADR arrangements; on the practicalities of the functions of ADR bodies, their remit and their obligations under the ADR Directive; types of complaints to be handled by ADR bodies; the transfer of complaint handling from the CAA's PACT service to private ADR providers; and whether consumers can be charged a fee for using the ADR services.

8.6 The CAA received 15 responses to this consultation, mainly from airlines and their trade associations and consumer bodies. In general, the CAA's policy on bringing ADR arrangements to aviation sector as a means for effective complaint handling were supported. The industry concentrated on the nature of the ADR arrangements and some clarifications on the types of complaints handled were identified. The need to emphasise the voluntary nature of ADR, in accordance with the ADR Directive, as well as the level of incentives for the industry to sign up to ADR were raised by the industry.

8.7 The consumer bodies wanted to ascertain that the ADR arrangements would not leave the consumer in a worse position than before the schemes are introduced and that all consumers, irrespective of the airline they choose, have access to out-of-court dispute resolution. These concerns were taken into account when finalising the CAA's policy.

8.8 The consumer bodies were also concerned over the CAA allowing the ADR providers to charge a fee for the consumer for use of the scheme. The industry wanted this as an option to deter spurious claims. This issue was considered when finalising the policy, and a consumer fee with an upper limit of £25 was allowed to be levied. However, the CAA's preferred position was that no consumer fee was charged.

8.9 The responses were used to guide the completion of the CAA's policy on consumer complaint handling and ADR (CAP1286), accessible at http://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6712.

8.10 The CAA's response to the consultation can be accessed at http://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=6711

9. Guidance

9.1 The CAA has published guidance on its website, which is aviation sector-specific and directed to ADR entities wishing to be certified to operate in aviation, as well as to airlines. Additionally, the CAA has approached the airlines with letters, copies of which can be viewed on the same website at http://www.caa.co.uk/Commercial-industry/Airlines/Alternative-dispute-resolution/.

10. Impact

10.1 There is minimal impact on business, charities or voluntary bodies.

10.2 There is minimal impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

10.4 This legislation does not place a direct financial burden on the industry. This legislation provides designation, as per the requirements contained in the Regulations 261 and 1107, in UK law to two named ADR providers, enabling these ADR

providers to conduct business in aviation sector and giving the airlines a choice as to how they would like their passengers' statutory complaints to be handled. This will provide a degree of competition to the sector and is likely to lead to a better level of service experienced by the consumer.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 No specific action is proposed to minimise regulatory burdens on small businesses.

11.3 This legislation ensures that all airlines have the possibility to consider their complaint handling processes and, should they wish to do so, are able to access a choice of ADR providers. This legislation does not restrict small ADR providers from accessing the market.

12. Monitoring & review

12.1 This instrument amends the 2005 Regulations and the 2014 Regulations to add in each case a review provision requiring the Secretary of State to carry out a review within five years of the coming into force of this instrument and at intervals not exceeding five years thereafter.

13. Contact

13.1 Jonne Olkinuora at the Department for Transport Telephone: 0207 944 4530 or email: jonne.olkinuora@dft.gsi.gov.uk can answer any queries regarding the instrument.