EXPLANATORY MEMORANDUM TO

THE AVIATION (CONSUMERS) (AMENDMENT) REGULATIONS 2023

2023 No. [XXXX]

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 Regulation (EC) 261/2004 to restate key principles of relevant European Union ("EU") case law. This Regulation establishes common rules on compensation and assistance for passengers in the event of denied boarding, cancellation, or long delay of flights. The instrument aims to maintain the status quo and clarify the safeguarding of consumer rights in the United Kingdom ("UK") aviation industry.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Notwithstanding the instrument being within scope of the negative sift procedure, Ministers have decided that the appropriate procedure for this instrument is draft affirmative.

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, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister for Aviation, Baroness Vere of Norbiton, has made the following statement regarding Human Rights:

"In my view the provisions of The Aviation (Consumers) (Amendment) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Regulation (EC) 261/2004 sets out air passengers' rights in the event of certain flight disruptions. It is a highly litigated piece of legislation, and through the associated case law from the EU and the UK, these rights have been interpreted beyond the literal wording of Regulation (EC) 261/2004. Courts have adopted a purposive construction approach to interpretation, meaning they have considered the Regulation's intended purpose rather than solely relying on the literal meaning of the words when coming to judgments.

6.2 This instrument is made in exercise of powers in section 11(1) and 20(1)(b) of the Retained EU Law (Revocation and Reform) Act 2023 ("REUL Act"). This instrument restates the key principles set out in relevant case law that affect the interpretation of Regulation (EC) 261/2004, providing clarity of the rights of passengers in the event of denied boarding, flight delay and cancellation, and maintaining the current protections.

6.3 The principles being restated by this instrument are retained EU law as defined in section 6(7) of European Union (Withdrawal) Act 2018 ("EUWA"):

"retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day and so far as they:

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);"

The principles being restated by this instrument relate to section 4 of the EUWA.

6.4 Section 11(1) of the REUL Act provides the power to restate any secondary retained EU law. The definition of secondary retained EU law as defined by section 11(2) includes any retained EU law that is not primary legislation. The case law principles are not primary legislation.

6.5 Section 13(3) states that the section 11 power is appropriately used when making changes which resolve ambiguity and facilitate improvement in the clarity and accessibility of the law. This instrument will improve clarity and accessibility of the legislation whilst maintaining the existing policy and legal approach.

6.6 Section 20(1)(b) states that "a power to make regulations under this Act" also includes the power to make "supplementary, incidental, consequential, transitional, transitory or saving provision". This confirms the power to include provisions that do not restate case law principles, but are required for consistency and clarity of the law in relation to the rights of passengers in the event of flight disruption.

6.7 Retained EU case law not codified by this instrument will continue to be followed by UK courts, and can be departed from only by a relevant appeal court, the High Court of Justiciary (in certain cases) and the Supreme Court (section 6(4) and (6B) of the EUWA (2018 c. 16) as amended by section 6 of the REUL Act (2023 c. 28)).

7. Policy background

What is being done and why?

7.1 Regulation (EC) 261/2004, which was retained in UK law under the EUWA, sets out the rules on compensation and assistance for air passengers in the event of denied boarding, flight cancellation, or long delay. Regulation (EC) 261/2004 has been the subject of a significant amount of litigation, and the associated case law has shaped the interpretation of the legislation.

7.2 Under the REUL Act, Regulation (EC) 261/2004 will become assimilated UK law at the end of 2023. However, as per sections 3, 4, and 6 of the REUL Act, the rules governing the interpretation of retained EU law will cease to have effect at the end of 2023.

7.3 As a result of these changes, this instrument restates certain key principles (as outlined below) derived from the Court of Justice of the European Union ("CJEU") case law by inserting them into Regulation (EC) 261/2004. The effect of the restatement ensures clarity of the law, and upholds the current approach, in relation to certain passenger rights in the event of flight disruption.

7.4 The instrument inserts four key principles into Regulation (EC) 261/2004. These relate to:

- compensation for long delay
- the scope of the Montreal Convention 1999 ("the Convention") in relation to claims under Regulation (EC) 261/2004
- the definition and application of "extraordinary circumstances"
- the territorial scope of Regulation (EC) 261/2004.

Long Delay:

7.5 Article 7 of Regulation (EC) 261/2004 as drafted, sets out the compensation available for passengers who have been denied boarding, or whose flight has been cancelled within specified timeframes. The compensation available is dependent on the length of the flight, starting from £220 for a flight of 1,500 kilometres or less.

7.6 The CJEU, in *Sturgeon v Condor Flugdienst Gmbh* found that the principle of equal treatment required the right to compensation under Article 7 of Regulation (EC) 261/2004 to be available not only to passengers whose flights had been cancelled, but also to those who had suffered "on account of a flight delay, a loss of time equal to or in excess of three hours".

7.7 This right is absent from the express wording of Regulation (EC) 261/2004. Without this principle being restated there is a risk of reduction in the current level of protections afforded to consumers.

7.8 This instrument therefore codifies the above-noted principle of compensation for long delay. This means that after the end of 2023, under UK law, passengers will continue to be entitled to compensation (as detailed in Article 7 of Regulation (EC) 261/2004) for a delay to their arrival at their final destination by three hours or more.

7.9 This instrument also clarifies the definition of "arrival time" to mean the time when passengers are permitted to exit the aircraft upon reaching the final destination, and "scheduled arrival time" to be the time of arrival at the final destination which is fixed in the flight schedule and indicated on the reservation or other evidence held by the passenger. These concepts being codified also arise from EU case law.

7.10 Furthermore, this instrument inserts a reference to the defence of "extraordinary circumstances" in relation to compensation under Article 7 of Regulation (EC) 261/2004 for a long delay. This means that compensation will not be available for a long delay that was caused by an "extraordinary circumstance" which could not have been avoided even if all reasonable measures had been taken. This mirrors the existing provision for compensation in the event of cancellation, in Article 5(3).

Scope of the Montreal Convention:

7.11 The Convention is an international treaty governing airline liability in the case of death or bodily injury to passengers, as well as in cases of delay, damage or loss of

baggage and cargo. Passengers can claim damages up to the amounts set out in the Convention.

7.12 The Convention includes an exclusivity provision, at Article 29, which limits actions for damages, and provides that certain actions can only be brought under the Convention. A series of cases considered by the CJEU held that the exclusivity principle did not apply in relation to the compensation set out under Article 7 of Regulation (EC) 261/2004 for a long delay or cancellation of their flight or for being denied boarding. This means passengers were not limited to claims under the Convention for these kinds of flight disruption and could apply for compensation under Article 7 of Regulation (EC) 261/2004. The CJEU has also found that the limitation period set out under the Convention does not apply to Article 7 compensation claims. In the UK context this means that the UK's six-year limitation period under section 9 of the Limitation Act 1980 applies.

7.13 Without codifying this principle, it could result in a significant reduction in the current consumer protections available, by removing the ability to claim compensation under Article 7 of Regulation (EC) 261/2004. It would also reduce the limitation period for such claims to two years (as per the Convention).

7.14 This instrument restates these principles, so that consumers will continue to be able to claim compensation under Regulation (EC) 261/2004 and within the six-year limitation period, as set out in section 9 of the Limitation Act 1980.

Territorial Scope:

7.15 Article 3(1) of Regulation (EC) 261/2004 states that the Regulation applies: (a) to passengers departing from a UK airport, (b) to passengers departing from an airport outside of the UK and either arriving in a UK airport if the airline is a European Community or UK airline, or arriving in a EU member state on a UK airline.

7.16 Two issues have arisen in court challenges, in relation to the wording of Regulation (EC) 261/2004. The first is whether, for the purpose of calculating compensation under Article 7, different legs of a journey should be taken together. The second issue with the wording of Article 3(1) is the extent to which a delay outside of EU airspace can bind a non-European Community airline. This relates to the part of the provision which provides that a flight of multiple legs departs from the first departure point. This is important because this determines the territory which is applicable.

7.17 CJEU case law relating to these issues has provided that a journey which comprises more than one leg, is to be treated as a whole, provided that it was booked as a single unit. In addition, a journey, regardless of the number of legs, departs from the initial place of departure (meaning the departure of the first flight rather than a departure from any other leg). This is important because compensation under Regulation (EC) 261/2004 increases in value the longer the distance of the flight.

7.18 The amendment made by this instrument clarifies that these principles still apply in relation to Regulation (EC) 261/2004, to maintain the current protections.

Definition of Extraordinary circumstances:

7.19 Article 5(3) of Regulation (EC) 261/2004 currently provides that an airline will not be liable for compensation in accordance with Article 7 if a flight is cancelled due to "extraordinary circumstances", and the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

7.20 The term "extraordinary circumstances" is not defined by Regulation (EC) 261/2004, but the CJEU has interpreted its meaning in case law. The Recital of Regulation (EC) 261/2004 does set out key principles relating to "extraordinary circumstances" however, that concept is codified by this instrument in express wording to ensure clarity.

7.21 The instrument codifies the case law so as to provide a definition of "extraordinary circumstances" in Regulation (EC) 261/2004 itself. It defines "extraordinary circumstances" as those which cause delay or cancellation and by their nature or origin are not inherent in the normal exercise of the activity of the air carrier, and are beyond the actual control of the air carrier, and that the air carrier had taken all reasonable measures in relation to but was unable to avoid. In addition to this, extraordinary circumstances will exist where the delay or cancellation arose from an air traffic management decision and could not have been avoided even if all reasonable measures had been taken by the air carrier to avoid that delay or cancellation, as outlined at Recital 15 of Regulation (EC) 261/2004 and provided for in case law.

Explanations

What did any law do before the changes to be made by this instrument?

7.22 Regulation (EC) 261/2004 will become assimilated law under the REUL Act, at the end of 2023 and consumers will continue to have the benefits expressly set out in that Regulation. However, the effects of Sections 3, 4, and 6 of the REUL Act mean that retained EU case law will not necessarily retain the same effects in the UK after the end of 2023.

7.23 Not restating the case law principles as set out above, could result in passengers being subjected to varying levels of protection, contingent on their departure location.

Why is it being changed?

7.24 The change will ensure consumer protections established through case law are not lost. This will be done by this instrument restating principles previously set out by case law, to provide clarity to the law, and maintain the current protections for air passengers. As certain EU case law has significantly shaped the interpretation of Regulation (EC) 261/2004, key legal principles will be codified by this instrument in order to maintain the status quo of the current protection of aviation consumers.

7.25 DfT analysis of Civil Aviation Authority (CAA) punctuality data shows that, in 2019, 31,200 passenger flights departing from or arriving at UK airports (that report to the CAA) were delayed by 3 hours or more or cancelled, representing 1.5% of flights. This compares to 40,500 (2.6%) in 2022. Note that domestic flights are counted twice in this data as both departing and landing airports report data.

7.26 Passenger complaint data published by the CAA shows the total number of passengers that have complained to the two approved Alternative Dispute Resolution bodies and the CAA Passenger Advice and Complaints Team in relation to Regulation (EC) 261/2004. Such complaints are only made when resolution cannot be reached directly with the airlines. The most recent data shows a total of 18,741 passenger Regulation (EC) 261/2004 complaints in the first three quarters of 2022, and 22,564 in 2019. Statistics are not held on those complaints resolved directly with airlines in relation to (EC) 261/2004.

What will it now do?

7.27 The amended legislation will protect certain rights of aviation consumers beyond the end of 2023. The changes do not change the substance of the existing retained legislation but remove ambiguity on the application of certain principles previously set out in case law. As this instrument does not impose any new regulatory requirements or duties, this instrument will come into force the day after the date it is made.

8. European Union Withdrawal and Future Relationship and RUEL/Assimilated Law

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

8.2 This instrument does however relate to the reform of REUL/assimilated law under the power in section 11(1) of the REUL Act to restate REUL.

9. Consolidation

9.1 This instrument is not consolidating other instruments.

10. Consultation outcome

10.1 Department for Transport Ministers and officials have regular engagement with the aviation industry. The Department also works closely with the CAA on all aviation matters, and has had frequent communication with the CAA regarding this instrument.

10.2 Under Article 438(3) of the Trade and Co-operation Agreement, the United Kingdom and European Union shall consult each other on any matter related to aviation consumer protection, including planned measures. The Department for Transport has consulted with the European Union in relation to the provisions of this instrument. The European Union did not have any comments on the instrument.

10.3 No formal external consultation has taken place, as this instrument replicates existing arrangements and no, or no significant, impact on businesses is expected.

11. Guidance

11.1 The Department for Transport is not producing any specific guidance on the Regulations 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 A full Impact Assessment has not been prepared for this instrument because the purpose of this instrument is to clarify the law and to maintain the existing policy approach. It does not materially change the requirements on airlines, so the instrument is expected to have an annual net impact of zero or close to zero.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. We expect that the majority of businesses affected by this policy will fall into the medium

and large categories. However, it is possible that some of the smaller airlines within scope of this instrument employ fewer than 50 people, and would therefore be considered small businesses.

13.2 No specific action is proposed to minimise the regulatory burden on small businesses. The Instrument maintains the current policy approach to protect passengers in the event of flight disruptions. Due to their size and the smaller number of passengers, small businesses would be expected to face smaller compensation, refund or assistance claims compared to larger businesses.

14. Monitoring & review

14.1 As this instrument is made under the REUL Act, no review clause is required.

15. Contact

15.1 Jonet Tann at the Department for Transport Telephone: 07976078023 or email: jonet.tann@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 Michael Stark, Deputy Director for Aviation Commercial, Strategy and Consumers, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

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