EXPLANATORY MEMORANDUM TO

THE OPERATION OF AIR SERVICES (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") in order to address deficiencies in retained EU law in the field of the operation of air services which arise from the withdrawal of the United Kingdom from the European Union (the "EU"). Further details are set out in the explanations in paragraphs 2.2.

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community ("the Regulation") provides the basis for the EU internal market in air services. The Regulation provides common rules for the licensing of air carriers, provides all EU air carriers with the ability to operate between any two points within the EU, and lifts any economic restrictions on air services between Member States such as the pricing of air fares. The Regulation also contains provisions to provide for an internal market in the wet leasing of aircraft and harmonises restrictions on the leasing of aircraft from third countries. Whilst the Regulation sets out to lift interventions in the air services market, it also provides for consistent arrangements for the provision of public service obligations (subsidised routes in regions where scheduled air services might not otherwise be commercially viable).

2.3 Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, establishes a procedure for notifying and authorising negotiations conducted by Member States with third countries on bilateral air service agreements.

Why is it being changed?

2.4 The amendments made by this instrument fix deficiencies in the retained legislation which arise as a result of the UK leaving the EU. The changes will provide clarity that the Regulation only applies to the territory of the UK and regulates the licensing of UK, rather than EU, air carriers. It also makes changes to connected domestic legislation to ensure that it functions appropriately alongside the Regulation. In particular, related amendments are made to the Civil Aviation Act 1982, the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007, the Operation of Air Services in the Community Regulations 2009, the Operation of Air Services in the

Community (Pricing etc.) Regulations 2013, and the Air Navigation Order 2016. Regulation (EC) No 847/2004 is revoked as the UK will no longer need to notify and seek authorisation from the Commission when negotiating and concluding air services agreements with non-EU countries.

What will it now do?

2.5 The Regulation will now reflect the fact that it applies only within the UK, so it will not provide air carriers with the ability to operate intra-EU air services. It will continue to set out the requirements for holding an operating licence, although these will now only apply to UK carriers, and it will provide continuity of the regime for approving the wet lease of aircraft. The amendments made through this instrument are explained in paragraphs 7.1 – 7.16.

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

"In my view the provisions of the Operation of Air Services (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The key legislative context for this instrument is set out in paragraph 2.2 above. In addition to this instrument the Department will be making a number of other instruments to address deficiencies in retained EU law in the aviation field.

6.2 The Withdrawal Act makes provision for repealing the European Communities Act 1972 and will retain certain EU law, as it stands at the moment of exit, in UK 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 UK's obligations as a member of the EU. This instrument is made in exercise of powers in section 8 of the Withdrawal Act which allows Ministers to address deficiencies in retained EU law, to ensure that the UK's legal system continues to function properly outside the EU.

6.3 This instrument also includes provisions made under section 2(2) of the European Communities Act 1972 to update some cross references to EU legislation in retained EU law. These amendments will be brought into force before exit day.

7. Policy background

What is being done and why?

7.1 This instrument amends definitions in the Regulation to clarify that it applies only in the UK, and affects UK entities, rather than the EU and EU entities. For instance, references to "community air carrier" are replaced by "UK air carrier".

7.2 The amended Regulation specifies the conditions for the granting of an operating licence to an air carrier by the Civil Aviation Authority, which ensures that providers of commercial air transport are financially solvent, insured and properly managed. A pre-requisite for an operating licence is that the holder should also hold an Air Operator Certificate to certify that it meets aviation safety requirements. Individuals managing the air carrier must still provide proof that they are of good repute, but the capital and turnover requirements for demonstrating the financial viability of the business that were defined in euros, are converted to pounds sterling.

7.3 The Regulation is amended so that an air carrier must have its principal place of business in "the UK", instead of "in a Member State". This ensures that the licensing authority (the Civil Aviation Authority) is able to deliver proper oversight, and if necessary, take enforcement measures against the carrier. The requirement for holders of an operating licence to be majority owned and controlled by EU nationals is revoked. This definition would no longer apply to UK nationals, and the amendment means that the licences of all current UK air carriers will remain valid. Furthermore, the provision is redundant because, post EU exit, airline ownership requirements in relation to air services between the UK and the EU will be covered by the relevant air services agreements entered into between the UK and the EU and/or EU Member States.

7.4 Air transport is not in scope of trade agreements, but operates internationally on the basis of bilateral and multilateral air service agreements under the framework of the 1944 Chicago Convention. Clauses in such agreements routinely specify that eligibility to operate under the agreement shall be restricted to carriers meeting specific, ownership and control requirements. The UK is party to 111 bilateral air service agreements and the exact provisions on ownership and control vary between them. As the UK will be bound by obligations negotiated under these agreements, (including any form of agreement with the EU and or Member States) it would not be appropriate to retain a separate ownership and control provision in licensing legislation. The requirement on the licensing authority to inform the European Commission of any decisions taken with regard to operating licences is revoked.

7.5 Article 12 of the Regulation is amended to clarify that, other than when using leased aircraft, aircraft used by UK licensed air carriers must be registered in the UK national register, ensuring that the Civil Aviation Authority can supervise the safety oversight of aircraft operated by UK carriers. Member States were given flexibility under the original regulation to permit their licensed air carriers to register their aircraft in other Member States, but the UK has never exercised this flexibility.

7.6 The conditions for the leasing of aircraft in Article 13 are amended such that the current regime of approvals for UK carriers wishing to lease aircraft is maintained. Wet leasing is a commercial arrangement for a lessor to provide and operate an aircraft, together with the crew, maintenance and insurance, as opposed to a dry lease, of just the aircraft. Wet leasing another aircraft, often at short notice, allows air carriers to make most efficient use of their fleet and ensure that they are able to

provide passengers with additional services or to avoid cancelling a service if there is a problem with their own aircraft. The amendments made by this instrument will ensure that UK air carriers have as much stability and continuity as possible with regards to leasing foreign registered aircraft. A wet-lease approval requires the UK licensed carrier to satisfy the safety regulator that leasing an aircraft not registered in the UK will not endanger safety, because that aircraft meets safety standards equivalent to those of the UK. When leasing from beyond the EEA, the carrier must also demonstrate to the satisfaction of the Secretary of State that there is an exceptional need or a seasonal capacity requirement for the aircraft or that the leasing is necessary to overcome operational difficulties, and that a suitable aircraft is not available within the EEA. The Secretary of State can withhold approval if there is not a reciprocal level of market access with the country from which the carrier proposes to lease an aircraft.

7.7 The provisions regulating the imposition of public service obligation (PSO) air services have been clarified so that they only apply to the UK and Gibraltar, rather than all Member States. A PSO is a subsidised air service to an outer-lying region that would not otherwise be commercially viable, but is deemed be essential for economic and social reasons. The Secretary of State will still have to meet similar requirements as today to impose a PSO, in particular requirements for consultation and tendering will apply. The regulations clarify that 'qualifying' air carriers will be eligible to operate PSOs in the UK. This will include UK air carriers and carriers from other countries who have cabotage rights (the right to operate wholly within the UK). In a no-deal scenario it is unlikely that any basic contingency agreement with the EU would grant cabotage rights to EU air carriers. However, if cabotage rights were exchanged in any bilateral air services agreement, then air carriers from the respective states would be eligible to operate these routes under the amended Regulation. Since only UK carriers currently operate PSOs, there is no operational impact on PSO services.

7.8 Functions previously undertaken by the European Commission in relation to state aid will be conferred on the Competition and Markets Authority (CMA) by other instruments made using powers in the Withdrawal Act. So, the CMA will be empowered to examine whether an air carrier operating a PSO has been overcompensated. Other provisions for the Commission to oversee and examine the imposition of PSOs are revoked as the Commission will no longer enjoy these powers in the UK.

7.9 The discretion given to EU Member States to regulate the distribution of traffic rights and impose measures to refuse, limit or impose conditions on the exercise of traffic rights to deal with short term, unforeseen problems or when serious environmental problems exist have been revoked. These provisions applied to the intra-EU traffic rights granted under Article 15 but, as noted in para 2.5, the retained Regulation only applies to the UK and does not grant any traffic rights to or within the EU. Consequently, Articles 19 to 22 are redundant and have been revoked.

7.10 This instrument also addresses deficiencies in the Operation of Air Services in the Community Regulations 2009 (S.I. 2009/41) and the Operation of Air Services in the Community (Pricing etc.) Regulations 2013 (S.I. 2013/481) ("the 2013 Regulations"). These two sets of regulations implemented various aspects of Regulation 1008/2008 and made provision for enforcement and penalties. The amendments to Part 3 (information society services) of the 2013 Regulations remove the requirement that,

when providing information on air fares and air rates, an on-line service provider should only be subject to the regulations governing it in its home EU Member State.

7.11 The exemption from the requirement for a Foreign Carrier Permit under the Air Navigation Order 2016 (S.I. 2016/765) ("the 2016 Order") for EEA carriers (article 250) has been revoked. The Air Navigation Order had previously exempted EEA carriers operating under the traffic rights afforded by Regulation 1008/2008 from the requirement for a permit. Since the Order would refer to the retained version of the Regulation, it would be deficient, in that the Regulation would not provide EEA carriers with any traffic rights. As a result, all foreign carriers (including EEA carriers) requesting permission from the CAA to operate to the UK will be treated in the same way. This will give the UK the means to ensure that all air carriers operating to the UK are eligible to do so and that they comply with the relevant requirements. The UK envisages granting permits to EU operators to allow them to continue operating to the UK, and expects this to be reciprocated by EU countries.

7.12 Similarly, the exemption from the requirement for a permit to undertake aerial work in the UK (article 252) has been revoked for aircraft registered in the EEA. All aircraft registered outside the UK will require a permit in order to provide services such as parachute drops, aerial photography or flying advertising banners. The scope of the Secretary of State's power to give directions to make passenger and crew data available (article 260) is widened so that it covers flights between the UK and EEA states. Article 260 allows the Secretary of State to direct operators of relevant aircraft to provide data about the passengers and crew, known as PNR (Passenger name Records), to the authorities of a foreign country for law enforcement purposes. At present UK carriers only transfer PNR to the US, Canada, Australia and the EEA. As a result of these amendments, persons operating EEA-registered aircraft or UK-EEA flights potentially fall within the scope of the relevant criminal offences in section 265, and Schedule 13 to, the 2016 Order.

7.13 The offences relating to operating commercial air services without a foreign carrier permit, or providing aerial work services without a permit are punishable by a fine or imprisonment not exceeding two years. The offence relating to failure to comply with a direction to make passenger data available is punishable by a fine not exceeding £2500. The Department considers that the scope of these offences is widened, and consequently that this instrument is subject to the affirmative procedure in accordance with paragraph 1(2)(c) of Schedule 7 to the Withdrawal Act.

7.14 This instrument also corrects deficiencies in the Civil Aviation (Allocation of Scarce Capacity) Regulations 2007 (S.I. 2007/3556), which made provision to comply with Regulation 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries. The effect is to ensure that carriers which currently qualify for consideration in the allocation of capacity on a capacity constrained route will continue to do so. Scarce capacity situations can arise when there are restrictions on the frequency of operations in a bilateral air service agreement. The UK will always seek to lift or remove such a cap, but if that is not possible, then a hearing to allocate the frequencies amongst qualifying airlines will be held.

7.15 The exemption in the Civil Aviation Act 1982 from the requirement to hold a route licence in order to operate air services to the EU is revoked, so that all air carriers operating international air services from the UK will require a route licence in addition to their operating licence. UK route licences pre-date operating licences, and

to an extent were superseded by them, but unlike an operating licence, conditions or restrictions can be attached to route licences for safety, security or diplomatic reasons. Route licences also require operators to provide passengers with specific information about the operation of a service before a ticket is purchased. All major UK air carriers (those licensed to operate an aircraft with more than 20 seats or weighing more than 10 tonnes) already hold a route licence, and the rest are all being individually contacted by the CAA and invited to apply for a free route licence if required. Definitions are also amended to clarify that the provision applies to UK air carriers, rather than EU air carriers, and that applicants for a route licence must also hold a UK operating licence, rather than an EU operating licence.

7.16 This instrument also clarifies that only operating licences granted by the Civil Aviation Authority will continue to be valid, so UK carriers have reassurance that their licences remain valid.

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 and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21(b) of Schedule 7 of that Act. 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.

8.2 Alongside the EU (Withdrawal) Act 2018 powers, the instrument is also being made under section 2(2) of the European Communities Act 1972, which provides for Ministers to make regulations for the purposes of implementing EU obligations of the United Kingdom.

9. Consolidation

9.1 There are no plans for consolidation.

10. Consultation outcome

10.1 The CAA and the aviation industry have been consulted throughout the preparation of this statutory instrument and have been informed of the department's intentions to lay statutory instruments using powers in the Withdrawal Act to address deficiencies in retained EU legislation. Consultation took the form of regular meetings with representatives of air carriers, airports and others as well as representative trade associations both individually on a bilateral basis and in group settings at stakeholder workshops. Workshops at official level took place in February and September 2017 and in July 2018, and at Ministerial level in February 2017.

10.2 Department for Transport representatives hold regular bilateral meetings with air carriers and have informed them of Government's intentions to maintain the current conditions for the issuing of an operating licence, and for the leasing of aircraft. Of particular interest to air carriers has been our removal of the nationality requirement for the issuing of an operating licence. No carriers expressed support for maintaining this restriction, or tightening it to UK nationals. All agreed that it does not help to assure the licensing authority that the operator is safe, financially solvent, and run by suitably fit and proper, experienced managers. At the same time, all carriers

understand that traffic rights with other countries will remain restricted on nationality grounds in our air service agreements, and by the requirement to hold a route licence in order to operate international air services.

10.3 Air carriers recognised that the repeal of Article 15 in itself does not cause them to lose access to intra-EU routes, and understand that the act of leaving the EU causes that. UK licensed air carriers understand well that an agreement on market access is required to provide them with the right to operate routes to, from and within the EU. They recognise that Article 15 could not be amended in domestic law to preserve the current level of access to the internal market.

10.4 The majority of carriers support the maintenance of the current regime of prior approvals for the leasing of aircraft. A small number of carriers expressed disquiet that the market access arrangements for the leasing of aircraft would not be reciprocal with the EU, but understood that this could not be amended through legislation and would require an agreement between the UK and EU.

10.5 Air carriers thought it appropriate to require EU air carriers to apply for a foreign carrier permit from the CAA in order to operate to the UK. Some viewed this as a lever through which the Government could provide for reciprocity in the conditions for the operation of air services between the UK and EU.

11. Guidance

11.1 No guidance is necessary.

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 it makes only minor changes to address deficiencies in retained EU law. The impact on businesses and the public sector is limited to minor familiarisation costs.

13. Regulating small business

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

14. Monitoring & review

14.1 No specific monitoring arrangements are needed.

14.2 As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

15.1 Rory Sedgley at the Department for Transport Telephone: 07825523715 or email: rory.sedgley@dft.gov.uk can be contacted with any queries regarding the instrument.

15.2 Michael Clark, 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, Parliamentary Under Secretary of State for Transport 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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
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 for Transport, Baroness Sugg, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Operation of Air Services (Amendments Etc.) (EU Exit) Regulations 2018 does no more than is appropriate".

1.2 This is the case because the changes this instrument makes are minor and do no more than is necessary to ensure that air carriers have continuity in the regulatory conditions they are required to meet in order to operate air services. The specific changes are set out in the 'Policy Background' section in paragraphs 7.1 – 7.13.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for Transport, 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 legislation regulating the operation of air services continues to function correctly once the UK has left the EU; and
- Ensuring that there is clarity for air carriers that their operating licences will remain valid and on the requirements they are expected to meet in order to operate air services post EU exit, and that the conditions for approving the lease of foreign aircraft will continue to apply once the UK has left the EU.

3. Equalities

3.1 The Parliamentary Under Secretary of State for Transport, Baroness Sugg, has made the following statement:

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

"In relation to the 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.

5. Criminal offences

5.1 The Parliamentary Under Secretary of State for Transport, Baroness Sugg, has made the following statement:

"In my view there are good reasons for widening the scope of criminal offences in this instrument."

These are:

- The amendments made by this instrument to the Air Navigation Order 2016 remove exemptions for EEA air carriers from the requirement to obtain certain permits, and widen the scope of the Secretary of State's power to give directions to make passenger and crew data available so that it covers flights between the UK and EEA states.
- Consequently, EEA carriers breaching these requirements should now fall within the scope of the relevant criminal offences in section 265, and Schedule 13 to, the 2016 Order.
- This will ensure that all foreign air carriers operating to the UK, whether from the EEA or beyond, are subject to the same legal requirements.