EXPLANATORY MEMORANDUM TO

THE OPERATION OF AIR SERVICES IN THE COMMUNITY (PRICING ETC.) REGULATIONS 2013

2013 No. 486

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument enables the effective implementation and enforcement of Article 23 of Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (recast) ("the EC Regulation"). It designates the Civil Aviation Authority ("CAA") and the Office of Fair Trading ("OFT") as enforcers for requirements on transparency and non-discrimination in the publication of air fares and air cargo rates, and establishes an enforcement regime.

2.2 The instrument amends the Operation of Air Services in the Community Regulations 2009 (S.I. 2009/41) to require the Secretary of State to review the operation and effect of those regulations and to publish a report within five years after such requirement comes into force and within every five years after that. The instrument further amends those regulations to provide for appeal procedures in respect of certain CAA and Secretary of State decisions relating to approvals for leased aircraft.

2.3 The instrument revokes the Licensing of Air Carriers Regulations 1999 (S.I. 1999/2245) ("the 1999 Regulations"), which established an earlier appeals procedure for similar purposes.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The EC Regulation consolidates and revises three previous EC regulations enacted in 1992 that finally established the single market in air services in the Community. These three regulations are: EC 2407/92 on the licensing of air carriers; EC 2408/92 on access for community air carriers to intra community air routes; and EC 2409/92 on fares and rates for air services, together known as the "third aviation package".

4.2. Chapters I to III and V of the EC Regulation were implemented in the UK by the Operation of Air Services in the Community Regulations 2009 (SI 2009/41) ("the 2009 Regulations").

4.3 This instrument addresses Chapter IV of the EC Regulation. This Chapter sets out new provisions not in the original third aviation package regulations. In particular, Article 23 states that air fares and air cargo rates available to the general public must:-

- include the applicable conditions;
- indicate at all times the final price inclusive of unavoidable and foreseeable taxes fees and charges;
- include a breakdown of the price into its constituent parts;
- indicate the existence of any optional charges at the start of the booking process for acceptance by the customer on an "opt-in" basis; and
- be available without discrimination based on the nationality of the customer or their place of residence within the Community.

4.4 Article 24 requires Member States to ensure compliance with Article 23 and lay down effective, proportionate and dissuasive penalties for infringements.

4.5 Article 13 of the EC Regulation sets out requirements about the leasing of aircraft by EU air carriers. The 2009 Regulations set out the roles of the CAA and Secretary of State in approving leasing proposals submitted by UK licensed airlines. The CAA is responsible for making decisions on safety matters and the Secretary of State is responsible for deciding on economic and operational conditions, where these apply.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom. Responsibility for consumer protection issues has been transferred to the Northern Ireland Ministers, who have agreed that the jurisdiction of the enforcers nominated for the purposes of this legislation should extend to Northern Ireland.

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.

7. Policy background

7.1 Chapter IV of Regulation (EC) No 1008/2008 on common rules for the Operation of Air Services in the Community requires price transparency and non-discrimination in the sale and advertising of air tickets and air cargo rates. It also requires Member States to ensure compliance with the rules and lay down penalties for infringements that are effective, proportionate and dissuasive.

7.2 Legislation is required to improve compliance and to meet the UK's obligations under the EC Regulation. This will enable consumers to make better comparisons of air fares and cargo rates offered by different suppliers

and service providers, including airlines, tour operators, travel agents and price comparison websites.

7.3 The instrument introduces a civil enforcement regime (modelled on that in Part 8 of the Enterprise Act 2002), for specific application to air fare transparency. It is not possible to utilise the Enterprise Act directly for the enforcement of the EC regulation, as infringement of Article 23 would not constitute either a "community infringement" or a "domestic infringement" for the purposes of the Enterprise Act.

7.4 The instrument designates the CAA and the OFT as enforcers. The intention is that the CAA will take the lead in enforcement casework, reflecting its experience in enforcing other EU legislation and familiarity with the air transport industry. The OFT, which is not funded by industry, will only become involved where a case may have wider, cross-sectoral consumer protection implications.

7.5 Under the proposed regime an enforcer consults with a business which it believes does not, or intends not to, comply with the requirements of the EC Regulation, with a view to obtaining an undertaking to cease the non-compliant behaviour. If a business does not agree to undertakings, or gives an undertaking but fails to comply with it, the enforcer can apply to a court for an enforcement order. The court may issue an enforcement order or may decide to accept undertakings from the business as an alternative. If a business fails to comply with an order it could be found to be in contempt of court, and so potentially be liable to a fine or imprisonment of the individuals concerned.

7.6 The instrument also gives powers to enforcers to require businesses to provide information to help with their enquiries, and creates offences for obstructing or failing to co-operate with an enforcer, withholding information requested by an enforcer, or providing false or misleading information.

7.7 Part 5 of the instrument amends the 2009 Regulations to introduce a requirement for the Secretary of State to review the operation and effect of those regulations and to publish a report within five years after such requirement comes into force and within every five years after that. It also introduces a right of appeal against decisions on aircraft leasing for the purposes of Article 13 of the EC Regulation. New procedures for determining such appeals are established. The right of appeal is considered necessary to satisfy human rights considerations.

7.8 In the case of decisions on aircraft safety grounds taken by the CAA, an airline can appeal to a CAA Member (i.e. a person appointed to be a member of the CAA Board under section 2 of the Civil Aviation Act 1982). Where a decision on a leasing application has been made by the Secretary of State on economic and operational conditions, the appeal will be heard in a County Court, or a Sheriff Court in Scotland.

7.9 The 1999 Regulations provided for procedures to be followed by the CAA in making decisions under Article 10 of Council Regulation No. 2409/92

on licensing of air carriers. This regulation has been superseded by the EC Regulation. The 1999 Regulations are accordingly no longer necessary and are therefore revoked.

7.10 The instrument ensures that the provisions of the instrument do not conflict with the requirements of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (the "E-commerce Directive"). The Directive concerns information society services, which are services provided from a distance by means of electronic equipment to businesses and consumers such as on-line shopping, direct marketing and advertising. The instrument provides that to the extent the instrument is concerned with the enforcement of Article 23, where an information society service provider is established in the United Kingdom, the instrument applies to anything done by the service provider in an EEA state (including the United Kingdom). By contrast, where the service provider is established in an EEA state other than the United Kingdom, the instrument does not apply to anything done by the service provider in providing the information society service. Various exceptions to the provisions of the instrument are provided in respect of intermediary internet service providers who carry out activities essential for the operation of the internet in accordance with Articles 12 to 14 of the E-Commerce Directive.

8. Consultation outcome

8.1 A formal consultation took place during 2010. Sixteen responses were received, from organisations in the air transport and travel sectors and consumer bodies. The responses were generally supportive of the proposals. Some airlines questioned the need for criminal sanctions, which were included in the draft instrument to address serious or repeated cases of non-compliance with the requirements of Article 23 of the EC regulation. On reflection, the Government has concluded that the creation of a criminal offence for that purpose would be a disproportionate response to the behaviour being targeted. It has not therefore been included in the final instrument. Two responses suggested that the instrument should put in place the means to address complaints raised by individual consumers, but this would go beyond the requirements of the EC regulation. The case for two enforcers was generally recognised, although some responses favoured the CAA alone for this role. The publication of guidance by the enforcers, setting out their respective roles and approach to enforcement, should address these concerns.

8.2 Seven of the responses commented on the proposed appeals procedures for decisions on aircraft leasing. Of these, six supported the proposals.

9. Guidance

9.1 The CAA and the OFT are producing joint guidance on the requirements of the EC Regulation and a number of other consumer protection regulations that require the transparent provision of price and other information to consumers. The CAA and the OFT propose to publish this guidance in March

2013. The guidance will be available on the CAA and OFT websites at www.caa.co.uk and www.oft.gov.uk.

10. Impact

10.1 All businesses making available to the public air fares and air cargo rates for air services from an airport located in the UK are subject to the requirements of Chapter IV of the EC Regulation. This ranges from very large airlines to small businesses selling air tickets as part of a travel agency business. There are some 1,200 International Air Transport Association agents in the UK selling tickets on behalf of airlines. Based on membership of the main trade associations, there are also around 120 airlines providing passenger services from UK airports who also sell tickets to the public. A small number of other firms also make air cargo rates available to the public. Some airports may also be affected where they require all passengers to pay certain fees before boarding flights. This suggests that in total a maximum of 1,500 businesses may be subject to the EC Regulation and the enforcement regime.

10.2 A summary of the annual gross costs (all to business) is set out in the table below:

Costs (Base Year 2013)		£m (best estimate)	£m (high)
Average Annual (constant price)	Staff costs for enforcement.	0.02	0.04
	Legal (in house).	0.025	0.05
Total annual gross costs		0.045	0.09

10.3 Ongoing costs reflect the in-house enforcement and legal resource the CAA will require to effectively enforce the EC Regulation. These costs will be passed on to the air transport industry (both the compliant and non-compliant) via CAA's charges. These figures are best estimates, and may be subject to change if the numbers of non-compliant cases are higher than anticipated. The cost estimates are based on the CAA's experience of current compliance.

10.4 It has not been possible to monetise any of the benefits. However, the change will benefit consumers by fully realising the benefits of the EC Regulation's pricing provisions by providing an effective, proportionate and dissuasive enforcement regime that ensures that the provisions are adhered to by the relevant businesses.

10.5 An Impact Assessment is published alongside the Explanatory Memorandum at www.legislation.gov.uk.

11. Regulating small businesses

11.1 The EC Regulation imposes universal requirements on transparency and non-discrimination in the interests of consumer protection. It therefore applies to all businesses, regardless of size. The CAA's approach to enforcement is to provide assistance and guidance in the first instance, which will limit any additional burdens on small businesses.

12. Monitoring & review

12.1 Regulation 2 of the instrument requires the Secretary of State to carry out a review of its provisions within five years of its coming into force, and thereafter at five-year intervals.

13. Contact

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