

CIVIL AVIATION BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

INTRODUCTION

1. These Explanatory Notes relate to the Lords Amendments to the Civil Aviation Bill, as brought from the House of Lords on 13 November 2012. The Notes have been prepared by the Department for Transport in order to assist the reader of the Bill and the Lords Amendments, and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These Notes, like the Lords Amendments themselves, refer to HL Bill 26, the Bill as first printed for the Lords.
3. These Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords Amendments.
4. All the Lords Amendments were in the name of the Minister. Amendments 1 and 3 were amended by amendments which were proposed by the Opposition and accepted by the Government.

COMMENTARY ON LORDS AMENDMENTS

Lords Amendments 1 to 4

5. Clauses 1 and 2 set out the general duties applicable to the Civil Aviation Authority and the Secretary of State respectively in the discharge of many of their functions under Chapters 1 and 3 of the Bill.

6. Lords Amendment 1 would add to the list of matters to which the Civil Aviation Authority must have regard when performing its duties in clause 1(1) and (2). The duty to have regard to these matters does not, individually or collectively, override the Civil Aviation Authority's primary duty under clause 1(1) and (2). Specifically, these amendments would add an environmental duty. Collectively these amendments would require the Civil Aviation Authority in discharging its Chapter 1 functions to have regard to the need to secure that each licence holder is able to take reasonable measures to address the adverse environmental effects of the licensed airport, including aircraft using that airport. A non-exhaustive list of the environmental effects referred to at Lords Amendment 1 is set out at Lords Amendment 2.

7. Lords Amendment 3 (taken together with Lords Amendment 4, which imports the same non-exhaustive definition of "environmental effects" as Lords Amendment 2) would add an equivalent duty to the list of matters to which the Secretary of State must have regard when discharging functions under Chapter 1 and under some provisions in Chapter 3.

8. Lords Amendment 2 would provide that "environmental effects" includes (amongst other listed matters) substances, noise, vibration and emissions and the effects of works carried out at the airport.

Lords Amendments 5, 6 and 29

9. Clause 6 sets out the market power test. The market power test is met in relation to an airport area only if the Civil Aviation Authority is satisfied that tests A, B and C are all met by or in relation to the operator of that airport area. In those cases where the market power test is not met an airport operator will not be subject to economic regulation under Chapter 1.

10. Lords Amendment 6 would provide that the Civil Aviation Authority must have regard to relevant competition notices and guidance published by the European Commission and relevant advice and information published by UK competition authorities when applying the market power test. Lords Amendment 5 is consequential on Lords Amendment 6.

11. Lords Amendment 29 would provide that the Competition Appeal Tribunal must have regard to these notices, guidance, information and advice when deciding an appeal relating to a market power determination, or making such a determination, under Schedule 1.

Lords Amendment 7

12. Lords Amendment 7 would insert the word "operator" into clause 9(5) in order to make it clear that the reference to determinations made by the Civil Aviation Authority under clause 10 is only to operator determinations (defined in clause 10(2)).

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Lords Amendment 8

13. Lords Amendment 8 to clause 12 concerns advance market power determinations and would clarify the effect of their publication on other existing determinations.

14. Under clause 12(5), where the Civil Aviation Authority publishes an advance market power determination in respect of an airport area, its legal effects are contingent on specified circumstances arising in the future.

15. Lords Amendment 8 would make it clear that any previous market power determination in respect of the airport area continues to have effect until the future specified circumstances set out in the advance determination have in fact arisen.

Lords Amendments 9 and 31

16. Lords Amendment 31 would provide for a third set of circumstances in which a licence condition, or a modification of a licence condition, is automatically suspended under Part 3 of Schedule 2 (appeals to the Competition Commission about licence conditions and modifications).

17. Part 3 of Schedule 2 currently provides for two sets of circumstances in which a condition or modification is automatically suspended. Paragraph 6 provides for the automatic suspension of a condition proposed to be included in new licence on an appeal under clause 24 (conditions of new licences) if the condition is a relevant financial arrangements condition (as defined in that paragraph). Paragraph 7 provides for the automatic suspension of a modification of a relevant financial arrangements condition on an appeal under clause 25 (modification of licence conditions) if it is a modification to which clause 23 applies (removal or restriction of exception).

18. Lords Amendment 31 would provide for the automatic suspension of a modification proposed to an existing licence on an appeal to the Competition Commission if the modification would introduce a new financial arrangements condition.

19. Without the special provisions in Part 3 of Schedule 2, the standard licence condition appeals process would apply. The proposed condition or modification would take effect during the period when the appeal was being heard, unless an application for suspension was made and granted under Part 4 of Schedule 2. The circumstances in which such an application may be granted are set out in paragraphs 10 and 13 of that Schedule.

20. Lords Amendment 9 is a consequential amendment of clause 22(8)(b) as a result of Lords Amendment 31.

Lords Amendments 10, 25, 26, 33 to 36, 38, 39, 41, 42, 70 and 71

21. These Lords Amendments would have the effect of providing consistency in the grounds on which the Competition Commission and the Competition Appeal Tribunal decide appeals.

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22. Lords Amendment 10 to clause 26(c) would clarify the wording of one of the grounds on which the Competition Commission may allow an appeal under clauses 24 and 25 by changing it from “that the decision was based on the wrong exercise of a discretion” to “that an error was made in the exercise of a discretion”.

23. Lords Amendments 25 and 26 are to Schedule 1 which covers appeals to the Competition Appeal Tribunal against market power determinations and operator determinations. Lords Amendment 25 would delete the restriction on the grounds on which an appeal may be made. They are:

- (a) that the determination is based on an error of fact;
- (b) that the determination is wrong in law;
- (c) that the determination is based on the wrong exercise of a discretion.

24. Lords Amendment 26 would delete the requirement for the Competition Appeal Tribunal to decide the appeal “on the merits” and “by reference to the grounds of appeal”.

25. Lords Amendment 26 would replace those provisions with new provision stating that the Competition Appeal Tribunal may allow an appeal against a determination only to the extent that it is satisfied that a determination was wrong on one or more of the following grounds:

- (a) that the determination was based on an error of fact;
- (b) that the determination was wrong in law;
- (c) that an error was made in the exercise of a discretion.

26. That would be consistent with the provision about appeals to the Competition Commission in clause 26, as amended by Lords Amendment 10 (described above).

27. Lords Amendments 33, 34, 35 and 36 would make equivalent changes in Schedule 3 (appeals to Competition Appeal Tribunal against enforcement orders and penalties).

28. Lords Amendments 38 and 39 would make equivalent changes in Schedule 4 (appeals to Competition Appeal Tribunal against revocation of licence).

29. Lords Amendments 41 and 42 would make equivalent changes in Schedule 5 (appeals to Competition Appeal Tribunal against penalties imposed under clause 51 or 52 in relation to requests for information).

30. Lords Amendments 70 and 71 would make equivalent changes in Schedule 13 (appeals to Competition Appeal Tribunal against penalties imposed under clause 86 or 87 in relation to requests for information).

Lords Amendments 11, 12, 28, 37, 40, 43 and 72

31. These amendments would add or amend provision about how the general duties imposed on the Civil Aviation Authority under clause 1 are taken into account where there is an appeal to the Competition Commission or the Competition Appeal Tribunal under Chapter 1 of Part 1 of the Bill. Lords Amendments 28, 37, 40 and 43 are to Schedules 1 (appeals against market power and operator determinations), 3 (appeals against orders and penalties), 4 (appeals against revocation of licence) and 5 (appeals against penalties: information) respectively. They would insert an express duty on the Competition Appeal Tribunal, when deciding appeals under those Schedules, to have regard to the matters in respect of which duties are imposed on the Civil Aviation Authority by clause 1. Lords Amendment 72 to Schedule 13 (appeals against penalties imposed under clause 86 or 87 in relation to requests for information) would insert an express duty on the Competition Appeal Tribunal to have regard to the Civil Aviation Authority's duties as set out in section 4 of the Civil Aviation Act 1982 when deciding an appeal under Schedule 13.

32. Lords Amendments 11 and 12 are to clause 30 and concern appeals to the Competition Commission. Clause 30(2) provides that the duty in clause 1(1), (2) and (5) applies to the carrying out by the Competition Commission of its functions of determining appeals and applications for permission to appeal or to intervene in an appeal. Clause 30(3) provides that, in carrying out those functions, the Competition Commission must have regard to the matters mentioned in clause 1(3) and (4). Lords Amendments 11 and 12 would remove those subsections and replace them with a duty for the Competition Commission to have regard to the matters in respect of which duties are imposed on the Civil Aviation Authority by clause 1. That would be consistent with the provision inserted by Lords Amendments 28, 37, 40 and 43 in the Schedules relating to appeals to the Competition Appeal Tribunal.

Lords Amendments 13 to 16

33. The purpose of Lords Amendments 13, 14, 15 and 16 is to clarify the meaning of "servicing".

34. Lords Amendment 14 would insert a new subsection (8) in clause 67 which clarifies that, for the purposes of the definitions of an airport and its core area, land, buildings and structures used for the servicing of aircraft include those used for the supply of fuel, and the repair, maintenance and overhaul of aircraft that land at the aerodrome.

35. Lords Amendment 16 would ensure that the extended definition of "servicing" at clause 67(8) applies also to the term "servicing of aircraft" where it is used in the definition of airport operation services in clause 68.

36. Lords Amendments 13 and 15 would make further consequential changes to remove the now unnecessary references to "supply of fuel" clauses 66(1)(b) and 68(1)(b) respectively.

Lords Amendments 17 and 18

37. Section 71 of the Civil Aviation Act 1982 confers a power on the Secretary of State to regulate the provision of flight accommodation in the United Kingdom. That power is broadened by clause 94, and Lords Amendments 17 and 18 would further extend that power to enable regulation of businesses that ‘facilitate’ the making available of flight accommodation where certain prescribed arrangements in relation to payment for the flight apply. Businesses which operate in this way may not themselves be making available flight accommodation, or procuring flight accommodation on behalf of a consumer, and so would not otherwise be subject to the ATOL scheme.

38. Under Lords Amendments 17 and 18 the payment arrangements that it would be possible to prescribe under the new subsection (1)(d) for section 71 of the Civil Aviation Act 1982 are arrangements where the business makes or receives a payment in relation to the making available of flight accommodation, or facilitates the making or receiving of such a payment by another person.

Lords Amendment 19

39. Under section 71(2)(b) of the Civil Aviation Act 1982, regulations made by the Secretary of State under section 71 may include provision as to the terms of licences, which may include terms relating to goods, services and other benefits furnished by any person in connection with any contract for flight accommodation.

40. Lords Amendment 19 would have the effect that regulations under section 71 could, in making provision about the terms of licences, include terms about goods, services and other benefits provided by any person alongside a flight without such goods, services and other benefits having to be supplied in connection with a contract for the flight accommodation.

Lords Amendment 20

41. This amendment would amend the wording in the new subsection (3)(a) of section 71 of the Civil Aviation Act 1982 to be inserted by clause 94(4) so that it refers to the same category of goods, services and other benefits referred to in section 71(2)(b), as amended by Lords Amendment 19.

Lords Amendment 21

42. Lords Amendment 21 would add to paragraph 5(1) of Schedule 1 to the Civil Aviation Act 1982 (to be substituted by clause 96(6)) a new ground on which a non-executive member of the Civil Aviation Authority may be removed from office by the Secretary of State. That new ground is that the Secretary of State is satisfied that the member is subject to a debt relief order under Part 7A of the Insolvency Act 1986.

43. This amendment would preserve the effect of the Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order 2012 which came into force on 1 October 2012. The Order made amendments to primary and secondary

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legislation which already provide for individuals to be disqualified or removed from office in the event of bankruptcy so as to provide for the disqualification or removal of an individual in respect of whom a debt relief order has been made under Part 7A of the Insolvency Act 1986. In particular, it amended paragraph 5(1) of Schedule 1 to the Civil Aviation Act 1982 to enable the Secretary of State to remove a member of the Civil Aviation Authority from office in those circumstances.

Lords Amendment 22

44. Lords Amendment 22 would amend section 21(2) of the Civil Aviation Act 1982 so as to require the annual report made by the Civil Aviation Authority under section 21(1) to include a statement by the Civil Aviation Authority about efficiency in the performance of its functions (an "efficiency statement") and an assessment by the Civil Aviation Authority's auditors of that statement.

45. The amendment would also insert in section 21 new subsections (2A) and (2B). New subsection (2A) would provide a power for the Secretary of State to give directions to the Civil Aviation Authority about the matters that must be covered in an efficiency statement. New subsection (2B) would impose on the auditors appointed under section 15(2) of the Civil Aviation Act 1982 a duty to produce an assessment of the efficiency statement.

Lords Amendments 23 and 24

46. Under the current drafting, the power under clause 107 to make consequential, transitional etc provision by regulations, which includes power to amend the Bill, will come into force on Royal Assent (see clause 109(2)). However, the restriction on that power in Schedule 10, paragraph 7 is to be brought into force by order (see clause 109(1)).

47. Lords Amendments 23 and 24 would have the effect of providing for both the power to make regulations and the restriction on this power to come into force on Royal Assent.

Lords Amendments 27 and 30

48. Lords Amendments 27 and 30 to Schedule 1 concern the effect of suspending or setting aside a market power determination as part of an appeal to the Competition Appeal Tribunal.

49. Under clause 7(9) and (10) a market power determination in respect of an airport area ceases to have effect if the Civil Aviation Authority publishes a notice of a further market power determination in respect of the airport area.

50. Lords Amendment 27 would insert a new paragraph 3A into Schedule 1 and establish a default position that, on a market power determination in respect of an airport area being suspended or set aside, a previous market power determination in respect of the airport area takes effect again or continues to have effect (as appropriate), unless the Competition Appeal Tribunal orders otherwise.

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51. Lords Amendment 30 would ensure that a further appeal would lie to the appropriate court on a point of law arising from a Competition Appeal Tribunal decision under new paragraph 3A(3) and (4) (decision to order that, on the setting aside of a new market power determination, a previous market power determination does not continue to have effect or take effect again). See also the reference to new paragraph 3A in the sub-paragraph inserted by Lords Amendment 28 (discussed above).

Lords Amendment 32

52. Paragraph 22 of Schedule 2 sets out the circumstances in which the Competition Commission may allow new matters, information or evidence to be adduced in relation to applications for permission to appeal and appeals brought under clause 24 and clause 25. Paragraph 22(2) generally prohibits the Competition Commission from considering any matter, information or evidence raised or provided by the Civil Aviation Authority if it was not considered by the Civil Aviation Authority in making the decision which is the subject of the application or appeal.

53. However, in common with other appellate jurisdictions, there are limited circumstances where, in the interests of justice, this general rule needs to be capable of being displaced. Paragraph 22(2)(a) and (b) and (4) set out the limited circumstances in which the Competition Commission may have regard to any new “matter, information or evidence”.

54. Lords Amendment 32 would correct paragraph 22(2)(a) so that, consistent with the opening words of paragraph 22(2), it refers not only to a “matter” but also to “information or evidence”.

Lord Amendments 44 to 48

55. Lords Amendments 44, 45, 46, 47 and 48 relate to Schedule 8 to the Bill.

56. The amendments would ensure that where the Secretary of State seeks to make an order increasing for *inflation reasons* the annual turnover threshold by which an airport becomes eligible for statutory undertaker status, the order would be subject to parliamentary scrutiny by means of the negative resolution procedure, and in the case that the increase is for *any other reason* the order would be subject to the affirmative resolution procedure.

Lords Amendments 49 and 50

57. Lords Amendments 49 and 50 are to Schedule 9 which contains amendments of other Acts which are consequential on Part 1 of the Bill.

58. It includes amendments of section 74 of the Airports Act 1986 (disclosure of information). Subsection (4) of that section provides that the restrictions in that section on the disclosure of information-

- do not limit the disclosure of information in reports of the Competition Commission under section 45 of that Act, and

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- do not apply to information which has been made public as part of such a report.

59. Lords Amendment 50 would provide for the repeal of paragraph (a) of section 74(4), which will be redundant once Part 4 of the Airports Act 1986 is repealed (see clause 76(1) of the Bill). Lords Amendment 49 is a technical amendment in consequence of Lords Amendment 50.

60. Paragraph (b) of section 74(4) will continue to be relevant in relation to information previously disclosed in Competition Commission reports under Part 4 of the Airports Act 1986.

Lords Amendments 51, 52 and 55 to 67

61. Lords Amendments 51, 52 and 55 to 67 are to Part 1 of Schedule 10 which sets out the main transitional provisions for the move from the existing regulatory regime for dominant airports under Part 4 of the Airports Act 1986, and Part 4 of the Airports (Northern Ireland) Order 1994, to the one proposed in Chapter 1 of the Bill.

62. Lords Amendments 55 to 67 are to paragraph 6 of Schedule 10. That paragraph modifies the preceding paragraphs of that Schedule as they apply in cases in which a collection of land, buildings and structures which counts as an airport for the purposes of Part 1 of the Bill consists of an airport as defined in the 1986 Act or the 1994 Order and other land, buildings and structures (see paragraph 6(1)). Lords Amendments 55 to 67 would adjust the modifications to take account of the fact that, at such an airport, different areas may have different operators, eg. the terminal and runway may be under the control of one person and the car park may be under the control of another.

63. Lords Amendment 55 would provide a definition of “the main operator’s airport area”, ie. the area under the control of the person who is the operator of the airport for the purposes of the 1986 Act or the 1994 Order.

64. Lords Amendments 56 to 59 would change the scope of the deeming provision in paragraph 2 of Schedule 10. That provision states that, where an airport is designated under the 1986 Act or the 1994 Order on the commencement day, an airport area consisting of the whole of the airport is deemed to have met the market power test and thus be subject to economic regulation when the Bill is commenced. At present, paragraph 6(2) provides that, in a case described in paragraph 6(1), the effect of paragraph 2 is that an airport area consisting of the whole of the airport as defined in Part 1 of the Bill is deemed to have met the market power test. The Lords Amendments would modify the scope of the deeming provision (in cases described in paragraph 6(1)) so that only the main operator’s airport area is deemed to have met the market power test.

65. The remaining amendments would make further minor and consequential changes to Part 1 of Schedule 10.

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Lords Amendments 53 and 54

66. Lords Amendments 53 and 54 to Part 1 of Schedule 10 would amend the circumstances in which the Secretary of State can, during the interim period, revoke an order made under the Part 4 of the Airports Act 1986, or Part 4 of the Airports (Northern Ireland) Order 1994, designating an airport for price control regulation. The interim period will be the period between commencement of clause 3 and 31 March 2014.

67. Paragraph 5(3) of Schedule 10 currently provides that, during the interim period, the Secretary of State (or the Department of the Environment in Northern Ireland) must revoke such an order if the designated airport ceases to be a dominant airport for the purposes of Part 1 of the Bill. It also provides that such an order may not otherwise be revoked.

68. Amendments 53 and 54 would provide that the Secretary of State (or the Department of Environment in Northern Ireland) must not revoke such an order in three circumstances: 1) during the sixty day period in which a person may make an appeal to the Competition Appeal Tribunal against the market power determination; 2) at a time when the market power determination has been suspended by the Competition Appeal Tribunal or the Secretary of State or Department considers it may be suspended; or 3) if the market power determination has been set aside or quashed.

Lords Amendments 68 and 69

69. Lords Amendments 68 and 69 relate to paragraph 7 of Schedule 10 (transitional provision).

70. Lords Amendment 68 would remove the specific provision in paragraph 7(1) extending the power under clause 107 to make consequential, transitional and transitory provision so that it includes power to amend Schedule 10. That provision is no longer required now that the power in clause 107 to modify legislation includes power to modify enactments contained in the Bill, as a result of an amendment at Commons Committee stage to the definition of “legislation” in clause 107(5).

71. Paragraph 7(2) prevents the power under clause 107 being used to shorten the interim period provided for in Schedule 10. Lords Amendment 69 would preserve that restriction.

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