Commission Implementing Decision (EU) 2019/1957 of 25 November 2019 on the assessment made pursuant to Regulation (EU) 2018/1139 of the European Parliament and of the Council as regards an exemption from certain substantive requirements laid down in Commission Implementing Regulation (EU) No 923/2012 granted by the United Kingdom (notified under document C(2019) 8345) (Only the English text is authentic) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2019/1957

of 25 November 2019

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91[(1)], and in particular Article 71(2) thereof,

Whereas:

(1) On 20 September 2019, the United Kingdom notified the Commission, the European Union Aviation Safety Agency (‘the Agency’) and the other Member States, that it had granted an exemption, pursuant to Article 71(1) of Regulation (EU) 2018/1139, to all operators of aircraft flown within the United Kingdom at or below 3 000 feet above mean sea level and within Class D airspace, from the requirements laid down in point SERA.5005(a) (visual flight rules (VFR)) of the Annex to Commission Implementing Regulation (EU) No 923/2012[(2)]. The exemption as notified specifies inter alia that the previous, identical exemption, which had been notified to the Commission on 17 April 2019, is revoked with effect from 12 September.

(2) The above exemption is permitted when an aircraft is flying under the following cumulative conditions: (i) by day only; (ii) at a speed which, according to its airspeed indicator, is 140 knots or less, to give adequate opportunity to observe other traffic and

any obstacles in time to avoid a collision; (iii) clear of cloud with the surface in sight and if the aircraft is not a helicopter, in a flight visibility of at least 5 km or if the aircraft is a helicopter, in a flight visibility of at least, 1 500 m.

(3) The United Kingdom has granted this exemption to facilitate the safe transition to future airspace requirements as formulated in its revised high level action plan and in particular to allow time to implement the air traffic service procedural changes that are necessary to safely apply the relevant SERA requirements and to consider airspace modernisation. Finally, the United Kingdom provided a description of various mitigation measures accompanying that exemption.

(4) The exemption was granted for the period of 12 September 2019 to 25 March 2020. Since 2014, the United Kingdom has issued eight exemptions from point SERA.5005(a) of the Annex to Implementing Regulation (EU) No 923/2012 of a cumulative duration of sixty one months[3]. Based on the principle according to which new rules apply immediately to the future effects of a situation which arose under the old rule, the eight months periods referred to in Article 71(2) of Regulation (EU) 2018/1139 are to be calculated by including periods prior to the entry into force of that Regulation. Taking that into account, the Agency assessed whether the conditions laid down in Article 71(1) of that Regulation were met and concluded that some of them were not.

(5) The Commission agrees with the Agency's recommendation.

(6) Under Article 71(1) of Regulation (EU) 2018/1139 a Member State is allowed to grant an exemption only if it is granted to any natural or legal person subject to this Regulation 'in the event of urgent unforeseeable circumstances affecting those persons or urgent operational needs of those persons' and provided that all the conditions stipulated in points (a) to (d) of that article are met.

(7) The Commission considers that the exemption does not meet the condition of 'urgent operational needs'. This conclusion is confirmed by the repetitive issuing of the same kind of exemption since 13 November 2014. The continuous repetition of the exemption indicates that its duration is not limited and demonstrates that a real objective is to maintain a long-term derogation from point SERA.5005(a) rather than addressing a specific urgent operational need of a person to whom those provisions apply. Furthermore, the fact that the United Kingdom stated in its notification that it has not imposed the minimum distance from cloud in Class D airspace and that it had declared that it would take action to comply with Implementing Regulation (EU) No 923/2012 in the long term does not change that conclusion.

(8) In view of the above considerations, there is no need for the Commission to assess whether conditions of points (a) to (d) of Article 71(1) of Regulation (EU) 2018/1139 have been met. The Commission nevertheless observes the following.

(9) The Commission considers that the exemption does not meet the condition of point (a) of Article 71(1) of Regulation (EU) 2018/1139, because the needs triggered by that exemption can be adequately addressed by other means which are in compliance with the Regulation. In fact, despite the United Kingdom's claims, Implementing Regulation (EU) No 923/2012 allows for adequately meeting the needs without granting

the exemption. Under that Regulation, flights can be operated as 'special VFR flights' as provided in point SERA.5010 (Special VFR in control zones) that are cleared by air traffic control to operate within a control zone in meteorological conditions below visual meteorological conditions. Alternatively, wherever there is a need to accommodate within a given airspace class operations compatible with a less restrictive class, consideration could be given to solutions such as: reclassification of the airspace concerned, or redesigning the volume of airspace concerned by defining airspace restrictions or reservations, or sub-volumes of less restrictive classes of airspace (e.g. corridors), as provided in point SERA.6001(a).

(10) Finally, the exemption does not meet the requirements for safety and is not compliant with the essential requirements of Regulation (EU) 2018/1139. In this regard the Commission refers to its earlier Decision (recitals 11-13) concerning an exemption from point SERA.5005(a) of the Annex to Implementing Regulation (EU) No 923/2012[(4)].

(11) As a consequence, the level of safety is adversely affected by the implementation of the exemption notified on 17 April 2019, and the exemption does not comply with the general safety objectives of Regulation (EU) 2018/1139.

(12) The Commission also notes that, pursuant to Commission's previous Decision concerning an exemption from point SERA.5005(a) of the Annex to Implementing Regulation (EU) No 923/2012[(5)], the United Kingdom was required to revoke the exemption, rather than extending its application in time as it has done.

(13) On 29 March 2017, the United Kingdom submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union (TEU). In accordance with Article 50(3) TEU, the Treaties are to cease to apply to the withdrawing State from the date of entry into force of a withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. The period has been extended three times, last time by European Council Decision (EU) 2019/1810[(6)], which extended it until 31 January 2020, at the latest.

(14) On 11 January 2019, by Decision (EU) 2019/274[(7)], the Council authorised the signature of the withdrawal agreement agreed at negotiators' level on 14 November 2018. The Union confirmed that it stands ready to proceed swiftly with its signature and conclusion in the event that the United Kingdom Parliament approves the withdrawal agreement. Part Four of the withdrawal agreement[(8)] provides for a transition period starting on the date of entry into force of the agreement, during which Union law is to continue to apply to and in the United Kingdom as laid down therein.

(15) In any event, this Decision applies only as long as Union law applies to and in the United Kingdom,

HAS ADOPTED THIS DECISION:

Article 1

The exemption from the requirements laid down in point SERA.5005(a) of the Annex to Implementing Regulation (EU) No 923/2012, granted by United Kingdom and notified