

17 December 2013
FOIA reference: F0001740

Dear XXXX

I am writing in respect of your recent request of 27 November 2013, for the release of information held by the Civil Aviation Authority (CAA).

Your request:

- 1. How many passenger complaint about airlines have been submitted to the CAA since January 2012?*
- 2. How many complaints have been resolved favourably to the passenger?*

Our response:

In assessing your request in line with the provisions of the Freedom of Information Act 2000 (FOIA), we are pleased to be able to provide the information below.

1. The CAA has received 30911 passenger complaints since 1 January 2012.
2. The CAA has referred 18987 compensation claims under Regulation EC261/2004 back to airlines following guidelines published by the European Commission in July 2013 on the “extraordinary circumstances” clause in Regulation EC261/2004 that airlines can invoke to deny compensation (a copy of these guidelines can be found attached).

In addition a further 3146 passenger complaints regarding other issues have been referred back to airlines since July 2013 and are pending review by either the airline or the CAA.

To date 2464 complaints assessed by the CAA have been resolved in favour of passengers. The CAA is not currently in a position to provide a definitive number for cases that will be resolved favourably to the passenger given that many of the complaints referred back to airlines since July are still pending assessment by the airline or the CAA.

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Other than those that are still pending assessment by the CAA, all other complaints received have been concluded as follows:

- Advice only has been provided to the passenger.
- The complaint has been referred to another National Enforcement Body for consideration.
- The complaint was outside the remit of the CAA and not taken up.
- The CAA wrote to the airline chasing a response from the airline with an instruction to contact the passenger directly .
- Following submission the complaint was withdrawn by the passenger.
- The CAA has been in agreement with the airline.

If you are not satisfied with how we have dealt with your request in the first instance you should approach the CAA in writing at:-

Mark Stevens
External Response Manager
Civil Aviation Authority
Aviation House
Gatwick Airport South
West Sussex
RH6 0YR

mark.stevens@caa.co.uk

The CAA has a formal internal review process for dealing with appeals or complaints in connection with Freedom of Information requests. The key steps in this process are set in the attachment.

Should you remain dissatisfied with the outcome you have a right under Section 50 of the Freedom of Information Act to appeal against the decision by contacting the Information Commissioner at:-

Information Commissioner's Office
FOI/EIR Complaints Resolution
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
www.ico.gov.uk/complaints.aspx

Should you wish to make further Freedom of Information requests, please use the e-form at <http://www.caa.co.uk/foi>.

Yours sincerely

Rick Chatfield
Information Rights and Enquiries Officer

CAA INTERNAL REVIEW & COMPLAINTS PROCEDURE

- The original case to which the appeal or complaint relates is identified and the case file is made available;
- The appeal or complaint is allocated to an Appeal Manager, the appeal is acknowledged and the details of the Appeal Manager are provided to the applicant;
- The Appeal Manager reviews the case to understand the nature of the appeal or complaint, reviews the actions and decisions taken in connection with the original case and takes account of any new information that may have been received. This will typically require contact with those persons involved in the original case and consultation with the CAA Legal Department;
- The Appeal Manager concludes the review and, after consultation with those involved with the case, and with the CAA Legal Department, agrees on the course of action to be taken;
- The Appeal Manager prepares the necessary response and collates any information to be provided to the applicant;
- The response and any necessary information is sent to the applicant, together with information about further rights of appeal to the Information Commissioners Office, including full contact details.

11 July 2013

Dear Colleague

EC261/2004 – Cancelled / delayed flights and ‘extraordinary circumstances’

First of all, I apologise that this is quite a long letter so I'll begin with a summary.

Summary

1. There are European guidelines now published about applying the extraordinary circumstances test. These have been developed by national enforcement bodies (NEBs) including the CAA. These guidelines can be found as the following link;

<http://ec.europa.eu/transport/themes/passengers/air/doc/neb-extraordinary-circumstances-list.pdf>
2. The CAA currently has several thousand open complaints from passengers about delays and cancellations where an airline has refused compensation on grounds of extraordinary circumstances. Our experience of investigating several hundred cases, using the criteria now being adopted across Europe, is that airlines had acted consistently with these criteria in declining to pay compensation in about 60% of cases (varying by airline). We have had good co-operation from airlines in paying compensation where we have advised that extraordinary circumstances did not apply.
3. ACTION FOR AIRLINES. As the new European guidelines are now available, we are asking you to reassess all the complaints currently on our books, and which come to CAA over the next few weeks, using the new criteria. To minimise administration for us all, we are sending the complaints listed on spread sheets and providing a proforma for airlines to reply, rather than expecting an exchange of letters about each case. There are further details below. We may need to request supporting documentation for some flights, especially if the proforma is not completed fully and clearly.
4. In the medium term we wish to move towards an “accreditation” system where CAA would be able take a less detailed approach to those airlines which satisfy us that they are applying the extraordinary circumstances test correctly; and that their complaint-handling is of a suitable standard. We shall use the proformas described in para 3 above to begin assessing which airlines could be ready for accreditation soonest.
5. We are requesting your co-operation in providing the information set about above, for the benefit of passengers. Please feel free to discuss any cases with us. We are not at this stage planning to use formal powers or publicity about the cases we investigate.
6. In the longer term, the EU Directive on Alternative Dispute Resolution (ADR) comes into force in 2015 and the UK will have to ensure all consumers have access to an ADR scheme. The CAA has begun informal discussions with government and industry about how this might be implemented for aviation.

Civil Aviation Authority
Fourth Floor, CAA House, 45-59 Kingsway, London, WC2B 6TE

Tel: 020 7453 6237

Email: sandra.webber@caa.co.uk

EU-wide 'extraordinary circumstances' guidelines

We wrote to you on 14 September 2012 to update you on our emerging thinking on 'extraordinary circumstances' and the types of incidents that we considered may fall under the exemption. Since then we have been working with six other national enforcement bodies (France, Germany, Ireland, Netherlands, Spain and Switzerland) to develop a non-exhaustive classification that could be used across the EU. Each Member State was able to make a contribution based on advice from experts in safety, law, policy and enforcement.

This list was presented to all the EU national enforcement bodies (NEBs) for the Denied Boarding Regulations (DBRs) in April 2013. Consensus was reached on the general approach and the types of incidents included on the EU list. Following a small number of drafting changes, the EU list is now finalised and has now been published.

The publication of the list represents an important milestone in the development of the CAA's approach to extraordinary circumstances. We expect the EU list to provide greater clarity to airlines and passengers on what is and is not likely to be considered an extraordinary circumstance, and should help to ensure a consistent approach across the EU. We also hope that it will ensure passenger claims for compensation will be assessed consistently across airlines.

Current complaints

As part of our work towards establishing the list, the CAA examined several hundred flights where the airline had refused compensation on grounds of extraordinary circumstances. We sought documentation where relevant to gather evidence on the precise timing of events, weather effects, aircraft maintenance etc. In 40% of flights we formed the view that the incident was not actually an extraordinary circumstance and we asked the airline to pay compensation. The CAA currently has several thousand complaints of this kind and we assume, based on our previous experience, that in about 40% of cases overall the airline needs to revise its previous assessment.

Alongside this letter, we have sent you details of all the open passenger claims for financial compensation¹ that passengers have lodged with the CAA. We request that you reassess these claims against the EU list, taking full account of the test of 'reasonable measures' within the 'extraordinary circumstances' test (see guidance on this at *Appendix B*).

- a. For the passenger claims set out in Spreadsheet 1 ('Old Database'), following your reassessment of these claims, we request that you respond to us with the results of your reassessment of these complaints using the *proforma at Appendix A to this letter*. We may ask you for further evidence or documents but would hope not to if the proforma is completed clearly. Once we notify you that the guidelines are published we wish you to complete the proforma within 6 weeks but will consider an extension for a large number of cases.
- b. For the more recent passenger claims set out in Spreadsheet 2 ('New Database'), following your reassessment of these claims, we request that you respond directly to the passengers concerned with the results of your reassessment, indicating whether compensation is now payable. We also need you to complete a proforma

¹ Namely, claims for financial compensation under Article 7 of the DBRs for flights that have been cancelled or suffered along delay (greater than three hours on arrival), and where the airline is refusing to pay the financial compensation on the basis of extraordinary circumstances.

for CAA for this set of cases, as the passengers will be able to re-open their complaint to CAA if not satisfied with the explanation they receive from you. Now the guidelines are published we wish you to complete the proforma and reply to the passenger within 6 weeks but will consider an extension for a large number of cases.

We shall send you further batches of complaints for reassessment over the summer if we receive more.

Publication of the EU list also represents a good opportunity to highlight the importance of providing passengers with accurate and timely information about the reasons for the disruption to their flight and, more generally, the importance of good customer care in dealing with passenger complaints. In relation to the former, we do not expect you to provide copies of detailed technical information, but we do expect you to provide the passenger a full explanation of what happened, at the time of the cancellation or delay if possible, and certainly in the event that the passenger makes a claim for financial compensation. It is important that passengers have sufficient information to decide whether they wish to take their case further, for instance through the small claims process. This is a common view across all NEBs and I attach an agreed letter (*Appendix C*) setting out the level of detail that is expected by all NEBs.

Development of an “accreditation” system

In the medium term we wish to move towards an “accreditation and audit” system where CAA would be able to take a less detailed approach to airlines which satisfy us that they are applying the key extraordinary circumstances test correctly; and, more generally, that their complaint-handling of claims under the Regulation is of a suitable standard. We shall use the proformas described in para 3 above to begin assessing which airlines could be ready for accreditation and audit earliest. We will work with those airlines on a more general programme of assurance culminating in, when the time is appropriate, an agreement between the CAA and the airline in the form of a Code of Conduct. Whilst we hope that, over time, we would be able to migrate all airlines into accreditation and audit, the CAA can of course take enforcement action where airlines refuse to move into routine compliance.

As the designated body for passenger complaints in relation to EC261/2004, the CAA is exposed to a wide range of different approaches by airlines towards customers who have had their flights cancelled, or who have suffered a long delay. The CAA has seen good practice in this area. However, it is also fair to say that the CAA has come across examples of poor practice, for instance around attitudes of customer relations staff, convoluted complaint handling processes and clarity of explanations to passengers. We feel strongly that fair complaint handling is key to reducing the number of unnecessary disputes between passengers and airlines. This would form part of our accreditation system, and we would expect to engage an external body to help us judge which airlines have a suitable standard of complaint handling.

We have not completed our thinking on how the accreditation and audit system will work but wanted to let you know it is on the horizon and that we shall be using the proformas you provide as a starting point for assessing the compliance performance of each company in relation to regulation EC261/2004.

Alternative Dispute Resolution

In the longer term there may be changes to the CAA’s complaint handling arising from the EU Directive on Alternative Dispute Resolution (ADR). This requires Member States to have ADR schemes to enable consumers to submit any dispute in respect of goods and services. The Directive is now in force and gives until 9 July 2015 to transpose the requirements into UK law.

Civil Aviation Authority
Fourth Floor, CAA House, 45-59 Kingsway, London, WC2B 6TE

Tel: 020 7453 6237

Email: sandra.webber@caa.co.uk

We understand it is the Government's intention to implement the legislation earlier in 2015. The CAA has begun informal discussions with government and industry about how this might be implemented for aviation.

Next steps

We are requesting your co-operation in providing the information set about above, for the benefit of passengers. Please feel free to discuss any cases with us. For the moment we are not planning to use formal powers or publicity about the cases we investigate. To date the CAA has not made public, on a flight-by-flight basis, the results of its own extraordinary circumstances assessments; however, this remains an option for us to minimise the numbers of cases we receive.

We welcome the assistance industry has provided to CAA in developing the EU list and ensuring that it can be used practically to assess the reason for delays and cancellations. We hope that the steps set out above will improve the efficiency and effectiveness with which the extraordinary circumstances test is applied, improving the experience for passengers claiming financial compensation for cancelled or delayed flights, whilst simultaneously reducing the administrative burden on industry and on the CAA in relation to handling individual passenger claims.

If you have any questions please contact me or my colleagues:

Jackie Knight

jackie.knight@caa.co.uk

Matthew Buffey

matthew.buffey@caa.co.uk

Yours sincerely

Sandra Webber

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Consumer Support Director

APPENDIX A is a separate document.

APPENDIX B

Civil Aviation Authority
Fourth Floor, CAA House, 45-59 Kingsway, London, WC2B 6TE

Tel: 020 7453 6237

Email: sandra.webber@caa.co.uk

The reasonable measures test

The EU list deals only with the first stage of the test for whether compensation is payable for a cancelled flight or a flight which has been delayed by more than three hours on arrival. This first part of the extraordinary circumstances test is largely a technical assessment of whether the incident or event was outside the control of the airline. The EU list represents an effort to capture such incidents or events as far as it is possible to do so.

The second part of the extraordinary circumstances test is a more subjective one which is based on whether the airline took reasonable measures to avoid the disruption.

This was addressed by the Court of Justice of the European Union in Case C-549/07 *Frederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA (Wallentin)*, and the relevant paragraphs of the judgment are:

38 By its third question, the referring court is essentially asking whether it must be considered that an air carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 if it establishes that the minimum legal requirements with regard to maintenance work have been met on the aircraft the flight of which was cancelled and whether that evidence is sufficient to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

39 It must be observed that the Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken.

40 It follows that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

41 That party must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

42 It is for the referring court to ascertain whether, in the circumstances of the case in the main proceedings, the air carrier concerned took measures appropriate to the situation, that is to say measures which, at the time of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

43 In view of the foregoing, the answer to the third question referred must be that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

The European Court built on its ruling in *Wallentin* in its later judgment in *Eglitis*². This case concerned the cancellation of a flight from Copenhagen to Riga on Air Baltic after there was a

² *Eglitis and Ratnieks v Latvijas Republikas Ekonomikas ministrija*, Case C 294/10
Civil Aviation Authority
Fourth Floor, CAA House, 45-59 Kingsway, London, WC2B 6TE

power cut to radar and air traffic systems with the result that air space was closed. By the time it was re-opened, the Air Baltic crew had run out of flying hours.

The court's view was that the obligations in the Regulation imposed a duty on airlines to build in some extra "reserve time" to cope with unforeseen delays and where they failed to take such 'reasonable measures' they would not be able to bring themselves within the scope of the "extraordinary circumstances" defence. However, the court took care to make it clear that it would not be expected to take such precautionary measures where to do so would involve an intolerable sacrifice on the part of the air carrier.³ Clearly, in the *Eglitis* case, the Court took the view that reasonable measures were relevant not just to avoiding the underlying event, in this case the closure of airspace as a result of a power cut, but also to mitigating the resulting disruption to flights.

Clearly, the reasonable measures test must take into account factors specific to the airline concerned and specific to the flight it was scheduled to operate. In relying on the reasonable measures test to refuse to pay financial compensation to passengers on cancelled / delayed flights, an airline must justify why the measures it took at the time to avoid the disruption were reasonable and why there were no further measures that it could have been reasonably expected to take. In applying this test, the issues that NEBs think should be considered by airlines include:

- Where the incident occurred (home base, line station);
- Availability of spare parts/engineering facilities;
- Estimated versus actual repair times;
- Distance (in number of legs) between the incident and the flight being claimed as an extraordinary circumstance;
- Weather forecasts;
- Crew hours;
- Curfews;
- Availability of spare aircraft within the airline's own fleet;
- Cost and availability of hire-in aircraft;
- Length of strike-notice periods;
- Labour or strike-breaking policies; and
- Any other information which could materially affect the decisions taken by the airline following the extraordinary circumstances.

Each airline is likely to have its own particular response to contingency planning and the measures that it takes to ensure resilience in its operation. It is not appropriate or desirable for the CAA to try to specify in advance what this response should be. But we do expect airlines to embed these considerations into their processes for assessing whether a passengers claim for compensation should be refused on the basis of reasonable measures. Going forward, and working closely with airlines, the CAA will continue to develop its understanding of the issues surrounding reasonable measures.

³ See Para 37 of *Eglitis*.
Civil Aviation Authority
Fourth Floor, CAA House, 45-59 Kingsway, London, WC2B 6TE

AIR CARRIERS' OBLIGATION TO PROVIDE A DETAILED EXPLANATION TO PASSENGERS WHERE THEY REFUSE TO PAY COMPENSATION UNDER REGULATION 261/2004 ON THE BASIS OF EXTRAORDINARY CIRCUMSTANCES

As you are aware, under Regulation (EC) 261/2004 operating air carriers are required to pay compensation in situations of short-notice cancellation or long delay where the conditions set out within the Regulation as interpreted by the Court of Justice of European Union, in particular the Sturgeon judgment (C-402/2007 and 432/2007), are met.

Article 5(3) of the Regulation states that an operating air carrier shall not be obliged to pay compensation, provided it can prove that a cancellation *"is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken"*. The Court of Justice of European Union (CJEU), in the Sturgeon judgment, confirmed that an operating air carrier may also claim extraordinary circumstances in situations of long delay subject to the same qualifying criteria and requirements to demonstrate those circumstances apply.

As a designated National Enforcement Body (NEB), whose duty it is to enforce the Regulation, we would like to draw your attention to your obligation, in accordance with the requirements of article 5 (3), to provide a reasoned and sufficiently detailed explanation in responses to passengers whenever you refuse compensation on the grounds of extraordinary circumstances.

Article 5 (3) places a clear obligation on an air carrier to demonstrate both the existence of extraordinary circumstances and that, notwithstanding the existence of those circumstances, all reasonable measures to avoid the disruption were taken. This interpretation was confirmed by the CJEU in its Wallentin-Hermann judgment (C-549/07). On the basis of the Regulation, as interpreted by the CJEU, an air carrier therefore has to provide an NEB or a national court with any necessary evidence to demonstrate extraordinary circumstances, if it wishes to use this exclusion.

However, most claims for compensation to air carriers will be made directly by passengers, at least initially, rather than either through an NEB or via a legal process. Consequently, in the event of an air carrier rejecting a claim for compensation on the grounds of Article 5(3), it must also respect the other rights afforded to the passenger under that provision and provide a detailed answer describing the extraordinary circumstances and explaining why the disruption could not have been avoided. Such an answer may be brief, provided it is clear, accurate and that the facts behind it have been checked and can be verified later if required.

We consider that general answers to passengers that reject claims for compensation by merely vaguely referring to the existence of "extraordinary circumstances" without identifying them fall short of the obligations on air carriers under Article 5(3).

Whilst it is not necessary for air carriers to provide passengers with the same level of detailed response they would provide when responding to an NEB, they must investigate the circumstances relating to every flight for which a compensation claim is made and ensure their reply contains enough information to allow passengers to decide whether to pursue the matter further.

The lack of a detailed explanation in the responses of air carriers may lead to the matter being investigated by an NEB. Such an investigation could be in respect of an individual complaint or where an apparent trend of insufficiently detailed letters is identified.

In addition, air carriers are reminded that their commercial practices, including the handling of consumer complaints, additionally fall under the terms of the Unfair Commercial Practices Directive

(2005/29/EC). Any issue of transparency in responding to passenger complaints may therefore be separately taken up by the relevant enforcement authorities in any Member State.