

[REDACTED]
[REDACTED]

18 July 2017
Reference: F0003250

Dear [REDACTED]

I am writing in respect of your recent request of 20 June 2017, for the release of information held by the Civil Aviation Authority (CAA).

Your request:

'The Civil Aviation Authority ("CAA") acts as the United Kingdom's nominated National Enforcement Body pursuant to Article 16 of Regulation (EC) No 261/2004 ("Regulation 261/2004").

In conducting its statutory role it is the responsibility of the CAA to ensure that airlines are lawfully complying with the Regulation 261/2004.

Since 26th July 2016 the airline, Ryanair DAC, have introduced a contractual term at Article 15.2 of its general terms and conditions which stipulates that "Passengers must submit claims directly to Ryanair and. Ryanair will not process claims submitted by a third party."

The CAA will no doubt be aware of this contractual term and have carried out an analysis of its validity and lawfulness.

In accordance with the Freedom of Information Act 2000 we would be grateful if you could provide documentation relating to a) the analysis carried out and b) the conclusion reached.'

Our response:

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

The attached document is an extract from an email to Ryanair. The analysis carried out involved confidential communications between the CAA's Consumers and Markets Team and a CAA in-house legal adviser for the purpose of seeking and giving legal advice. These communications are exempt from disclosure in accordance with Section 42 of the FOIA as they are subject to legal professional privilege.

Section 42 is a qualified exemption and we have considered the public interest in the disclosure of this information. The public interest in disclosing the information includes the general principle of transparency, open government and the public right to access information held. The CAA also recognises the public interest in consumers being satisfied that the CAA is effectively protecting consumer rights.

However, there is a strong and important public interest in protecting the principle of legal professional privilege, safeguarding openness in all communications between a public body and its legal advisers to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. We have taken into account the ICO's guidance on this exemption, which states that *the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP. The guidance also provides that additional weight may be added if the advice is recent, as is the case here.*

In addition, the public interest in protecting consumer rights is met through the release of the enclosed extract from an email to Ryanair.

Having considered the factors on both sides, the CAA has concluded that, in relation to the information subject to legal professional privilege, the public interest in maintaining the exemption outweighs the public interest in disclosure and the information, has therefore been withheld. A copy of this exemption can be found below.

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:-

Caroline Chalk
Head of External Information Services
Civil Aviation Authority
Aviation House
Gatwick Airport South
Gatwick
RH6 0YR

caroline.chalk@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 FOIA to appeal against the decision by contacting the Information Commissioner at:-

Information Commissioner's Office
FOI/EIR Complaints Resolution
Wycliffe House
Water Lane
Wilmslow
SK9 5AF

<https://ico.org.uk/concerns/>

If you wish to request further information from the CAA, please use the form on the CAA website at <http://publicapps.caa.co.uk/modalapplication.aspx?appid=24>.

Yours sincerely

A handwritten signature in black ink that reads "Rihanne Stephen". The signature is written in a cursive style with a large 'R' and 'S'.

Rihanne Stephen
Information Rights 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.

Freedom of Information Act : Section 42

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Extract from Email sent on 23/03/2017 at 14:23

From: Consumers and Markets Group (CMG) at the CAA
To: Ryanair

[Part 2 of the Consumer Rights Act 2015](#) on Unfair Terms states that “a term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance between the parties’ rights and obligations under the contract to the detriment of the consumer”

The CJEU decision in the case of [Aziz v Caixa d’Estalvis de Catalunya](#) contained a two stage approach to testing this definition that has since become the accepted legal test for fairness.

1. Significant imbalance: Whether there is a significant imbalance between the parties’ rights and obligations under the contract will depend primarily upon whether the consumer is being deprived of an advantage he would otherwise enjoy under national law.

2 Good faith: In assessing whether a term is contrary to the requirement of good faith the key question is whether, if dealt with “fairly and equitably”, the supplier could “reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.”

As a first step to assuring yourself that your contract term is not unfair you need to consider how the term affects the application of other relevant legal rights and obligations and whether you believe that the average consumer would understand and agree to the term if the consequences of the term were explained to be them. It’s worth remembering that elements of the test may overlap, and a Court considering fairness must also take into account the context of the contract as a whole and all the circumstances in which the contract is entered into.

We recommend that you review the Competition and Market Authority’s [Guidance](#) on Unfair Terms. This includes consideration of the list of consumer contract terms that may be regarded as unfair as set down in Schedule 2 of the CRA15. This list, known as the grey list, includes a term that has the object or effect of inappropriately excluding or limiting the legal rights of the consumer. Paragraphs 5.29.7 and 5.29.8 of the CMA Guidance considers the extent to which terms concerning exclusive jurisdiction and choice of law could be considered such a term. It is also worth considering whether any term that impacts on a consumers ability to make use of legal representation could also be considered in this context.

You should also be aware that the CJEU ruled that an exclusive jurisdiction clause was unfair in *Oceano Grupo Editorial SA v Rocio Murciano Quintero* (C-240/98) case and the *Pannon GSM Zrt v Gyorfi* (C-243/08) case.

The Pannon Ruling states *“It is for the national court to determine whether a contractual term, such as that which is the subject-matter of the dispute in the main proceedings, satisfies the criteria to be categorised as unfair within the meaning of Article 3(1) of Directive 93/13. In so doing, the national court must take account of the fact that a term, contained in a contract concluded between a consumer and a seller or supplier, which has been included without being individually negotiated and which confers exclusive jurisdiction on the court in*

the territorial jurisdiction of which the seller or supplier has his principal place of business may be considered to be unfair.”

Part 2 of the Consumer Rights Act 2015 on Unfair Terms also creates a requirement for your terms to be transparent, meaning that the terms must be written in plain, intelligible language and be legible. The CMA Guidance explains that terms should be drafted to ensure that consumers can make informed choices and that the transparency provisions in the Act have to be understood as demanding ‘transparency’ in the full sense that allows the consumer a proper understanding of the contract for sensible and practical purposes.

Where lack of transparency results in ambiguity the court is required to apply the interpretation most favourable to the consumer and where any ambiguity could cause detriment to consumers, the CMA points out that it may be challenged as unfair even if one of its possible meanings is fair. It is also important that terms that could have a disadvantageous impact on the consumer should be given appropriate prominence, as well as setting out clearly the obligations and the circumstances in which they arise. The legislation says that a relevant term is prominent if it is brought to the consumer’s attention in such a way that an average consumer would be aware of it.