

# CONSUMER

## Law guide: Flight compensation and refunds



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## Introduction

By virtue of EU Regulation 261/2004 air passengers have specific consumer rights under European law. When someone purchases a ticket for air travel they enter into a contract with the airline. One of the terms of this agreement is that you must confirm that you will be ready to take the flight on the date of travel (confirming your reservation) and you must present yourself at check-in to demonstrate that you have a valid ticket and are ready to fly on the date on your ticket.

It is important to note, at this stage, that consumer rights under the above regulation do not apply to passengers who:

- do not have a confirmed reservation
- do not have the correct travel documentation for their journey e.g. visas etc
- do not arrive at the boarding gate in good time (i.e. at least 45 minutes before departure) for their flight
- pose safety or security concerns for the air airline

Where such a situation arises the airline can refuse you boarding the aircraft. The airline is not obliged to offer you any compensation nor are you entitled to receive any.

If, on the other hand, the passenger has presented themselves for check-in and they have been denied boarding against their will, i.e. the flight is overbooked, or their flight has been cancelled or delayed (including diversion), the regulation will apply. The airline must provide you with a written notice setting out the rules for compensation and assistance. These will be discussed in detail below.

### **Informing passengers of their rights**

The operating air airline must ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: 'If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance'.

An operating air airline denying boarding or cancelling a flight must provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. It must also provide each passenger affected by a delay of at least two hours with an equivalent notice.

### **KLM ruling**

Under EU regulations, passengers who experience delays of three hours or more in getting to their final destination are entitled to claim up to €600 (distance dependent) from an airline unless there are 'extraordinary circumstances'.

The European Court of Justice (ECJ) ruled in September 2015 that the Dutch airline, KLM, could not claim that unforeseeable technical problems were an extraordinary circumstance, thus excusing it from paying flight disruption compensation to passengers.

The ruling by the ECJ has set an important precedent and further underpins consumers' rights. It also highlights the position that an extraordinary circumstance has to be an event outside an airline's control.

### **Code sharing**

A code-share agreement is an arrangement where two or more airlines share the same flight code or number. Under this arrangement a seat can be purchased from an airline on a flight that is actually operated by another airline. If airline XX has a code-share agreement with airline YY, a ticket sold by XX will show 'operated by YY'.

All major airlines have at least one, and often multiple, code-share agreements. There are well-known code-sharing alliances. For example the Star Alliance currently has 27 member airlines such as Lufthansa, SAS, Singapore Airlines, Swiss Air etc.

Code-share agreements are particularly relevant if the flight which is the subject of a claim departed from a non-EU airport. A necessary pre-condition for flights into the EU to be eligible is that they are operated by an EU airline. This does not mean that the ticket must be issued by an EU airline but it does mean that the flight must be operated by an EU-licensed airline.

Take the example of a passenger flying from the US to the EU with a Delta Air Lines ticket showing the Delta flight number DL1234. If the arrival of this flight is delayed for more than three hours is this passenger eligible for compensation under this EU Regulation? The flight is eligible for compensation under this Regulation if the flight was operated by, for example, Air France, an EU licenced airline, with whom Delta has a code-sharing agreement, in which case the ticket shows 'operated by Air France'.

## What are 'extraordinary circumstances'?

In the case of cancelled or delayed flights an airline is not required to pay the compensation if the cancellation or delay was caused by 'extraordinary circumstances'. The following considerations apply in determining if extraordinary circumstance exist in the case of any particular incident:

1. An extraordinary circumstance is defined by the following general principle: the event has to meet the three criteria, being unpredictable, unavoidable and external.
2. While there are particular circumstances, e.g. war, weather etc. that are likely to constitute extraordinary circumstances for the purpose of the Regulation, national enforcement bodies are required to examine individual cases to determine whether distinguishing factors exist.
3. To rebut a claim for compensation the air airline must provide proof of the extraordinary circumstances alleged and it must also clearly demonstrate how these circumstances resulted in the flight disruption.
4. After demonstrating the existence of extraordinary circumstances, the air airline must also explain what reasonable measures it took to subsequently avoid the disruption.

A meeting of the National Enforcement Bodies (the national regulators responsible for the airline sector) held on 12th April, 2013 defined the following circumstances as being 'extraordinary':

- war
- political instability
- unlawful act
- sabotage
- security
- meteorological
- de-icing
- airport closure
- medical grounds
- airport closure
- manufacturing defects
- unexpected flight safety shortcomings
- industrial relations issues
- air traffic management

The same meeting defined the following circumstance as 'not extraordinary':

- technical issues

- crew out of hours
- absence of correct flight documentation
- safety inspections which require immediate assessment or repair

## Who do the Regulations apply to?

When Regulation 261/2004 came into effect in February 2005 its objective was to establish common rules and assistance to passengers, in the event that:

- they are denied boarding against their will (i.e. flight is overbooked)
- their flight is cancelled
- their flight is delayed (including being diverted)
- their seat is downgraded

1. This Regulation will apply:

- a) to passengers departing from an airport located in the territory of a Member State of the EU or EEA
- b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State of the EU or EEA, unless they received benefits or compensation and were given assistance in that third country, if the operating air airline of the flight concerned is an EU/EEA airline

2. Passengers are only covered by the Regulation if they:

- a) have a confirmed reservation on the flight concerned and, except in the case of cancellation, present themselves for check-in as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air airline, the tour operator or an authorised travel agent, or, if no time is indicated, not later than 45 minutes before the published departure time, or
- b) have been transferred by an air airline or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

It is important to note that this Regulation will not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it will apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air airline or tour operator.

This Regulation will apply to any operating air airline providing transport to passengers covered by points one and two above. Where an operating air airline which has no contract with the passenger performs obligations under this Regulation, it will be regarded as doing so on behalf of the person having a contract with that passenger.

## Passenger rights

### Denied boarding (overbooked flight)

#### *Voluntary denied boarding*

When an operating air airline reasonably expects to deny boarding on a flight, it will first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air airline. Those passengers who agree to give up their seats are voluntarily denied boarding and must be offered the choice between;

- re-routing as soon as possible
- re-routing at a later date at your convenience
- a refund of the full cost of the unused flight ticket

#### *Involuntary denied boarding*

If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air airline may then deny boarding to passengers against their will.

If boarding is denied to passengers against their will, the operating air airline will immediately compensate them based on flight distance and arrival time (see the chapter on the right to compensation below). As well as the choices offered above passengers will be entitled to care and assistance in the form of:

- meals and refreshments in a reasonable relation to the delay
- hotel accommodation (where an overnight stay becomes necessary)
- transport between the airport and the hotel (where necessary)
- two telephone calls/faxes/emails

Passengers will also be entitled to compensation. See the chapter on 'Right to compensation' for more details.

### Cancellation

In case of cancellation of a flight, regardless of when they were notified of the cancellation the passengers concerned must be offered:

- rerouting as close as possible to the original departure date
- rerouting at a later date
- a refund of the cost of the unused flight ticket



### *Less than seven days*

If you receive less than seven days' notice of the cancellation having chosen the first option above, and your rerouted flight departed no more than one hour before the original departure time and arrived no more than two hours after the original arrival time, you are not entitled to compensation from your air airline. Passengers will be entitled to compensation, if they were give a rerouting outside of these timeframes, unless the airline can prove that the cancellation was caused by extraordinary circumstances. In addition, passengers will also be offered:

- meals and refreshments in a reasonable relation to the delay
- hotel accommodation (where an overnight stay becomes necessary)
- transport between the airport and the hotel (where necessary)
- two telephone calls/faxes/emails

### *Between seven days and two weeks' notice*

If the passenger chose the first option mentioned above, and their rerouted flight departed no more than two hours before the original departure time and arrived no more than four hours after the original arrival time they will not be entitled to compensation. Any rerouting outside of these timeframes would result in compensation to the passenger, unless the airline can prove that the cancellation was caused by extraordinary circumstances.

### *More than two weeks' notice*

Where the passenger has been informed of the cancellation at least two weeks' before the scheduled time of departure they will not be entitled to compensation.

### **Delay (including diversion)**

When an operating air airline reasonably expects a flight to be delayed beyond its scheduled time of departure it should provide its passengers with written information about their entitlements. The timeframes are as follows:

- a) for all flights of 1500 kilometres or less the delay must be greater than 2 hours
- b) in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres, the delay must be greater than three hours
- c) in the case of all non-community flights of more than 3500 kilometres, the delay must be greater than 4 hours.

Where this is the case passengers will be offered the following care and assistance by the operating air airline:

- meals and refreshments in a reasonable relation to the waiting time

- when the reasonably expected time of departure is at least the day after the time of departure previously announced, hotel accommodation and transport between the airport and place of accommodation; and

If the airline does not provide the above assistance to you and you are forced to make your own arrangements, you should retain all your receipts as you will be entitled to reimbursement of your expenses.

### **Refund**

If the flight is delayed at least 5 hours, you must be offered a refund of your ticket instead of flying. A refund is a full refund of the ticket for the part or parts of the journey you have not made and for the part or parts you already made if the flight is no longer serving any purpose to your original travel plan. When relevant, it also includes a return flight to your first point of departure at the earliest opportunity.

### **Delays over three hours**

The Regulation did not provide that compensation would be payable in cases of delay.

However in November 2009 the European Court of Justice ruled in the cases of *Sturgeon v Condor Flugdienst GmbH* and *Bock and Others v Air France SA* that compensation similar to that paid for cancelled flights is payable in delay situations where the delay exceeds three hours. The exception being flights of 3500km which are delayed between three and no more than four hours in which case the compensation payable is reduced by 50%.

## Right to compensation

The amount of compensation that passengers will be entitled to depends upon the distance of the route involved. The amounts payable are as follows:

- a) EUR 250 for all flights of 1500 kilometres or less
- b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres
- c) EUR 600 for all flights not falling under (a) or (b)

In determining the distance, the basis will be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

When passengers are offered re-routing to their final destination on an alternative flight, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked:

- a) by two hours, in respect of all flights of 1500 kilometres or less, or
- b) by three hours, in respect of all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres, or
- c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air airline may reduce the compensation provided for in paragraph one by 50%.

### **Method of payment**

Any compensation referred to above will be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

### **Great Circle Route Method**

The method used in calculating the distances mentioned above is known as the Great Circle Route Method. Essentially, it is the shortest course between two points on the surface of a sphere. Long distance air traffic uses great circle routes routinely, saving time and fuel.

### **Right to reimbursement or rerouting**

The regulations offer passengers the choice of being either reimbursed or rerouted. This is described in detail below:

- a) reimbursement within seven days, by any of the methods described above, of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any

purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure at the earliest opportunity

- b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity, or
- c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats

Where a town, city or region is served by several airports, and an operating air airline offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air airline will bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

### **Right to care**

Where providing such does not add further to any delay, passengers are also entitled, free of charge, to:

- a) meals and refreshments in a reasonable relation to the waiting time
- b) hotel accommodation in cases where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary
- c) transport between the airport and place of accommodation (hotel or other)

In addition, passengers must be offered free of charge two telephone calls, telex or fax messages, or e-mails.

## Upgrading and downgrading

Many airlines, especially those that specialise in long distance travel offer many different ticket classes. These can be first class, business, club, economy etc.. Those who wish to travel in a higher class will pay a higher price for their ticket.

### **Upgrading**

If an operating air airline places a passenger in a class higher than that for which the ticket was purchased, it may not request any supplementary payment.

### **Downgrading**

In some situations a passenger may have bought a ticket for a particular class but the airline does not accommodate them and they are forced to travel in a lower class. This is known as downgrading. If an operating air airline places a passenger in a class lower than that for which the ticket was purchased, it will within seven days, by the methods described above, reimburse:

- 30 % of the price of the ticket for all flights of 1500 kilometres or less
- 50 % of the price of the ticket for all intra-EU/EEA flights of more than 1500 kilometres, except flights between EU/EEA territory and the French overseas departments, and for all other flights between 1500 and 3500 kilometres, or
- 75 % of the price of the ticket for all flights not falling under (a) or (b), including flights between EU/EEA territory and the French overseas departments.

## Making a claim

Claims under this Regulation can be sent directly to the airline concerned. LawOnline's 'Flight compensation and refund claim' (CR001) document process enables you to draft your own claim and contains all of the relevant details.

### How to check the details of your flight

The Flightstats website (<http://www.flightstats.com/go/Home/home.do>) contains data relating to all previous commercial passenger airline flights dating back to 2005. If you intend to claim compensation for cancellation, delay or diversion, you can confirm that there was an issue with the flight by checking the departure and arrival dates and times on this site.

To access the relevant page ('Historical Flight Status Information') you need to provide an email address and password only which gives you immediate access. To get flight data you need to provide airline, flight number and date.

### How to check if the carrier is licenced in the EU/EEA

If you are unsure whether or not the relevant airline is licenced in the EU/EEA, or by which Member State the licenced was issued, you can check a number of sources to find out:

- IATA (International Air Transport Association): Airline members of IATA carrying over 83% of the world's air traffic. You can search its membership list at <https://www.iata.org/about/members/Pages/airline-list.aspx>
- EU Commission: The Commission provides a list of all airlines licenced in by EU/EEA Member States at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.034.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.034.01.0001.01.ENG)
- The airline: The fastest method to find this information may be to contact the airline itself.

### How to calculate the flight distance

For claims relating to cancellation, delay (including diversion) and denied boarding (i.e. overbooked flight) you will need to provide the flight distance if you want LawOnline to calculate the compensation due to you for inclusion in your claim letter to the airline.

The law states that when calculating the distance of a flight, you must use the 'Great circle route method'. This method is traditionally used across the aviation sector to determine the distance between two airports.

Go to Great Circle Mapper (<http://www.gcmap.com/>) and enter the codes of the departure and arrival airports, e.g. DUB-LHR (for Dublin to London Heathrow), in the first field, or space, under the words 'Great Circle Mapper'.

The click on the 'Distance' tab, i.e. the second tab to the right, and the distance will then be displayed in miles, e.g. 280 miles is the distance given by Great Circle Mapper from Dublin Airport (DUB) to London Heathrow (LHR).

The relevant airport codes you need to enter are shown on your airline ticket.

## What if the airline refuses to pay?

The National Enforcement Body (NEB) of each Member State is responsible for departures from airports within its territory and arrivals into such airports from third countries on EU/EEA-licensed airlines.

A full list of the NEBs can be found at:

[http://ec.europa.eu/transport/themes/passengers/air/doc/2004\\_261\\_national\\_enforcement\\_bodies.pdf](http://ec.europa.eu/transport/themes/passengers/air/doc/2004_261_national_enforcement_bodies.pdf)

### Complaints procedure

It is recommended that passengers first submit claims under this Regulation to the relevant airline for its attention. However, if the airline fails to provide you with a reply within six weeks of receipt or if you are not satisfied with its reply, the complaint should be forwarded to the NEB in the member state where the incident took place.

Therefore, if your flight departed from London Heathrow then your complaint should be submitted to the UK NEB, whereas if the flight departed from Shannon then the appropriate body is the Commission for Aviation Regulation. If the incident took place at an airport of departure outside the EU/EEA, the relevant NEB to contact is the one located in the Member State of the flight destination.

The NEB in all member states has a significant consumer protection role and is responsible for monitoring and regulating EU legislation that covers air passengers rights.

### The NEB in the Republic of Ireland

The NEB in the Republic of Ireland is the Commission for Aviation Regulation (CAR). It is an independent body with many functions including the determination of airport charges and the licensing of tour operators, travel agents and air airlines. It deals with complaints arising from flights departing from Irish airports or those arriving at an Irish airport from outside the EU/EEA on a EU/EEA-licensed airline.

It should be noted that NEBs cannot in general, take binding decisions on airlines in respect of individual complaints. If you are still not satisfied with the airline's response, even following a supportive answer from the NEB, you will have to pursue the matter in court or through alternative dispute resolution.

### Taking your case through court

In the event that the airline refuses to pay your claim you can seek payment through the courts using the small claims procedure which is designed to be relatively simple and straightforward, and to be used by claimants themselves without the need for a solicitor or other legal professionals.

The location, i.e. Member State, of the court you should use depends on whether or not you paid for travel and accommodation, i.e. a 'package', or just for travel alone and also on where the airline is licenced.



If your claim relates to a travel package, or involves an Irish airline, you can use the Irish courts. If you paid for a travel ticket only and the airline is licenced in an EU/EEA country other than the Republic of Ireland you will need to send your claim to the relevant court in the country which licences the airline. To do so you should use the European Small Claims Procedure (see below). Again, this procedure is designed to make it easy for claimants to make a claim across an EU border.

A claim can be made against an airline via the District Court using the following LawOnline document processes: see 'Application to the Small Claims Registrar' (DR015) (<https://lawonline.clientsecured.com/lawonline/index.cfm?event=base:product&collection=1%2C3&productId=16404>) or 'Claim notice: debt claim not exceeding €15,000' (DR016) (<https://lawonline.clientsecured.com/lawonline/index.cfm?event=base:product&collection=1%2C3&productId=15874>).

### **European Small Claims Procedure**

The European Small Claims procedure (ESCP) was established under EU Regulation 861/2007 and is available in all member states except Denmark. The main objective of the ESCP is to provide an inexpensive and easy way for someone to pursue a cross-border claim without the need to employ a solicitor. It is also intended to be a wholly written process, i.e. there is no requirement to attend court, but there is provision for an oral hearing in exceptional circumstance. The ESCP can be used in both civil and commercial matters, and the claim cannot exceed €2,000.

To begin the process, a claimant must fill out the ESCP claim form (Form A). The claimant has to give details of their claim, the amount they are seeking and any other details. The claim and any supporting documentation must be in the language of the court or tribunal where the claim is being made.

After the court has received the properly filled out claim form, a standard answer form is prepared. This form, together with a copy of the claim form and any supporting documentation, is served on the defendant by post within 14 days. The defendant then has 30 days to respond to the claim.

Within 14 days of receiving the defendant's response, the court forwards a copy of it and any supporting documentation to you.

If either you or the defendant refuses to accept documentation because it is not in a language you or the defendant understands, the court will ask the other party to supply a translation.

On receipt of the claim form the defendant may respond:

- within 30 days of service by completing the response form and returning it to the court with any relevant supporting documents
- without using the answer form in any other appropriate way

- not respond, in which case the court will give judgment on the claim after 30 days from the date of service

The defendant, in any response, may, amongst other things:

- admit the claim or dispute it in whole or in part
- challenge the ground of jurisdiction on which the claim is based
- challenge the claim by arguing:
  - a) that it is outside the material scope of the ESCP as regards the subject matter, or
  - b) that it is not a cross-border case within the meaning of Article 3 of the Regulation
  - c) state that the value of a claim, if non-monetary, exceeds the limit set for the European Small Claims Procedure;
  - d) dispute the claim based on the substance or on the amount claimed

The steps taken beyond this point depend on the nature of the defendant's response and can include settlement, an oral hearing, judgment or a counterclaim.