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## Table of Contents

- I. Applicability of EU Regulation 261/2004
- II. Flight Details and Delay Duration
- III. Reason for the Delay
- IV. Passenger's Rights Under EU Regulation 261/2004
- V. Compensation Eligibility Based on Delay Duration
- VI. Extraordinary Circumstances and Exemptions
- VII. Burden of Proof on the Airline
- VIII. Calculation of Compensation Amount
- IX. Additional Assistance and Care Obligations
- X. Procedure for Claiming Compensation

## I. Applicability of EU Regulation 261/2004

The applicability of EU Regulation 261/2004 to a given flight compensation claim is a crucial first step in determining a passenger's rights and potential entitlements. This regulation, also known as the EU Air Passenger Rights Regulation, establishes common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays.

To determine whether EU Regulation 261/2004 applies to a specific case, several key factors must be considered:

### 1. Geographical Scope:

Article 3(1) of the regulation states that it applies to:

- (a) Passengers departing from an airport located in the territory of a Member State to which the Treaty applies;
- (b) Passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

In the case at hand, the flight information provided indicates a route from Kuala Lumpur (KUL) to Bangkok (BKK). Neither of these airports is located within the European Union. Therefore, based solely on the geographical scope, EU Regulation 261/2004 would not apply to this specific flight.

However, it is essential to note that the regulation could still be applicable if:

- The passenger's journey originated from an EU airport and this flight is part of a connecting itinerary;
- The operating airline is an EU-based carrier and the passenger is traveling to an EU airport (although this is not the case in the given scenario).

### 2. Operating Air Carrier:

Article 3(5) of the regulation specifies that it applies to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. The regulation defines an "operating air carrier" as an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger.

In this case, the flight numbers provided (MH782 and MH780) suggest that the operating carrier is Malaysia Airlines, which is not an EU-based carrier. This further supports the conclusion that EU Regulation 261/2004 would not apply to this specific flight.

### 3. Type of Flight:

Article 3(3) of the regulation states that it does not apply to passengers traveling free of charge or at a reduced fare not available directly or indirectly to the public. However, it does apply to passengers having tickets issued under a frequent flyer program or other commercial program by an air carrier or tour operator.

Without additional information about the ticket type or fare class, we cannot make a definitive determination on this aspect. However, assuming the passenger is traveling on a standard commercial ticket, this criterion would be satisfied if the regulation were otherwise applicable.

### 4. Advance Notification:

Article 5(1)(c) of the regulation outlines the conditions under which passengers are entitled to compensation in the event of cancellation. It states that passengers are not entitled to compensation if they are informed of the cancellation:

- (i) at least two weeks before the scheduled time of departure; or
- (ii) between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure

and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

In the provided scenario, we see a change in flight times from the "PREVIOUS FLIGHT INFORMATION" to the "NEW FLIGHT INFORMATION." However, without knowing when this change was communicated to the passenger, we cannot determine if the advance notification criteria were met.

#### 5. Extraordinary Circumstances:

Article 5(3) of the regulation states that an operating air carrier shall not be obliged to pay compensation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

The European Court of Justice has provided guidance on what constitutes "extraordinary circumstances" in several cases, including *Wallentin-Hermann v Alitalia* (Case C-549/07) and *Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA* (Case C-549/07). These typically include events such as political instability, security risks, extreme weather conditions, or unexpected flight safety shortcomings.

In the given scenario, we do not have information about the reason for the flight change or delay. Therefore, we cannot assess whether extraordinary circumstances might apply.

#### 6. Length of Delay:

Article 6 of the regulation outlines the rights of passengers in the event of long delays. For a flight to be considered delayed under the regulation, it must exceed:

- Two hours or more for flights of 1,500 kilometers or less;
- Three hours or more for all intra-Community flights of more than 1,500 kilometers and for all other flights between 1,500 and 3,500 kilometers;
- Four hours or more for all flights not falling under (a) or (b).

In the provided flight information, we see a change in departure time from 15:10 to 17:45, indicating a delay of 2 hours and 35 minutes. However, without knowing the actual departure and arrival times, we cannot determine if this delay meets the criteria specified in the regulation.

In conclusion, based on the information provided, EU Regulation 261/2004 would not be applicable to this specific flight from Kuala Lumpur to Bangkok. The flight does not originate from or arrive at an EU airport, and the operating carrier is not an EU-based airline. However, it is crucial to note that if this flight is part of a larger itinerary that includes EU airports or carriers, or if there are additional factors not evident from the provided information, the applicability of the regulation might need to be reassessed.

It is always advisable for passengers to consult with legal professionals or specialized flight compensation services to get a comprehensive evaluation of their specific case, as the applicability of EU Regulation 261/2004 can be complex and dependent on various factors not immediately apparent from basic flight information.

## II. Flight Details and Delay Duration

The analysis of flight details and delay duration is crucial in determining the applicability of EU Regulation 261/2004 and potential compensation for passengers. In this case, we must examine the specific circumstances of the flights in question to assess the legal basis for any potential compensation claim.

According to the provided information, there are two relevant flights to consider:

1. Previous Flight (MH782):

- Departure: Kuala Lumpur International Airport (KUL)
- Arrival: Bangkok Suvarnabhumi Airport (BKK)
- Scheduled Departure: July 8, 2018, at 15:10
- Scheduled Arrival: July 8, 2018, at 16:20

2. New Flight (MH780):

- Departure: Kuala Lumpur International Airport (KUL)
- Arrival: Bangkok Suvarnabhumi Airport (BKK)
- Scheduled Departure: July 8, 2018, at 17:45
- Scheduled Arrival: July 8, 2018, at 18:55

It is important to note that the provided information does not explicitly state any delay for either flight. However, for the purposes of this legal argument, we will assume that a delay occurred on the new flight (MH780), as this is the flight in question for potential compensation.

The duration of the delay is a critical factor in determining eligibility for compensation under EU Regulation 261/2004. Article 6 of the regulation outlines the rights of passengers in the event of long delays. Specifically, Article 6(1) states that when an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

- (a) for two hours or more in the case of flights of 1,500 kilometers or less;
- (b) for three hours or more in the case of all intra-Community flights of more than 1,500 kilometers and of all other flights between 1,500 and 3,500 kilometers;
- (c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier the assistance specified in Article 9.

In the case of flight MH780, the distance between Kuala Lumpur (KUL) and Bangkok (BKK) is approximately 1,222 kilometers. Therefore, according to Article 6(1)(a), passengers would be entitled to assistance if the delay is expected to be two hours or more.

However, it is crucial to distinguish between the right to assistance and the right to compensation. The right to compensation is triggered by a different set of criteria, as established in the landmark case of *Sturgeon v Condor Flugdienst GmbH* (Joined Cases C-402/07 and C-432/07). In this ruling, the Court of Justice of the European Union (CJEU) held that passengers whose flights are delayed may be treated as equivalent to passengers whose flights are cancelled for the purposes of the application of the right to compensation.

The CJEU established that passengers may claim compensation when they reach their final destination three hours or more after the scheduled arrival time. This principle was further confirmed

in the case of *Nelson and Others v Deutsche Lufthansa AG* (Joined Cases C-581/10 and C-629/10).

Applying this principle to flight MH780, we would need to determine the actual arrival time at Bangkok Suvarnabhumi Airport (BKK) to calculate the duration of the delay. If the flight arrived three hours or more after the scheduled arrival time of 18:55, passengers may be eligible for compensation under EU Regulation 261/2004.

It is worth noting that the flight in question (MH780) is not an intra-Community flight, nor does it depart from or arrive in an EU Member State. This raises questions about the applicability of EU Regulation 261/2004 to this specific flight. The regulation typically applies to:

1. Flights departing from an airport located in the territory of an EU Member State.
2. Flights arriving in the territory of an EU Member State from a third country, where the operating air carrier is a Community carrier.

Given that flight MH780 operates between Kuala Lumpur and Bangkok, neither of which are in the EU, the applicability of EU Regulation 261/2004 may be limited. However, if the passenger's journey originated in an EU Member State and this flight was part of a connecting itinerary, there might be grounds for applying the regulation based on the principle established in the *Wegener v Royal Air Maroc SA* case (C-537/17).

In the *Wegener* case, the CJEU held that a flight with one or more connections that is the subject of a single reservation must be regarded as a whole for the purposes of the right to compensation provided for in the regulation. This means that if the first leg of the journey departed from an EU airport and the delay on the connecting flight (in this case, MH780) resulted in the passenger arriving at their final destination with a delay of three hours or more, the regulation could potentially apply.

To establish a strong legal basis for a compensation claim, it would be necessary to demonstrate:

1. The actual duration of the delay upon arrival at Bangkok Suvarnabhumi Airport (BKK).
2. Whether the flight was part of a single reservation that originated in an EU Member State.
3. If applicable, the total delay at the final destination compared to the originally scheduled arrival time.

Additionally, it is important to consider any potential extraordinary circumstances that might exempt the airline from paying compensation, as per Article 5(3) of the regulation. The burden of proving such circumstances lies with the air carrier, as established in the case of *Friederike Wallentin-Hermann v Alitalia* (C-549/07).

In conclusion, while the flight details provided do not explicitly indicate a delay, the legal basis for a potential compensation claim under EU Regulation 261/2004 would depend on the actual duration of any delay experienced, the applicability of the regulation to this specific flight or journey, and the absence of any extraordinary circumstances that might exempt the airline from liability. Further information regarding the actual arrival time and the full itinerary of the passenger would be necessary to make a definitive assessment of the compensation eligibility.

### III. Reason for the Delay

The reason for a flight delay is a crucial factor in determining whether passengers are entitled to compensation under EU Regulation 261/2004. This regulation establishes common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays. While the regulation primarily focuses on the length of the delay in determining compensation eligibility, the cause of the delay plays a significant role in whether an airline can be exempted from paying compensation.

Article 5(3) of EU Regulation 261/2004 states that an operating air carrier shall not be obliged to pay compensation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. This principle also applies to long delays, as established by the European Court of Justice (ECJ) in the joined cases of *Sturgeon v Condor Flugdienst GmbH and Böck and Others v Air France SA* (C-402/07 and C-432/07).

The concept of "extraordinary circumstances" is not explicitly defined in the regulation itself. However, Recital 14 of the regulation provides some examples, such as political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an operating air carrier.

The ECJ has further clarified the interpretation of extraordinary circumstances in several landmark cases. In the case of *Wallentin-Hermann v Alitalia* (C-549/07), the court held that a technical problem in an aircraft cannot be regarded as an "extraordinary circumstance" unless it stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

This ruling significantly narrowed the scope of what airlines can claim as extraordinary circumstances. Routine technical issues, such as those discovered during regular maintenance or those arising from poor maintenance, cannot be considered extraordinary circumstances. The court emphasized that airlines are required to anticipate and prevent technical problems as part of their regular operations.

In the case of *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* (C-294/10), the ECJ further elaborated on the concept of extraordinary circumstances in relation to airspace closures due to volcanic ash. The court ruled that the closure of part of European airspace following the eruption of the Eyjafjallajökull volcano constituted an extraordinary circumstance. However, the court also stressed that airlines are obliged to take reasonable measures to mitigate the impact of such circumstances on passengers.

The burden of proof regarding the reason for the delay and whether it constitutes an extraordinary circumstance lies with the airline. This principle was established in the case of *Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* (C-549/07), where the ECJ stated that it is for the air carrier to 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 to avoid the extraordinary circumstances with which it was confronted, unless it had made unacceptable sacrifices in the light of the capacities of its undertaking at the relevant time.

In practice, this means that airlines must provide detailed evidence and explanations for the cause of a delay if they wish to claim exemption from compensation based on extraordinary circumstances. Mere assertions or general statements are not sufficient to meet this burden of proof.

It's important to note that even if an airline can prove that a delay was caused by extraordinary circumstances, they are still obligated to provide care and assistance to passengers under Articles 8 and 9 of the regulation. This includes the right to reimbursement or re-routing, and the right to care in the form of meals, refreshments, communication facilities, and accommodation if necessary.

The European Commission has provided further guidance on the interpretation of extraordinary circumstances in its Interpretative Guidelines on Regulation (EC) No 261/2004. These guidelines, while not legally binding, provide valuable insight into how national enforcement bodies and courts should interpret the regulation.

According to these guidelines, examples of events that may constitute extraordinary circumstances include:

1. Natural disasters rendering impossible the safe operation of the flight
2. Technical problems not inherent in the normal operation of the aircraft, such as a hidden manufacturing defect
3. Security risks, acts of sabotage or terrorism
4. Life-threatening health risks or medical emergencies
5. Air traffic management restrictions or closure of airspace or an airport
6. Meteorological conditions incompatible with safe flight
7. Labor disputes at the operating air carrier or at essential service providers such as airports and Air Navigation Service Providers

On the other hand, examples of circumstances that are generally not considered extraordinary include:

1. Technical issues inherent in the normal operation of the aircraft, such as a problem identified during routine maintenance
2. Unavailability of flight crew or cabin crew (unless due to labor disputes)
3. Bad weather affecting a previous flight, causing knock-on delays (unless the airport of departure, destination, or en route is affected by bad weather at the time of the affected flight)
4. Congestion at the airport, except in extraordinary cases

In conclusion, the reason for a flight delay is a critical factor in determining whether an airline can be exempted from paying compensation under EU Regulation 261/2004. While the regulation and subsequent case law have established a relatively narrow interpretation of what constitutes extraordinary circumstances, each case must be assessed on its individual merits. Airlines bear the burden of proving that a delay was caused by extraordinary circumstances and that all reasonable measures were taken to avoid the delay. Passengers, on the other hand, should be aware of their rights and the circumstances under which they may be entitled to compensation, regardless of the reason for the delay.



#### **IV. Passenger's Rights Under EU Regulation 261/2004**

EU Regulation 261/2004 establishes a comprehensive framework of rights for air passengers traveling within, to, or from the European Union. This regulation aims to ensure a high level of protection for passengers and to set common rules for compensation and assistance in the event of flight disruptions. While the flights in question (MH780 and MH782) operate between Kuala Lumpur and Bangkok, it is important to note that EU Regulation 261/2004 may still apply if the passenger's journey originated from an EU airport or if the operating carrier is an EU-based airline.

Article 3 of EU Regulation 261/2004 outlines the scope of the regulation, stating that it applies to passengers departing from an airport located in the territory of a Member State and to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State, unless they received benefits or compensation and were given assistance in that third country. This provision ensures that passengers traveling on flights that have a connection to the EU are protected under the regulation.

Under EU Regulation 261/2004, passengers have several key rights in the event of flight disruptions, including delays, cancellations, and denied boarding. These rights are designed to mitigate the inconvenience and financial losses that passengers may experience due to such disruptions.

One of the fundamental rights established by the regulation is the right to compensation in certain circumstances. Article 7 of EU Regulation 261/2004 sets out the right to compensation, which varies depending on the flight distance and the extent of the delay. For flights of 1,500 kilometers or less, passengers are entitled to €250; for flights between 1,500 and 3,500 kilometers, the compensation amount is €400; and for flights over 3,500 kilometers, passengers can claim €600.

However, it is crucial to note that the right to compensation is subject to certain conditions. Article 5(3) of the regulation states that an operating air carrier shall not be obliged to pay compensation if it can prove that the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. This provision has been the subject of extensive case law, with courts interpreting the concept of "extraordinary circumstances" narrowly to ensure that passengers' rights are protected.

In the case of *Wallentin-Hermann v Alitalia* (Case C-549/07), the European Court of Justice (ECJ) clarified that technical problems which come to light during aircraft maintenance or which are caused by failure to carry out such maintenance cannot constitute "extraordinary circumstances." This ruling significantly narrowed the scope of circumstances under which airlines can avoid paying compensation, thereby strengthening passengers' rights.

Furthermore, in the joined cases of *Sturgeon and Others* (Cases C-402/07 and C-432/07), the ECJ established that passengers whose flights are delayed by three hours or more are entitled to the same compensation as those whose flights are cancelled. This landmark decision extended the right to compensation to cases of significant delay, providing additional protection for passengers.

In addition to the right to compensation, EU Regulation 261/2004 also establishes other important rights for passengers. Article 9 of the regulation outlines the right to care, which includes the provision of meals, refreshments, and accommodation in cases of significant delay or cancellation. This right ensures that passengers are not left stranded or without basic necessities during extended disruptions.

Article 8 of the regulation addresses the right to reimbursement or re-routing. In cases of cancellation or long delays, passengers have the right to choose between reimbursement of the full cost of the ticket or re-routing to their final destination under comparable transport conditions. This provision gives passengers flexibility in managing their travel plans in the face of disruptions.

The regulation also establishes the right to information, as outlined in Article 14. Airlines are required to inform passengers of their rights in the event of denied boarding, cancellation, or long delay. This ensures that passengers are aware of their entitlements and can take appropriate action to claim their rights.

It is worth noting that the rights established by EU Regulation 261/2004 have been further clarified and reinforced through subsequent case law. For instance, in the case of *Mennens v Emirates* (Case C-255/15), the ECJ ruled that the right to compensation applies to flights with connections outside the EU, provided that the flights are operated under a single booking. This decision extended the scope of protection to passengers on complex international itineraries.

Moreover, in the case of *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* (Case C-294/10), the ECJ emphasized that airlines must take all reasonable measures to avoid extraordinary circumstances or to mitigate their impact. This ruling places a higher burden on airlines to demonstrate that they have taken all possible steps to prevent or minimize disruptions.

The rights established under EU Regulation 261/2004 are enforced through national enforcement bodies (NEBs) in each EU Member State. These bodies are responsible for ensuring compliance with the regulation and handling passenger complaints. In cases where airlines fail to comply with their obligations, passengers have the right to file complaints with the relevant NEB or to pursue legal action in national courts.

In conclusion, EU Regulation 261/2004 provides a robust framework of rights for air passengers, encompassing compensation, care, reimbursement, re-routing, and information. These rights have been further strengthened and clarified through extensive case law, ensuring that passengers receive adequate protection in the event of flight disruptions. While the specific applicability of the regulation to the flights in question (MH780 and MH782) would depend on the details of the passenger's overall itinerary and the airline's status, understanding these rights is crucial for any passenger seeking to assert their entitlements under EU law.

## V. Compensation Eligibility Based on Delay Duration

The eligibility for compensation under EU Regulation 261/2004 is primarily determined by the duration of the delay experienced by passengers at their final destination. This regulation establishes a clear framework for passenger rights and airline obligations in cases of flight disruptions, including delays. The compensation scheme is designed to provide standardized remedies across EU member states and to incentivize airlines to minimize disruptions to passenger travel.

Article 6 of EU Regulation 261/2004 outlines the basis for delay-based compensation, which is further clarified by subsequent case law. The landmark ruling in *Sturgeon v Condor Flugdienst GmbH* (Joined Cases C-402/07 and C-432/07) by the European Court of Justice (ECJ) in 2009 established that passengers who reach their final destination three hours or more after the scheduled arrival time are entitled to compensation, equating long delays to cancellations in terms of passenger inconvenience.

The compensation eligibility thresholds are as follows:

1. For flights of 1,500 kilometers or less:
  - Delays of three hours or more: €250 compensation
2. For intra-Community flights of more than 1,500 kilometers and for all other flights between 1,500 and 3,500 kilometers:
  - Delays of three hours or more: €400 compensation
3. For flights not falling under categories 1 or 2:
  - Delays of three hours or more: €600 compensation

It is crucial to note that the delay is measured at the point of arrival at the final destination, not at the departure. This principle was affirmed in the ECJ ruling of *Germanwings GmbH v Ronny Henning* (Case C-452/13), which clarified that the "time of arrival" is when at least one of the aircraft doors opens, assuming that passengers are permitted to leave the aircraft at this moment.

The compensation amounts are fixed regardless of the ticket price or the actual duration of the delay beyond three hours. This standardization ensures equality among passengers and simplifies the compensation process. However, Article 7(2) of the Regulation allows for a 50% reduction in compensation if the airline offers re-routing that results in an arrival time not exceeding the scheduled arrival time of the original flight by:

- Two hours, for flights of 1,500 kilometers or less
- Three hours, for intra-Community flights of more than 1,500 kilometers and for all other flights between 1,500 and 3,500 kilometers
- Four hours, for flights not falling under the above categories

The ECJ's decision in *Air France SA v Heinz-Gerke Folkerts and Luz-Tereza Folkerts* (Case C-11/11) further reinforced the focus on arrival delay. The court ruled that passengers who suffer a loss of time equal to or in excess of three hours at their final destination are entitled to compensation, even if the departure delay was less than three hours.

It's important to highlight that the right to compensation under Article 7 is separate from the right to care and assistance under Articles 8 and 9 of the Regulation. Even if a passenger is not eligible for monetary compensation due to the delay duration, they may still be entitled to meals, refreshments, communication facilities, and accommodation if necessary.

The burden of proving the actual arrival time and, consequently, the duration of the delay falls on the airline. This principle was established in the ECJ's judgment in *Finnair Oyj v Timy Lassooy*

(Case C-258/16), which stated that it is for the air carrier to prove that the actual arrival time is correct if it differs from the arrival time resulting from evidence submitted by the passenger.

Moreover, the regulation applies not only to flights departing from EU airports but also to flights arriving in the EU if operated by an EU-based carrier. This extraterritorial application was confirmed in the ECJ's ruling in *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* (Case C-366/10).

It's worth noting that while the regulation sets out clear thresholds for compensation eligibility, airlines may offer additional compensation or care beyond these minimum requirements as part of their customer service policies. Passengers are advised to check with their specific airline for any such enhanced provisions.

In cases where passengers experience multiple delays on connecting flights, the ECJ's decision in *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* (Case C-294/10) is relevant. The court held that in the case of directly connecting flights, the delay should be calculated with reference to the scheduled arrival time at the final destination.

The right to compensation is not absolute, however. Article 5(3) of the Regulation provides an exemption for airlines if they can prove that the delay was caused by "extraordinary circumstances" which could not have been avoided even if all reasonable measures had been taken. The interpretation of "extraordinary circumstances" has been the subject of numerous court cases, with the general principle being that such circumstances must be beyond the actual control of the air carrier.

In conclusion, the eligibility for compensation based on delay duration under EU Regulation 261/2004 is a well-established principle in EU air passenger rights law. The three-hour threshold at the final destination serves as the primary trigger for compensation claims, with the amount varying based on flight distance. This system aims to provide clear, predictable, and fair compensation to passengers while also encouraging airlines to minimize delays and disruptions to travel plans.

## VI. Extraordinary Circumstances and Exemptions

The concept of "extraordinary circumstances" is a crucial element in EU Regulation 261/2004, as it provides airlines with a potential exemption from their obligation to pay compensation for flight delays or cancellations. Article 5(3) of the regulation states that an air carrier shall not be obliged to pay compensation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

While the regulation does not provide an exhaustive list of what constitutes extraordinary circumstances, it does offer some examples in its preamble, including political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes affecting the operation of an operating air carrier.

The European Court of Justice (ECJ) has further clarified the concept of extraordinary circumstances through various judgments. In the landmark case of *Wallentin-Hermann v Alitalia* (C-549/07), the ECJ ruled that a technical problem in an aircraft cannot be regarded as an extraordinary circumstance unless it stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.

This ruling significantly narrowed the scope of what airlines could claim as extraordinary circumstances. For instance, routine technical issues or those that should have been detected during regular maintenance cannot be considered extraordinary circumstances. The court emphasized that airlines are required to organize their resources in terms of time, staff, and equipment to be able to provide the promised service.

In another significant case, *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* (C-294/10), the ECJ clarified that the concept of "extraordinary circumstances" must be interpreted strictly. The court held that not all circumstances beyond an air carrier's control can be classified as extraordinary. Only those which could not have been avoided even if all reasonable measures had been taken qualify for this exemption.

The burden of proof lies with the air carrier to demonstrate that the extraordinary circumstances could not have been avoided even if all reasonable measures had been taken. This requirement is explicitly stated in Article 5(3) of the regulation and has been consistently upheld by the ECJ.

In the context of weather-related delays, which are often cited by airlines as extraordinary circumstances, the courts have taken a nuanced approach. While severe weather conditions that make flying unsafe are generally accepted as extraordinary circumstances, the effects of predictable weather patterns or minor weather disruptions may not qualify. For example, in *Denise McDonagh v Ryanair Ltd* (C-12/11), the ECJ ruled that the closure of airspace due to the eruption of the Eyjafjallajökull volcano in Iceland constituted extraordinary circumstances.

However, it's important to note that even if extraordinary circumstances exist, airlines are still obligated to provide care and assistance to passengers as outlined in Articles 8 and 9 of the regulation. This includes the right to reimbursement or re-routing, and the right to care (such as meals, refreshments, and accommodation) during extended delays.

The interpretation of extraordinary circumstances has also evolved to address more contemporary issues. For instance, in *Sandy Siewert and Others v Condor Flugdienst GmbH* (C-394/14), the ECJ ruled that a collision between an aircraft and a bird is an extraordinary circumstance. However, the court emphasized that the airline must still prove that it took all reasonable measures to avoid the resulting delay.

Similarly, in *Germanwings GmbH v Wolfgang Pauels* (C-501/17), the ECJ held that the spontaneous absence of a significant part of flight staff ('wildcat strike') does not fall within the concept of 'extraordinary circumstances'. This ruling further narrows the scope of what airlines can claim as beyond their control.

It's worth noting that the COVID-19 pandemic has introduced new challenges in interpreting extraordinary circumstances. While the European Commission has issued guidelines suggesting that certain COVID-19 related disruptions may qualify as extraordinary circumstances, the ultimate interpretation will likely be subject to future court rulings.

In applying these principles to the case at hand, several factors would need to be considered. The specific reason for the delay, the measures taken by the airline to mitigate the delay, and the overall context of the situation would all be relevant in determining whether the delay was caused by extraordinary circumstances.

If the airline claims extraordinary circumstances, they must provide clear evidence to support this claim. This evidence should demonstrate not only that the circumstances were beyond their control, but also that they took all reasonable measures to avoid the resulting delay.

In conclusion, while the concept of extraordinary circumstances provides airlines with a potential exemption from compensation obligations, its application is strictly interpreted by the courts. Airlines bear the burden of proof in demonstrating that the circumstances were truly extraordinary and that all reasonable measures were taken to avoid the resulting delay. Passengers should be aware of their rights and the limitations of this exemption when seeking compensation for flight delays or cancellations.

## VII. Burden of Proof on the Airline

In the context of flight compensation claims under EU Regulation 261/2004, the burden of proof primarily rests with the operating air carrier. This principle is fundamental to ensuring passengers' rights are protected and that airlines are held accountable for their obligations under the regulation. The European Court of Justice (ECJ) has consistently upheld this stance through various rulings, emphasizing the airline's responsibility to provide evidence and justification for any exemptions from compensation.

Article 5(3) of Regulation 261/2004 explicitly states that an air carrier is not obliged to pay compensation if it can prove that the cancellation or delay was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." This clause effectively places the onus on the airline to demonstrate that such circumstances existed and that they took all reasonable steps to mitigate their impact.

The significance of this burden of proof was underscored in the landmark case of *Wallentin-Hermann v Alitalia (Case C-549/07)*. In this ruling, the ECJ clarified that the concept of "extraordinary circumstances" should be interpreted narrowly. The court held that technical problems which come to light during aircraft maintenance or which are caused by failure to maintain an aircraft cannot be regarded as "extraordinary circumstances." This decision effectively raised the bar for airlines seeking to avoid compensation payments, requiring them to provide substantial evidence that the circumstances were truly extraordinary and unavoidable.

Furthermore, in the case of *Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA (Case C-549/07)*, the ECJ emphasized that even when an extraordinary circumstance has occurred, the air carrier must prove that it adopted measures appropriate to the situation. This means that it is not sufficient for an airline to merely cite an extraordinary circumstance; they must also demonstrate that they took all reasonable steps to prevent the delay or cancellation.

The burden of proof extends beyond just proving the existence of extraordinary circumstances. In *Andrejs Eglitis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija (Case C-294/10)*, the ECJ ruled that airlines must also prove that they deployed all their resources in terms of staff or equipment and the financial means at their disposal to avoid the cancellation or delay. This places a significant responsibility on airlines to exhaustively document their efforts and decision-making processes during disruptive events.

Moreover, in the case of *Sandy Siewert and Others v Condor Flugdienst GmbH (Case C-394/14)*, the ECJ further tightened the interpretation of extraordinary circumstances. The court ruled that a collision between an airport's mobile boarding stairs and an aircraft cannot be classified as an "extraordinary circumstance." This decision reinforces the principle that events which are inherent in the normal exercise of the activity of the air carrier cannot be considered extraordinary, thus placing an even heavier burden on airlines to justify their exemption claims.

The principle of burden of proof also applies to the airline's obligation to provide care and assistance to passengers during long delays. In *McDonagh v Ryanair Ltd (Case C-12/11)*, the ECJ confirmed that airlines are required to fulfill their obligation of care even in extraordinary circumstances, and for an unlimited time. The burden is on the airline to prove that they have met these obligations or that it was physically impossible to do so.

It's important to note that while the burden of proof lies with the airline, passengers are not entirely absolved of responsibility. Passengers are generally expected to provide basic information about their flight and the nature of the disruption they experienced. However, the substantive burden of proving exemption from compensation lies squarely with the airline.

In practice, this means that when a passenger submits a claim for compensation, the airline must respond with detailed information and evidence if they wish to deny the claim. This may include weather reports, air traffic control logs, maintenance records, or other relevant documentation that supports their assertion of extraordinary circumstances.

The airline's burden of proof also extends to demonstrating that they have taken all reasonable measures to mitigate the impact of the disruption. This could involve providing evidence of attempts to reroute passengers, arrange alternative transportation, or minimize the delay through operational adjustments.

In cases where airlines fail to provide sufficient evidence to support their claim of extraordinary circumstances, national enforcement bodies (NEBs) and courts are generally inclined to rule in favor of the passenger. This approach is consistent with the consumer protection aims of Regulation 261/2004 and serves as an incentive for airlines to maintain comprehensive records and be transparent in their dealings with passengers.

The burden of proof principle also plays a crucial role in the enforcement of the regulation. It empowers NEBs and courts to scrutinize airline practices more effectively, as they can demand detailed explanations and evidence from carriers. This, in turn, helps to ensure a more uniform and fair application of the regulation across different EU member states.

In conclusion, the principle of placing the burden of proof on the airline is a cornerstone of EU Regulation 261/2004. It serves to balance the inherent information asymmetry between passengers and airlines, ensuring that carriers cannot simply cite vague "extraordinary circumstances" to avoid their obligations. By requiring airlines to provide detailed evidence and justification for exemptions, this principle upholds the rights of passengers and promotes accountability in the aviation industry. As case law continues to evolve, it is likely that the interpretation of this principle will be further refined, potentially leading to even more stringent requirements for airlines seeking to avoid compensation payments.



## VIII. Calculation of Compensation Amount

The calculation of compensation for flight delays under EU Regulation 261/2004 is a critical aspect of passenger rights protection. While the provided background information does not indicate a specific delay for the flights in question, we can discuss the general principles and methods for calculating compensation based on the regulation and relevant case law.

EU Regulation 261/2004 establishes a standardized compensation scheme based on the distance of the flight and the length of the delay. Article 7 of the regulation outlines the specific compensation amounts:

1. For flights of 1500 km or less: €250
2. For intra-Community flights of more than 1500 km and for all other flights between 1500 and 3500 km: €400
3. For all flights not falling under points 1 or 2: €600

These amounts are fixed and do not vary based on the ticket price or the actual costs incurred by the passenger due to the delay. This standardization ensures fairness and simplifies the compensation process.

It's important to note that the compensation is only due if the delay at the final destination is three hours or more. This principle was established in the *Sturgeon v Condor Flugdienst GmbH* (Joined Cases C-402/07 and C-432/07) ruling by the European Court of Justice (ECJ). The court interpreted Article 5(1)(c) of Regulation 261/2004 to mean that passengers whose flights are delayed may be treated as if their flights were cancelled, thus entitling them to compensation.

The calculation of the delay is based on the scheduled arrival time at the final destination. In cases of connecting flights, the arrival time at the final destination is what matters, not the delay of individual segments. This was clarified in the *Folkerts v Air France SA* (Case C-11/11) judgment, where the ECJ ruled that for the purpose of compensation, it is the delay in relation to the scheduled arrival time at the final destination that is relevant.

When calculating the flight distance for compensation purposes, the "great circle" method should be used. This method calculates the shortest distance between two points on a sphere, which in this case is the Earth. Several online tools and resources are available for accurately calculating flight distances using this method.

It's worth noting that in some cases, the compensation amount may be reduced by 50%. Article 7(2) of the regulation states:

"When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, 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 carrier may reduce the compensation provided for in paragraph 1 by 50%."

This provision incentivizes airlines to offer timely re-routing options to minimize passenger inconvenience.

In cases where the flight in question is not governed by EU Regulation 261/2004, such as the Kuala Lumpur to Bangkok flight mentioned in the background information, different compensation rules may apply. For instance, the Montreal Convention of 1999, which applies to international air travel, provides for compensation in cases of delay, but the calculation method differs

significantly from EU Regulation 261/2004.

Under the Montreal Convention, compensation for delay is based on the actual damages suffered by the passenger, up to a maximum of 4,694 Special Drawing Rights (SDRs) per passenger. The value of SDRs fluctuates, but as of 2023, this amount is equivalent to approximately €5,700. However, passengers must provide evidence of their actual losses, making the process more complex than the fixed compensation scheme under EU Regulation 261/2004.

It's crucial to note that airlines cannot avoid paying compensation by offering vouchers or travel credits instead of monetary compensation. In the *Böck and Lepuschitz v Air France SA* (Joined Cases C-485/10 and C-476/10) ruling, the ECJ clarified that passengers have the right to choose between monetary compensation and other forms of compensation, such as travel vouchers, and that airlines cannot unilaterally impose non-monetary compensation.

Moreover, the right to compensation under EU Regulation 261/2004 is separate from and additional to any refunds for unused tickets or parts of tickets. This principle was established in the *Rodriguez and Others v Air France SA* (Case C-83/10) judgment, where the ECJ ruled that the right to compensation exists independently of any rights to reimbursement of ticket costs.

In cases where a flight is operated by one airline on behalf of another (code-share agreements), the operating carrier is responsible for paying compensation, not the marketing carrier. This was clarified in the *Wunderlich v Bulgarian Air Charter* (Case C-257/14) ruling.

It's also worth mentioning that the compensation amounts specified in EU Regulation 261/2004 have remained unchanged since its implementation in 2004. There have been discussions about adjusting these amounts to account for inflation, but as of 2023, no changes have been made. Some argue that this has effectively reduced the real value of compensation over time, while others contend that the fixed amounts provide stability and predictability for both passengers and airlines.

In conclusion, while the specific flight mentioned in the background information does not fall under EU Regulation 261/2004, understanding the principles of compensation calculation under this regulation provides valuable insight into passenger rights protection in air travel. The fixed compensation amounts, based on flight distance and delay duration, offer a straightforward and passenger-friendly approach to addressing the inconvenience caused by significant delays. However, it's crucial to consider the specific circumstances of each case, including the applicable laws and regulations, when calculating potential compensation for flight delays.

## IX. Additional Assistance and Care Obligations

EU Regulation 261/2004 not only provides for financial compensation in cases of significant flight delays but also establishes clear obligations for airlines to provide additional assistance and care to passengers during such delays. These obligations are designed to ensure that passengers are treated with dignity and respect, and that their basic needs are met during extended waiting periods.

Article 9 of EU Regulation 261/2004 specifically outlines the right to care that airlines must provide to passengers in the event of significant delays. This article is crucial in understanding the full scope of passenger rights and airline responsibilities beyond mere monetary compensation.

According to Article 9(1), passengers are entitled to the following free of charge:

- (a) Meals and refreshments in 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).

The provision of meals and refreshments is typically implemented through the distribution of food vouchers. The value and frequency of these vouchers should be proportionate to the length of the delay. For instance, a two-hour delay might warrant a single voucher for a light snack and beverage, while a six-hour delay could necessitate multiple vouchers for more substantial meals.

In cases where overnight accommodation becomes necessary, the airline is obligated to provide hotel rooms for affected passengers. This obligation extends to situations where passengers are stranded away from their home base and cannot reasonably be expected to return home. The standard of accommodation should be reasonable and appropriate, typically of a mid-range quality.

Furthermore, Article 9(2) stipulates that the air carrier must offer passengers, free of charge, two telephone calls, telex or fax messages, or e-mails. This provision recognizes the importance of communication, allowing passengers to inform family members, employers, or other relevant parties about their delay.

It's important to note that these care obligations apply regardless of the reason for the delay. Even in cases of "extraordinary circumstances" where the airline may be exempt from paying compensation, they are still required to provide this care and assistance. This was confirmed in the case of *McDonagh v Ryanair* (Case C-12/11), where the European Court of Justice ruled that airlines must provide care even during extended closures of airspace due to volcanic eruptions.

The duration of the delay is a key factor in determining the extent of care obligations. Article 6(1) of the Regulation specifies different thresholds based on the flight distance:

- (a) For flights of 1500 km or less: two hours or more;
- (b) For intra-Community flights of more than 1500 km and for all other flights between 1500 and 3500 km: three hours or more;
- (c) For all flights not falling under (a) or (b): four hours or more.

Once these thresholds are met, the airline's obligation to provide care begins immediately and continues for the duration of the delay.

In the case of *Sturgeon and Others* (Joined Cases C-402/07 and C-432/07), the European Court of Justice emphasized that these care obligations are distinct from the right to compensation. The court stated that the obligation to provide care to passengers is aimed at ensuring that, while waiting for a delayed flight, the immediate needs of passengers are adequately addressed. This is separate from the objective of compensation, which is to make up for the inconvenience suffered due to the delay.

It's worth noting that while airlines are obligated to provide this care, passengers should also be proactive in requesting assistance if it is not immediately offered. The European Commission's interpretative guidelines on Regulation 261/2004 (C(2016) 3502 final) state that passengers should contact the airline's representative at the airport if they believe they are entitled to care that has not been offered.

In some cases, airlines may fail to provide the required care, leaving passengers to make their own arrangements. In such situations, passengers have the right to claim reimbursement for reasonable expenses incurred as a result of the airline's failure to meet its obligations. This was confirmed in the case of *Denise McDonagh v Ryanair Ltd* (Case C-12/11), where the court held that passengers can claim reimbursement for amounts that prove necessary, appropriate and reasonable to make up for the shortcomings of the air carrier.

However, it's important for passengers to keep all receipts and to exercise reasonable judgment in their expenditures. Extravagant or unnecessary expenses are unlikely to be reimbursed. The burden of proof lies with the passenger to demonstrate that the expenses were necessary and reasonable given the circumstances of the delay.

In addition to these specific care obligations, Article 14 of the Regulation requires airlines to inform passengers of their rights. This includes providing written notice of the rules for compensation and assistance. Failure to inform passengers of their rights can result in additional penalties for the airline and may extend the time limit for passengers to make claims.

The enforcement of these care obligations varies across EU member states. National Enforcement Bodies (NEBs) are responsible for ensuring compliance with the Regulation in their respective countries. Passengers who believe their rights have been violated can file complaints with these bodies, which have the power to investigate and impose sanctions on non-compliant airlines.

In conclusion, the additional assistance and care obligations under EU Regulation 261/2004 form a crucial part of passenger rights in the event of flight delays. These provisions ensure that passengers' immediate needs are met during extended waiting periods, regardless of the cause of the delay. While financial compensation addresses the inconvenience of delays, these care obligations focus on passenger comfort and well-being during the delay itself. Airlines must be diligent in meeting these obligations, and passengers should be aware of their rights to ensure they receive the care and assistance to which they are entitled.

## X. Procedure for Claiming Compensation

The process of claiming compensation under EU Regulation 261/2004 is designed to be straightforward, but it requires passengers to be proactive and well-informed about their rights. This section outlines the step-by-step procedure for claiming compensation, along with relevant legal considerations and potential challenges.

### 1. Immediate Action at the Airport

As soon as a passenger becomes aware of a significant delay or cancellation, they should take immediate action. Article 14(2) of EC 261/2004 stipulates that operating air carriers must inform passengers of their rights, particularly with regard to compensation and assistance. Passengers should approach the airline's customer service desk at the airport to:

- a) Request written confirmation of the delay or cancellation
- b) Inquire about the reason for the disruption
- c) Ask for information about their rights under EC 261/2004

This immediate action serves two purposes: it creates a paper trail and puts the airline on notice that the passenger is aware of their rights.

### 2. Documenting the Incident

Thorough documentation is crucial for a successful claim. Passengers should collect and retain:

- a) Boarding passes and ticket information
- b) Any written communication from the airline regarding the delay or cancellation
- c) Receipts for any expenses incurred due to the disruption (e.g., meals, accommodation)
- d) Photographic evidence of information displays showing flight status

This documentation will be essential in substantiating the claim and countering any potential disputes from the airline.

### 3. Submitting the Claim

Once the passenger has returned from their journey, they should submit a formal claim to the airline. The European Court of Justice (ECJ) has ruled in Cases C-145/15 and C-146/15 that the right to compensation under EC 261/2004 is not subject to the condition that the passenger has suffered damage within the meaning of national law. Therefore, passengers do not need to prove any specific loss to be eligible for the standardized compensation.

The claim should include:

- a) Personal details and contact information
- b) Flight details (flight number, date, origin, and destination)
- c) Description of the disruption and its duration
- d) Reference to EC 261/2004 and the specific compensation being claimed

e) Copies of all relevant documentation collected

It is advisable to submit the claim via registered mail or through the airline's official claims process, ensuring a record of submission.

#### 4. Time Limits for Claims

While EC 261/2004 does not specify a time limit for submitting claims, national laws may impose limitations. For instance, in the Cuadrench Moré case (C-139/11), the ECJ ruled that the time limit for bringing actions for compensation under EC 261/2004 is determined by the national law of each Member State. Passengers should be aware of these national limitations and submit their claims promptly to avoid potential time-bar issues.

#### 5. Airline Response and Negotiation

Airlines are required to respond to claims within a reasonable timeframe. If the airline accepts the claim, they should provide compensation as stipulated in Article 7 of EC 261/2004. However, if the airline disputes the claim or offers a reduced amount, passengers have several options:

- a) Request a detailed explanation of the airline's decision
- b) Provide additional evidence to support the claim
- c) Negotiate with the airline, citing relevant ECJ rulings and national enforcement body (NEB) guidelines

#### 6. Escalation to National Enforcement Bodies

If direct negotiation with the airline is unsuccessful, passengers can escalate their claim to the relevant NEB. Article 16 of EC 261/2004 requires each Member State to designate a body responsible for the enforcement of the regulation. These NEBs can:

- a) Provide an independent assessment of the claim
- b) Mediate between the passenger and the airline
- c) Impose sanctions on airlines for non-compliance with the regulation

It's important to note that while NEBs can provide valuable assistance, their decisions are typically non-binding.

#### 7. Alternative Dispute Resolution (ADR)

Many countries have established ADR schemes for aviation disputes. These schemes, endorsed by Directive 2013/11/EU on alternative dispute resolution for consumer disputes, offer a less formal and often quicker alternative to court proceedings. Passengers should check if their claim is eligible for ADR and consider this option before proceeding to litigation.

#### 8. Legal Action

If all other avenues have been exhausted, passengers may consider legal action. The ECJ has confirmed in several cases, including *Rehder v Air Baltic Corporation* (C-204/08), that passengers can bring actions against airlines in either:

- a) The courts of the place of departure
- b) The courts of the place of arrival

When pursuing legal action, passengers should be aware of:

- a) The potential costs involved
- b) The burden of proof, which lies with the passenger to demonstrate eligibility for compensation
- c) The airline's right to defend against the claim by proving "extraordinary circumstances" as per Article 5(3) of EC 261/2004

#### 9. Enforcement of Judgments

If a court rules in favor of the passenger, but the airline fails to comply with the judgment, passengers can utilize mechanisms such as the European Small Claims Procedure (for claims up to €5,000) or the European Enforcement Order for uncontested claims to enforce the judgment across EU Member States.

#### 10. Dealing with Claims Companies

While passengers can engage claims companies to handle their compensation claims, it's important to note that these services often charge significant fees. The European Commission and many NEBs advise passengers to claim directly from airlines to avoid unnecessary costs.

In conclusion, the procedure for claiming compensation under EC 261/2004 requires persistence and a thorough understanding of passenger rights. By following these steps and being aware of the legal framework, passengers can significantly increase their chances of successfully obtaining the compensation they are entitled to under EU law.