March 12, 2021

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Re: AirHelp´s Position Statement regarding the Questions Posed in CTA Decision LET-C-A-72-2020 related to the Air Passenger Protection Regulations (APPR).

Background and "Contact Airline First" (CAF) Clause.

Taking into consideration the fact that the spirit and the goal of the adoption of the Air Passenger Protection Regulations (APPR) are to protect air passengers and to balance their interests with those of the air carriers, we consider that the first thing that should be changed in Canada is the airlines' abuse of consumer rights. Specifically, the clause used by most airlines known as **"Contact Airlines First" (CAF) clause.**

Concept of "Contact Airlines First" (CAF) Clause.

The CAF clause requires that the passenger directly contacts the airline when filing a claim for a flight delay or cancellation, without engaging third parties (like AirHelp or other knowledgeable support) to claim on behalf of the passengers.

This clause protects carriers´ interests at the expense of their customers, depriving passengers from the freedom to choose to have professional help when they seek compensation for delayed/cancelled flights or damaged luggage.

Why does the CAF Clause limit the rights of the passengers?

Although the provision does not restrict the substantive rights of the passengers concerned, it does **restrict them in asserting their rights** because it severely hinders their ability to use professional assistance in asserting their claims.

Most passengers are not experts on air passenger rights, which means that they find themselves in an unequal position when dealing with the airlines, since the carriers are, due to the nature of their business, experts on air passenger rights, whereas this is not the case for passengers. Third parties like lawyers or claim agencies can be used by passengers to counterbalance this unequal position, and increase their chances for their claim to be successfully processed from the start.

The CAF Clause is often used by the airlines as an opportunity to reject and filter out many claims that are actually valid, since the airlines know that most passengers will not pursue the matter further.

Even though passengers can get third party help after having been rejected by the airline, studies show that u**p to two-thirds of Canadian claimants give up their claim after an initial rejection by the airline**, according to an online YouGov survey from 2019 that included 10,400 participants.

A 2019 AirHelp study based on hundreds of thousands of the company's claims also found that **airlines wrongfully reject more than 50 per cent of valid claims at first,** which means that passengers need the help of experts to deal with these claims if they want to succeed.

An AirHelp (YouGov and Survey Monkey) August 2019 shows that:

- 25% of Canadian passengers first claim compensation by using a claim compensation provider and 12% used a lawyer, so Air Canada, by using its Rule 105 F can reject approximately 37% of submitted claims.
- What do Canadian passengers do after a first rejection? 67% quit; 33% contact a claim compensation provider.

The Spirit and Goal of the APPR.

The spirit and the goal of the adoption of the APPR are clear: to protect air passengers and to balance their interests with those of the air carriers, who had been given pretty much free reign to do as they pleased, in the absence of strict rules and compensations to be paid under certain circumstances. The title of the regulations pretty much says it all.

This goal is being harmed by the CAF clause, as it restricts the possibilities of the passenger to assert its rights. Even though a passenger has to pay a fee for a third party to be active, **the passenger always has the possibility to directly contact the airline first - without any clause!** So it is evident that the intention of this clause can only be detrimental for the passenger, as it limits his possibilities.

How can the APPR represent a set of minimum requirements if Air Canada can avoid its application by simply setting its own rules?

Air Canada´s use of the CAF Clause.

Canada's national flag carrier and its biggest airline, Air Canada, for example, has repeatedly been using and invoking this CAF clause, which, as previously stated, limits the rights of air passengers and is therefore not consistent with the spirit and the goal of the APPR. This is a very important issue that needs to be solved.

In this sense, most of the times when air passengers try to use the services of claims management companies like AirHelp, the CAF clause is invoked.

Air Canada has thus rejected most of the applicants claims as submitted by AirHelp invoking the contents of its International Tariff Rule 105 F:

> *"Our records show that the customer has not made a claim directly with Air Canada for the flight delay. In accordance with the contract of carriage, customers must submit their own claims directly to us and allow us 30 days or such time as prescribed by applicable law (whichever is the shorter time period) to respond directly to them before engaging third parties to claim on their behalf. As such, we are unable to process the claim you have submitted on behalf of the customer."*

We consider that Air Canada’s Rule 105 (and any similar CAF rule invoked by the other carriers in Canada) is contrary to the APPR: it violates the air carrier’s obligation to provide compensation to many passengers who are entitled to such compensation, under many circumstances.

By refusing to deal, within the first 30 days after a flight or events giving right to a compensation, with claims filed by third parties on behalf of a passenger, Air Canada avoids paying compensation to many passengers whose claim is perfectly valid.

Air Canada’s Rule 105 aims to avoid Air Canada’s liability under the APPR: a carrier must pay compensation if flights are delayed, cancelled, boarding is denied, baggage is lost, unless circumstances out of its control apply.

The air carrier's liability is clearly stated. It cannot be limited or avoided by using tariff provisions which create abusive obligations for passengers to submit their claims in a certain manner or face their rejections.

The text of the APPR is concise and clear: it should receive literal, minimal interpretation. As the APPR states, without ambiguity:

> *Article 19 (1) If APPR paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation: (…)*
>
> *Article 19 (4) APPR Deadline to respond: The carrier must, within 30 days after the day which it receives the request, provide the compensation or an explanation as to why compensation is not payable. Article 21 APPR A carrier who is required to provide compensation must do so in the form of money.*

The text of the APPR is clear: no discrimination is possible, as the carrier's obligations are set out in a strict manner: the carrier *must* (...)

Therefore, the APPR clearly sets out to create a strict liability regime for the air carriers. Letting them use their tariffs to avoid dealing with large numbers of claims simply cannot be accepted as being fair, just and reasonable.

Air Canada's own Comments about the adoption of the APPR.

Air Canada's own observations about the APPR adoption provide useful information to consider Air Canada's domestic tariff's Rule 105 as contrary to the APPR. Too many passengers are unaware of their rights, as Air Canada admits in the following excerpts of their Response to the adoption of the APPR. By initially (within the first 30 days after their flight) depriving them of an easy, inexpensive solution to handle their claims (third party claim processors), many passengers will be discouraged and abandon their claims altogether.

Overall, Air Canada's own comments in their Response to the adoption of the APPR are contradictory: Air Canada would like to have claims filtered to avoid undue ones, but it does not want third parties (the only ones who can actually filter the claims, especially regarding detailed, localized weather information and flight status evidence which regular passengers can hardly provide) to get involved until and unless a claim has first been rejected or otherwise been treated in an unsatisfactory manner for a passenger: under such circumstances, many passengers simply choose to abandon their well-founded claims and not pursue the matter, in face of such bad faith, as they will feel it is not worth their time and the aggravation to go on.

Rejecting claims filed by third parties, at the express demand of passengers, is a clear attempt to avoid paying compensation for valid claims. Air Canada (or any other carrier who carries on this practice) only wants to avoid a large number of claims, as many passengers would rather not deal themselves with the whole claim process.

Although simple at first glance, the claim process can be long and complex enough for the average passenger to get discouraged enough so as not to pursue the compensation to which they are entitled. Air Canada itself mentions that tariffs are very complicated.

Air Canada's comments about third-party claim processors are exaggerated and show unwarranted fear for legitimate service providers who provide a valuable service on a win-only percentage fee basis to passengers, which is about the only affordable solution to get help, as most lawyers' fees in Canada are too expensive to pursue claims which amount to hundreds of a few thousand dollars in most instances.

CTA´s previous decisions.

The Canadian Transportation Agency (CTA) issued on March 15, 2019, its Decision number 15-C-A-2019 (Application by Colm Heaney et al. against Air Canada) regarding Air Canada's International Tariff Rule 105 (F) -in other words, regarding Air Canada´s CAF Clause.

In that decision, the CTA allowed the application of the CAF clause, but Decision 15-C-A-2019 was rendered before the full coming into force of the APPR on December 15, 2019. Therefore, that case can clearly be distinguished from the present and future applications.

We believe that it is time now for the CTA to issue a new Decision with effect on December 15, 2019, stating that the CAF Clause is indeed contrary to the APPR.

Nevertheless, the CTA not directly revoking that decision does not imply that the Agency is bound by it either, since, in its Decision 250-C-A-2012, at paragraph 61, the CTA recognizes that it is not bound by the *stare decisis* rule:

> [61] Furthermore, even if the Agency had ruled on a similar issue in the past, the Supreme Court of Canada stated in *IWA v. Consolidated-Bathurst Packaging Ltd.* that members of administrative tribunals like the Agency are not bound by the principle of *stare decisis*. A useful explanation for this may be found in the textbook Administrative Law in Canada:
>
> Tribunals may take into account their previous decisions but should not regard those decisions as binding precedent. The doctrine of stare decisis should not be applied because tribunals should be flexible to adapt to new situations and changing times.

> [...]
>
> This flexibility enables a tribunal to apply the public interest in a way that reflects the evolution of policy and effectively regulates dynamic and ongoing relationships between parties. A tribunal may permit relitigation and may come to a different conclusion without risk of court interference. However, the importance of stability in an industry requires that a tribunal have good reason for reversing its decisions.
>
> [...]
>
> The principle of stare decisis does not apply to tribunals. A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances and evolving policy in the field it governs.

To sum up, as previously stated, it is time now for the CTA to issue a new Decision with effect on December 15, 2019, stating that the CAF Clause is indeed contrary to the APPR.

The CAF Clause in Europe.

Ryanair started using the CAF clause several years ago, jointly with similar clauses with the clear intention to limit passenger rights and limit the opportunity for passengers to be helped by third parties. Among these clauses were the "jurisdiction" clause, which forced passengers to sue Ryanair in Ireland only, and a "ban of assignment" which prohibited consumers to assign their compensation claim to any third party, forcing them to fight on their own against Ryanair in front of courts.

After the so-called Bott & Co. decision from 12 February 2019 (Bott Co. Solicitors ./. Ryanair), British Airways started to use this CAF-clause as well, followed by easyJet, TUI, Virgin Atlantic, and Air Canada. This judgement did allow the use of the CAF-clause; however, the decision is being appealed at the UK Supreme Court. After a wave of legal procedures in Europe, **all EU member States courts clearly ruled that the CAF-clause is unfair** according to EU Council Directive 93/13/EEC of 5 April 1993, a few examples here:

- 14.January 2019, District Court in Warsaw, **Poland** (appeal), file number XXVII Ca 1830/18
- 8 February 2019 **Belgian** Cour de Cassation, C.18.0354.N/1, Happy Flights./. Ryanair
- 11. July 2019, East Brabant Court, Eindhoven, **Netherlands**, case number 7564952 (Lovejoy ./. Ryanair)
- 27. September 2019 LG Kornneuburg, **Austria** (appeal), 29 Cg 37/18t -10 (VKI ./. Laudamotion)
- 2. May 2019, Tribunal Judicial Lisbon, **Portugal,** No 4123/19.4T8LSB

- 23 December 2019, District Court of Kaunas, **Lithuania**, Civil Case No e2-2785-1070/2019 (Skycop./. Ryanair)

The reasoning for these decisions were all based on the unfairness of the T&Cs of the airlines, and the violation of either EU law (Directive 93/13) or nationally transposed law. The Austrian verdict of the Court of Kornneuburg (see above) provides a good explanation for the unfairness of this clause:

> The Court stated in its reasoning that dealing with a third party is not a substantial additional effort or expense for the airline. On the other hand, the **clause is grossly unfavorable because the clause makes it much more difficult for consumers to assert their rights**:
>
> - There may be many reasons why a consumer is incapable to claim the compensation himself, e.g. elder passengers who find the correspondence with Laudamotion too stressful, exhausting or complicated.
> - The consumer must be protected in his **private autonomy**. The interest of the defendant to have direct contact with the passenger does not justify this interference with the private autonomy of the consumer – it is the **choice of the passenger**, whether he wants to proceed on his own against the airline or directly use third party representation.
> - If the consumer has to pay the air passenger rights portal or lawyer for his representation in claiming against the defendant, this is the consumer's choice. The defendant does not have to worry about whether passengers should receive the full amount of compensation or have to accept deductions to the passenger rights portals. **The clause is an illegal limitation of asserting EC261 rights according to Art. 15 EC 261.**

In many other member States (Germany, France, Spain, Denmark,..), Ryanair, British Airways or **Canada did not even dare to use the CAF-clause in court procedures** as a defense, knowing that this CAF-clause would have been clearly qualified to be unfair towards consumers.

After years of litigation in many EU countries, on 18 November 2020 the **European Court of Justice** (Case C-519/19) finally judged that one of these consumer unfriendly T&C clauses (the 'jurisdiction clause') is **unfair within the meaning of Article 3(1) of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts**. This proves that the assertion of consumer rights cannot be limited by dubious clauses in the airline's terms and conditions.

Pleadings.

As previously mentioned, taking into consideration the fact that the spirit and the goal of the adoption of the Air Passenger Protection Regulations (APPR) are to protect air passengers and to balance their interests with those of the air carriers, we therefore make the next pleadings on the following general questions of interpretation set out by the CTA´s Letter Decision No. LET-C-A-72-2020m, Subsection [18]:

1. ***How much detail regarding the reason for a flight disruption should be provided by carriers to passengers pursuant to paragraph 13(1)(a) of the APPR, including in situations that evolve, resulting in multiple reasons for delay over time?***

As per paragraph 13(1)(a) of the APPR, a carrier must provide the reason for the delay, cancellation or denial of boarding to the passengers who are affected by that delay, cancellation or denial of boarding. In this sense, air carriers are required to provide passengers affected by a flight disruption with clear, timely and accurate information, including in situations that evolve, resulting in multiple reasons for delay over time. The duty of informing the passengers in a clear, timely and accurate way should apply in any circumstance.
The Agency's guidance document, *Communicating Key Information to Passengers: A Guide*, states that "*communicating with passengers is a key obligation for [air carriers]*", and that *"[air carriers] must provide information that is clear and concise [...] "*.
Related to this, a Court from the EU dealt with the carrier's duty of informing the passengers properly. It was in Case C-354/18 (*Judgment of the Court -Eighth Chamber- of 29 July 2019 [request for a preliminary ruling from the Tribunalul Bacău — Romania] — Radu Lucian Rusu and Oana Maria Rusu v SC Blue Air — Airline Management Solutions Srl*). In that case, the Court stated that:

> Article 4(3) of Regulation No 261/2004, read in conjunction with Article 8(1) of that regulation, must be interpreted as requiring the operating air carrier to provide the passengers concerned with comprehensive information regarding all the options set out in the latter provision; the passengers in question have no obligation to make an active contribution to gathering the necessary information.

To conclude, we must say that we completely disagree with the remarks made by Air Canada in its Response to LET-C-A-72-2020, where the carrier stated that

> *Carriers cannot provide detailed explanations in relation to a specific disruption, and especially not in real time. As previously mentioned, and as noted in the Report, delay reasons are often multiple, interlinked, and evolve over time (...) Airline operations are*

> *far too complex to be realistically distilled and captured into accurate simplicity and are therefore too complex for detailed explanations to be provided in real time*

Even though we acknowledge the complexity of airline operations, carriers can and *must* provide a detailed explanation in relation to specific disruptions as per paragraph 13(1)(a) of the APPR but also as a way to show respect to the passengers. No matter how complex airlines operations are, it is always possible for airlines to state the reasons behind a flight disruption. Otherwise we must understand Air Canada´s position as another clear attempt to avoid paying compensation.

2. ***If a carrier refuses to pay compensation on the basis that a flight disruption was required for safety or was outside its control, how much detail regarding the reason for the flight disruption should be included in the explanation given to the passenger pursuant to subsection 19(4) of the APPR? Should carriers have to explain multiple reasons for a delay when more than one exists?***

In that case, and following the same rationale that we have just exposed in question number 1: the carrier should provide the passenger with an explanation as detailed as possible of the reasons for the delay. If more than one reason for a delay exists, then the carrier should have to explain all these multiple reasons to the passenger in a detailed and timely manner, not just one of them.
The length of the delay should be attributed to the respective reason. Cases of multicausality shall be identified as such, clearly indicating if one reason within the air carrier's control was (multi)causal for the delay.
As stated in the Inquiry Officer´s Report, it has been very common for airlines to reply by stating that compensation was denied due to, for example, "scheduling issues", without any further information.
However, we consider that a reply like this one:

> *In this instance, the compensation you are requesting does not apply because the delay was caused by an event outside of our control. Specifically: This flight was delayed due to crew constraints.*

does not really comply with the requirements set out in Subsection 19(4) of the APPR, since this is not a proper explanation:

> *(4) The carrier must, within 30 days after the day on which it receives the request, provide the compensation or an explanation as to why compensation is not payable.*

Once again, we must say that we completely disagree with the remarks made by Air Canada in its Response to LET-C-A-72-2020, where the carrier stated that

> *A requirement for detailed narratives adjusted to reflect the particularities of each passenger's itinerary will inevitably create an even heavier burden on carriers by increasing the handling time for complaints. These explanations will generate additional exchanges and questions from customers, further increasing handling time. Additional complaints to the Agency will be generated through questioning of the unfolding of events and analysis of categorization.*

There is a difference between providing a detailed explanation and providing contradictory reasons for a delay. It has been a common practice by Air Canada to provide passengers with 2 or 3 different explanations about the reason for the delay or cancellation. We consider that, by asking the airline to provide as little information as possible, this wrong behavior of allowing the carrier to provide different contradictory reasons is actually being encouraged, and this is not consistent with the spirit and goals of the APPR.

3. ***What criteria should be applied to determine the appropriate categorization of a flight disruption with multiple reasons for delay?***

The primary or most significant reason for the flight disruption is the one that should be taken into consideration. If the multiple reasons are completely independent, then the most favorable reason to the passenger should be the one taken into consideration (i.e. the reason that will give the passenger more chances to eventually receive compensation), as per the *protection of weaker parties* principle.

In cases of multicausality, the existence of a causal reason within the airlines control shall lead to a payment obligation of the airline.

In any case, the concurrence of multiple reasons should never be used by the carrier as an excuse to be less transparent when explaining the reasons for delay to the affected passengers: carriers must always be clear when providing information regarding the reasons for flight delays and cancellations.

4. ***What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a crew shortage? When, if ever, would a crew shortage be considered a safety-related reason for a flight disruption, rather than a matter within the carrier's control?***

A flight disruption caused by a crew shortage should be categorized as a **situation within airline control (not required for safety purposes).**

Unless the alleged motive is substantiated by very special circumstances which would render the availability of crews impossible to control by the carrier, the said carrier should always have back-up crews available at major airports. The carrier must predict the level of disruption and allocate enough standby crew to ensure that its planes can fly.

We consider that a crew shortage should be considered a safety-related reason only in those cases where, due to very extraordinary circumstances, the carrier cannot ensure that crew members remain sufficiently free from fatigue so they can operate to a satisfactory level of safety under all circumstances.

Nevertheless, those cases are extraordinary and should not be considered common.

Related to this, in the EU, a Court ruled that "crew sickness" (being "crew sickness" one of the possible causes for "crew shortage") is not one of the extraordinary circumstances airlines can use as a defense against paying flight delay compensation under EU Regulation 261/2004.

The judgement was handed down at Staines County Court in the case of *Davies V British Airways PLC.* District Judge Beck ruled in favor of Eric and Carole Davies, awarding the couple €800 for a delay of 3 hours and 51 minutes on a flight from Catania to London Gatwick in 2012.

District Judge Beck said that although a crew member falling ill mid-flight is "unusual", it should not be considered extraordinary because "it is an inescapable fact that, on a day-to-day basis, members of staff become ill and some are taken ill and at extremely inconvenient times."

The sole exception could be the sickness of an exceptionally high percentage of crew members (e.g. 3 times as high as usual) during a flight or at an airport, where the airline has not any based crew members.

5. ***What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a computer issue or network outage?***

Flight disruptions caused by computer issues or network outages **should normally be considered a situation within the airline control (not required for safety purposes),** being the carrier liable for it.

In the EU, computer issues are not considered to be an "extraordinary circumstance", and therefore the compensation amounts stated in EC261 would be applicable.

An airline has a defense to a claim for compensation if the delay, cancellation or denied boarding was (a) caused by “extraordinary circumstances” which (b) could not have been avoided even if all reasonable measures had been taken.

“Extraordinary circumstances” is not defined in EC261, but rulings of the ECJ have sought to interpret it. The 2009 case of Wallentin-Hermann referred to the circumstances listed in Recital 14 of EC261, namely “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 air carrier”. It went on to state that an event would be regarded as an extraordinary circumstance only if, like those listed in Recital 14, it “is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature and origin”.

A computer issue that could have been prevented is definitely not beyond the actual control of the carrier. A computer issue which could not have been prevented by the airline, but which is part of the regular use of a computer system (typical hacker attacks, typical software errors, outages), should not be considered to be extraordinary. The airline would have to anticipate such an event and prepare with appropriate measures to counteract within a short timeframe.

6. ***How should flight disruptions be categorized when a passenger experiences flight disruptions on multiple flights on their way to their ticketed destination? Should events affecting replacement flights affect the categorization of a flight disruption? For example, should the flight disruption be categorized based on the reason for the initial flight disruption or the reason for the longest delay?***

As explained in question number 3, the primary or most significant reason for the flight disruption is the one that should be taken into consideration. If the multiple reasons are completely independent, then the most favorable reason to the passenger should be the one taken into consideration (i.e. the reason that will give the passenger more chances to eventually receive compensation), as per the protection of weaker parties principle.

Events affecting replacement flights should affect the categorization of a flight disruption as long as it is in favor of the passenger, and the flight disruption should be categorized based on the reason for the initial flight disruption or the reason for the longest delay depending on which one is more favorable to the passenger, which will normally be the reason for the longest delay, but not necessarily.

When a passenger purchases a ticket, he/she enters into a contract with the airline, the Contract of Carriage. There is no doubt that, in this contractual relationship, the passenger is the weaker party, therefore he/she needs to be protected.

The concept of protecting a weaker contractual party is an essential doctrine not only in continental contract law, but also in common law. This concept is reflected, in particular, in such uniform acts as the UNIDROIT Principles of International Commercial Contracts (PICC), Principles of European Contract Law (PECL), Principles, Definitions and Model Rules of European Private Law, and Draft Common Frame of reference (DCFR).

In EU private international Law, consumers are the paradigmatic example for weaker parties, by the protection afforded by European law is not limited to consumers. According to Articles 5, 7 and 8 of the Rome I Regulation it also extends to passengers, (mass) insurance policy holders and employees when these parties enter into choice of law agreements.

In this sense, we completely agree with the remarks made by Westjet in its Response to LET-C-A-72-2020, where the carrier stated that

> *The main consideration should be the main contributing cause of a delay. For example if a weather delay causes a guest to be rebooked for a flight an hour later, and the second flight experiences a 3 hour delay due to unscheduled maintenance but for safety, the main contributing cause of delay to the guests final destination would be the 3 hour delay, not the 1 hour delay caused by missing the initial connection.*

7. ***What should or should not be considered to be "further to scheduled maintenance" as defined in subsection 1(1) of the APPR? Should a new issue identified during the repair of another issue be considered to be found further to scheduled maintenance? Do post-flight maintenance or pre-flight maintenance checks constitute scheduled maintenance?***

Subsection 1(1) of the APPR provides the definition of "mechanical malfunction" defined as "*a mechanical problem that reduces the safety of passengers but does not include a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements*" and "required for safety purposes", which means "*required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations but does not include scheduled maintenance in compliance with legal requirements.*"

Subsection 11 specifically establishes that, in cases of delays, cancellations and denials of boarding that are within the carrier´s control but required for safety purposes, the carrier must provide the passengers with the information set out in section 13 as well as other standards of

treatment, but subsection 11 does not entitle the passenger to receive compensation from the carrier.

The APPR thus establishes that a flight disruption caused by a "mechanical malfunction" is therefore within the carrier's control but required for safety purposes, which means that the carrier does not have the obligation to compensate the passenger.

However, this is not the case for a flight disruption caused by "scheduled maintenance", which the APPR establishes as within the carrier's control, which means that the passenger is entitled to receive compensation from the carrier.

The two related situations that fall within the category of "situation within airline control" and would therefore entitle the passenger to be compensated are a) scheduled maintenance of an aircraft that is necessary to comply with legal requirements, and b) mechanical malfunction of the aircraft identified during scheduled maintenance.

The definition of "further to scheduled maintenance" should be interpreted as broadly as possible. In this sense, a new issue identified during the repair of another issue should be considered to be found further to scheduled maintenance.

Related to this, we completely disagree with the remarks made by Air Canada in its Response to LET-C-A-72-2020, where the carrier stated that "*Scheduled maintenance, in the APPR sense, should be defined as being limited to situations when an aircraft is planned to be taken out of service to perform planned repairs or changes to parts of the aircraft.*" As previously stated, "scheduled maintenance" includes much more than just the situation described by Air Canada, since it also includes, for example, new issues identified during the repair of another issue.

Air Canada also points out that the use of the term "scheduled maintenance" in the Canadian Aviation Regulations (SOR/96-433, "CARs") conflicts with the meaning under the APPR, thus creating confusion, and concludes by stating that *The meaning under the CARs, while appropriate when dealing with strict maintenance issues, should not be used in relation to APPR for the determination of the controllability of flight delays.*

"Scheduled maintenance" in the CARs sense occurs every day on every aircraft, and could include numerous low-level checks that are essentially a walk-around, or checks of tire pressure and condition, brakes, hydraulic fluid quantities, cabin, safety equipment in cabin, slide pressure, engine oil, any obvious holes or punctures, lavatory condition, waste bin, overhead bins, cargo hold, cargo loading system, etc.

Air Canada argues that any issue found during these checks is necessarily unforeseen and safety-related, whereas we consider that these issues are not unforeseen and we actually see no contradiction between the CARs and the APPR, since the APPR should be interpreted in light of the CARs.

Related to this, pre and post flight checks should be considered as scheduled maintenance too, since there is a legal requirement for the captain to conduct pre and post flight checks, and those checks are not required for ad-hoc safety, but primarily for regulatory purposes (as per section 602.60(2) of the Canadian Aviation Regulations (SOR/96-433)).

Therefore, we must disagree with the remarks made by Westjet in its Response to LET-C-A-72-2020, where the carrier stated that pre and post-flight maintenance should not constitute scheduled maintenance because this "*would place an impossible obligation on air carriers*", since, for starters, the CARs makes a specific reference to those checks being legally required. Aside from that, we do not think that considering pre and post-flight maintenance to constitute scheduled maintenance is such a burden impossible for airlines to fulfil.

This also is in line with the distinction between a ***situation within airline control,*** *and* ***a situation within airline control but required for safety purposes*****: in the first one, mechanical problems arise in a scheduled situation,** i.e is a repetitive situation, which is planned beforehand, and takes place in a similar manner every time. This is clearly the case during the pilot's outside check, and all pre-flight operational checks; these are just checks to ensure the airworthiness of the aircraft. They are both required by law, and just necessary to ensure the operation of the flight, which is owed to the passenger. In contrast, situations required for safety purposes are "typically unforeseen events legally required to reduce safety risk to passengers". This comprises all situations after the outside and preflight checks, when typically these events should not occur any more. Pre-flight checks are just made to discover malfunctions before they would become a safety issue. Before the AC has left the parking position (off-blocks), there is no safety issue whatsoever, the airline can just change the aircraft.

As long as the plane has not started to move on the airport runway, we should consider all issues to be either scheduled maintenance or mechanical problems identified during scheduled maintenance.

In other words, since there is a legal requirement for the captain to perform those pre and post flight checks, any issue found before the airplane starts to move should not be considered as required for safety, but for regulatory purposes. Once the plane moves, then it is a safety issue. The pilot's check is therefore not a 'safety check', but a 'functionality check', as otherwise everything is related to technical issues could be called "safety-related", which would not be accurate.

In the EU, when it comes to compensation in case of technical defects, an airline can only be exempted from paying compensation in case of a long delay or a cancellation if it can prove "extraordinary circumstances".

In the case of Corina van der Lans v Kininkliike Luchtvaart Maatschappii, Case C-257/14, further clarification was provided by the Court of Justice of the EU (CJEU) in cases where delays are

caused by so called “technical problems”. In this case, the Court of Justice decided that technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves “extraordinary circumstances”. In cases, where a delay is caused by such technical problems, compensation will be payable by the airlines to passengers where their flights are delayed for longer than two hours.

The CJUE clarified that even a technical problem which has occurred unexpectedly, is not attributable to poor maintenance and is not detected during routine maintenance checks, does not fall within the definition of “extraordinary circumstances” when it is inherent in the normal exercise of the activity of the air carrier. Nevertheless, a hidden manufacturing defect revealed by the manufacturer of the aircraft or by a competent authority, or damage to the aircraft caused by acts of sabotage or terrorism may constitute extraordinary circumstance.

In the case of Wallentin-Hermann (Case C-549/07), the Court sought to interpret the concept of “extraordinary circumstances”, which is not defined in EC 261. This referred to the circumstances listed in Recital 14 of EC261, namely “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 air carrier”. It stated that an event would be regarded as an extraordinary circumstance only if, like those listed in Recital 14, it “is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature and origin”.
In the EU, the pre-flight inspection forms part of the essential requirements for air operation, as required in Annex V (point 6.2) of the ‘Basic Regulation’ (Regulation (EU) 2018/1139). Being relevant to the aircraft’s fitness for the intended flight, this essential requirement is implemented by the Commission Regulation (EU) 1321/2014 for continuing airworthiness.

It is the prime obligation of the airline according to the transportation contract, to provide a functioning aircraft which fulfills all regulatory safety requirements. Despite carrying out all necessary maintenance, it lies within the regular exercise of the operation of an aircraft, that malfunctionings occurs, also shortly before the flight. This is not a safety issue! As the aircraft still is on the ground, this is just a question of providing another functioning aircraft, which the airline might have to provide as a substitute. The decision not to provide such a substitute is not a question of safety, but an economic decision which is deliberately taken by the airline. This decision might also be very understandable to keep the airline's cost low, and to be able to offer more affordable tickets. Yet it does not change the fact that a passenger can expect to be provided with a functioning aircraft, and that the airline will be fully responsible if it fails to fulfill this fundamental obligation. This applies to all technical issues discovered while the aircraft is on the ground before initiating the start/after finishing the landing process on the runway.

All technical issues while being airborne should be considered to be extraordinary circumstances, as they are truly safety related; there typically is no way the airline could mitigate such an occurrence in-flight.

8. ***In situations where a flight disruption is the result of a knock-on effect from a previous flight disruption, what factors should the Agency consider when considering whether the carrier took all reasonable measures to mitigate the impact of the initial disruption as required by subsections 10(2) and 11(2) of the APPR? For example, should the Agency consider:***
    a. ***remoteness of the location;***
    b. ***the location being outside Canada;***
    c. ***other factors that may affect the carrier's ability to locate timely replacement aircraft; and***
    d. ***if the original flight disruption occurred more than one flight earlier in a chain of flight disruptions.***

In situations where a flight disruption was the result of a knock-on effect from a previous flight disruption, subsections 10(2) and 11(2) of the APPR state that the categorization of the previous flight disruption, as either outside the carrier's control or within the carrier's control but required for safety purposes, will also apply to the subsequent flight "if the carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation".

According to European court decisions, extraordinary circumstances are said to have deterred a flight only when they have affected the flight in question. In other words, knock-on effects are not accepted as extraordinary circumstances.

In this sense, we can cite *Case C-74/19 (Request for a preliminary ruling from the Tribunal Judicial da Comarca de Lisboa — Juízo Local Cível de Lisboa — Juiz 18 (Portugal) lodged on 31 January 2019 — LE v Transport Aéreos Portugueses S.A.)*, where the Court concluded that:

> 2. Article 5(3) of Regulation No 261/2004, read in the light of recital 14 of that regulation, must be interpreted as meaning that, in order to be exempted from its obligation to compensate passengers in the event of a long delay or cancellation of a flight, an operating air carrier may rely on an 'extraordinary circumstance' which affected a previous flight which it operated using the same aircraft, provided that there is a direct causal link between the occurrence of that circumstance and the delay or cancellation of the subsequent flight, which is for the national court to determine, having regard in particular to the conditions of operation of the aircraft in question by the operating air carrier concerned.
>
> 3. Article 5(3) of Regulation No 261/2004, read in the light of recital 14 of that regulation, must be interpreted as meaning that for an air carrier to re-route a

> passenger, on the ground that the aircraft carrying that passenger was affected by an extraordinary circumstance, by means of a flight operated by that carrier and resulting in that passenger arriving on the day following the day originally scheduled, does not constitute a 'reasonable measure' releasing that carrier from its obligation to pay compensation under Article 5(1)(c) and Article 7(1) of that regulation, unless there was no other possibility of direct or indirect re-routing by a flight operated by itself or any other air carrier and arriving at a time which was not as late as the next flight of the air carrier concerned or unless the implementation of such re-routing constituted an intolerable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time, which is a matter for the national court to assess.

Another key point here is to determine how the "carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation" should be interpreted.

Also in the EU, "Reasonable measures to be taken by the air carrier" as per Article 5(3) of Regulation 261/2004 must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organizing the flight, take account of the risk of delay connected to the possible occurrence of such circumstances. It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. However, the required reserve time should not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time (*Case C-294/10 Eglītis and Ratnieks*).

Furthermore, we consider that all the factors above mentioned (remoteness of the location, location being outside Canada…) should have been taken into consideration by the airline to prevent the knock-on effect from happening.

Thank you for your consideration of these comments.

Yours sincerely,

DocuSigned by:
12/03/2021
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Christian Nielsen,

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