



ACL Guidance on the EUACA EUSG 4 Interpretation of 'Force Majeure'

The EUACA issued its interpretation of the EU Slot Regulation in relation to Force Majeure in November 2017. Whilst ACL is not bound by the EUACA guidance, ACL will take them into account when considering alleviation. To provide additional guidance on ACL's interpretation of this document and requests for force majeure in general, comments have been added below. The guidance applies to all service types and will be administered in line with the principles of neutrality and non-discrimination. Despite this being a European document, ACL's guidance will be applied across all ACL airports.

Should a carrier require further clarity on this document or would like ACL to review a particular set of circumstances against these guidelines they should make contact with ACL.

1. PURPOSE

This document is aiming at providing guidance to slot coordinators about how the reasons provided by the aircraft operators for the non-utilisation of slots may be interpreted, and eventually considered as justified, according to the existing legal frame and the industry recommendations.

2. REFERENCES

EU Slot Regulation 95/93 (amended)

- Art. 8(1) and 8(2) – 'use it or lose it rule' and eligibility for historic precedence
- Art. 10(4) – reasons for the non-utilisation of slots

EU Regulation 261/2004 on passengers' rights

- Recital 14 – exclusion of obligation for air carriers when extraordinary circumstances occur

Worldwide Slot Guidelines

- Section 8.6 – 'use it or lose it rule'
- Section 8.7 – eligibility for historic precedence
- Section 8.8 – justified non-utilization of slots

3. PREAMBLE

Air carriers are required to operate 80% of the slots in a series held at 31 January or 31 August, as cleared by the Coordinator, in order to qualify for their entitlement to the same series of slots in the next equivalent season.

Unless the air carrier can demonstrate to the satisfaction of the Coordinator that a series of slots has been operated, as cleared by the Coordinator, for at least 80% of



the time for which it has been allocated, all the slots in that series will be placed in the slot pool, unless the non-utilisation can be justified. Justification can only take place for the specific reasons consistent with EU Slot Regulation.

Nonetheless, a regular and transparent dialogue and exchange of information between the air carriers concerned and the Coordinator, as well as with other relevant stakeholders when applicable (e.g. the airport managing body, the ANSP, the regulatory authority, etc.), is strongly advised for the clarity of the process regarding the interpretation of ‘force majeure’.

***ACL Guidance:** The EU Regulation allows 20% cancellations after 31 January for a summer season and 31 August for the winter season. This 20% is made available to cover cancellations that are not covered by the alleviation afforded under the EU Slot Regulation. It is for the carrier to determine how much of the 20% should be protected for unforeseen events, however ACL will not flex its interpretation of force majeure to accommodate commercial cancellations or events that can be reasonably expected to occur. Alleviation will only be granted if the carrier demonstrates it has taken all reasonable steps to mitigate i.e. the cancellations could not have been avoided if all reasonable measures had been taken.*

4. RECOMMENDATIONS

The EUACA believe that the following are examples of ‘force majeure’ events outside the air carrier’s control, caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken¹:

Grounding of the aircraft type generally used for the air service in question - Article 10.4(a)(i)

The grounding of an aircraft type (or engine type) by the manufacturers or by the relevant regulatory authority (e.g. Civil Aviation, EASA) for safety reasons.

***ACL Guidance:** ACL considers a grounding on an aircraft type (or engine type) to be an immediate requirement to cease operations of that type of equipment following a directive from the manufacturer or relevant regulatory authority. Such alleviation would extend to any directive related to any equipment installed on a given aircraft that would result in the requirement for the aircraft type to cease operations.*

Also, the unexpected and compulsory short term maintenance work on an aircraft type (or engine type), imposed on the air carrier by the manufacturers or by the relevant regulatory authority, would be considered as a justified reason for the non-utilisation of slots. What to consider as ‘short term’ should be determined by the Coordinator and discussed with the air carrier concerned, taking into account the details of the maintenance work.

¹ References to Articles 10.4(c) and 10.4(d) of EU Slot Regulation are not included in this EUSG as they are directly related to other specific EU Regulations (No 2407/92 and No 2408/92 respectively)



ACL Guidance: *ACL would consider requests for alleviation where a manufacturer or relevant regulatory authority issues a directive that requires unexpected and compulsory inspection or maintenance to be performed by a given deadline. Where it is necessary to ground aircraft to comply with the directive then ACL would consider alleviation based on the circumstances presented. ACL would review the circumstances on a carrier by carrier basis and would encourage carriers to make contact as soon as possible to discuss the impact and potential cancellations. ACL would not normally consider changes to an aircraft or engines maintenance regime to constitute a grounding of the fleet. Should such a change result in it being impossible to comply without grounding the fleet the carrier should contact ACL to discuss the circumstances being experienced.*

Consequential impact caused by the grounding of an aircraft or engine type should also be considered for alleviation in order to allow air carriers flexibility to mitigate the impact of such grounding. However, the burden of proof rests with the air carrier to demonstrate that the consequential impact is a direct result of grounding that particular aircraft or engine type.

Closure of an airport or airspace – Article 10.4(a)(ii)

Total or partial closure of an airport or airspace as a result of any planned event (e.g. works, restructuring of an airport and/or airspace, implementation or renewal of ATC/airport equipment or facilities) or unplanned event (e.g. extreme weather conditions, action of 'mother nature', failure of ATC services or EDP systems, conflict or political reasons) resulting in at least widespread disruption of services in that period.

ACL Guidance:

ACL considers an unplanned event in relation to extreme weather to be an event that is either unexpected and/or extreme. Weather events that would be reasonably expected at a given airport is neither unexpected nor necessarily extreme. For example it is reasonable to expect that during winter months that there may be cold weather conditions and the possibility of snowfall in Northern Europe. Such an event would only become extreme when such an event resulted in the closure or partial closure of the airport concerned. Whereas snowfall in Dubai would be considered to be completely unexpected and therefore may result in alleviation.

ACL will not consider alleviation for weather events such as wind, thunderstorms, fog, and sandstorms/LVP's (Dubai) if such an event would be normally experienced. ACL would consider that such cancellations (if required) be funded from the 20% allowance. ACL would make a determination after the event based on the conditions experienced as to whether it is considered extreme. Such events of previous extreme weather in the UK would be events such as Storm Katie.

Alleviation will only be considered where it is directly attributable to the event and not where a carrier could have reasonably prepared for such an event. For example a carrier not having sufficient de-icing facilities to cope with winter weather where



it's reasonably expected that winter conditions could occur would not be considered for alleviation.

Generally ACL would require planned works, restructuring of an airport and/or implementation or renewal of ATC equipment to be a likely to cause significant disruption and/or reduced capacity before ACL would consider alleviation. Where such events are planned well in advance and a NOTAM issued by the appropriate authority before the slot return deadline, carriers have the option to use cancellations permitted in the EU Regulation to cover this period. This would particularly be the case where any such change is at the request of the airlines concerned (e.g significant terminal moves instigated by the airlines). Where such events are beyond the carriers control, ACL would expect carriers to advise that such cancellations at the SRD are requesting alleviation and if agreed ACL would protect for the subsequent season. Such early notification allows for the slots to be reused on a non-historic basis.

Consequential impact caused by the closure of an airport or airspace may also be considered for alleviation in order to allow air carriers flexibility to mitigate the impact of such events. However, the burden of proof rests with the air carrier to demonstrate that the consequential impact is a direct result of the closure.

In case of planned capacity reductions, those cancellations made in anticipation of the event at the request of the Coordinator or the relevant authority, either on a voluntary basis or not, would be considered as justified when evaluating the non-utilisation of slots.

ACL Guidance: *Cancellations made at the request of an airport under an agreed capacity reduction scheme such as D vs C at Heathrow may be granted alleviation up to the number of cancellation requested by the airport, despite the event not falling into the extreme category. Requests for reductions are made due to the inability to operate all scheduled flights at times of disruption. Such alleviation would only apply to flights at Heathrow as these conditions are not prevalent at other ACL airports. Cancellations requests apply to carriers that have multiple frequencies at Heathrow and the decision of which flight to cancel is at the carriers discretion. As such unless ACL considered the event to be extreme (see above) the alleviation will not be applied to the other end of route as the carrier can manage the distribution of cancellations utilising the 20% permitted.*

Cancellations requested by a NOTAM issued by the appropriate authority as part of a capacity reduction requirement will be considered for alleviation up to the stated required reduction. A NOTAM advising that there may be disruption but not requesting action from the carrier would not be considered for alleviation automatically. Such a request would be assessed based on the severity of any such action or event.

In case of capacity reductions resulting in cancellations for a prolonged period, the subsequent cancellations during a reasonable period following the opening, partial

or total, should also be considered for alleviation. Such a reasonable period should be discussed between the air carrier and the Coordinator, taking into account the details of the event. In this regard, a transparent dialogue and exchange of information with the air carriers concerned and the airport managing body is highly advised.

Air carriers should explore alternative routings if airspace is disrupted for a prolonged period and, wherever feasible, amend its slots accordingly. The Coordinator should be flexible if revised slot times are required as a result of changed routings within the declared capacity of the airport.

Cancellations at one airport of services to/from another airport by airlines because of total or partial closure at that other airport would be considered outside the air carrier's control for the non-utilisation of slots at both ends of the route. For this purpose, Coordinators are required to exchange information with other Coordinators whenever a closure of an airport or airspace occurs at their airports.

ACL Guidance: *The above guidance applies to such requests.*

Serious disturbance of operations at the airports concerned, including those series of slots at other Community airports related to routes which have been affected by such disturbance, during a substantial part of the relevant scheduling period – Article 10.4(a)(iii)

Serious disturbances which affect a number of airports in the EU for a substantial part of the scheduling period for which, under the original text of Regulation 95/93 a special waiver of the use it or lose it rule would have been requested for example an epidemic outbreak (e.g. SARS), war or hostilities (e.g. Iraq), etc.

Depending on the circumstances, such alleviation may be time limited and the period of alleviation discussed between the Coordinator and the air carrier concerned.

ACL Guidance: *ACL would review such requests on a case by case basis. Any alleviation decision would be based on the impact of the event on operations at the airport and the advice given by the appropriate authorities. Where the airport remains open and there is no regulatory restrictions but circumstances reduce passenger demand, ACL would not grant alleviation as this would be considered as commercial cancellations.*

ACL urges an early dialogue in such circumstances.

Interruption of air services due to action intended to affect these services which makes it practically and/or technically impossible for the air carrier to carry out operations as planned – Article 10.4(b)



Examples of **action intended to affect the services of air carriers** are included below, though the exact circumstances need to be considered carefully in each case:

- Internal strikes which have been formally announced or declared (e.g. by a recognised Union following a ballot process) will be considered for alleviation (though not staff 'working to rule', unless this action has been publicly declared)
- External strikes by critical services (e.g. ATC, customs and immigration, aircraft manufacturers and any other critical service provider at the airport) that directly prevent that airline's operation.
- The withdrawal or suspension of traffic rights as a result of bilateral disputes.
- Temporary withdrawal of permission to operate by a State or any other regulatory authority on the grounds of safety or security (e.g. blacklists)

In all these examples (with the exception of strikes), the alleviation should be time limited, giving the air carrier concerned a reasonable period to find solutions and/or alternatives in order to utilise the slots properly. Such a reasonable period should be discussed between the Coordinator and the air carrier concerned, taking into account all the information available from other interested parties (e.g. the airport managing body, ANSP, the licencing authority, etc.).

ACL Guidance: *ACL would consider external strikes to cover areas critical to flight such as fuelling companies (where no alternative is available), ATC, immigration, customs, security etc. Alleviation would not be extended to non-critical areas. Non Critical services may include catering companies, cleaners other than functions related to potable water and toilet servicing, back office administrative staff such as commercial sales etc. The carrier would need to demonstrate to ACL that the function is critical for alleviation to be considered.*

Withdrawal or suspension of traffic rights and temporary withdrawal of permission to operate should be accompanied by appropriate notification from the relevant authority. Any such event should not be as a result of the actions of the carrier concerned where such actions are within the carrier's control. For example the leasing of an aircraft that does not have the minimum equipment required to operate to a given airport does not constitute force majeure.

There could be also other non-intentional actions outside the air carrier's control that may affect the services of the air carrier concerned (e.g. the interruption of air services following a recommendation from the relevant authority). In these cases, air carriers should discuss the issue in detail with the Coordinator concerned and, where necessary, provide clear evidence of the reasons for requesting alleviation. If the justification of the non-utilisation of slots is accepted by the Coordinator, the alleviation should be time limited as agreed between the Coordinator and the air carrier concerned. In general, it should not be extended further than the coordinated seasons that exist at the time the issue arises.

In all cases the Coordinator should be flexible regarding the reactionary and rotational cancellations and delays arising from the disruptions outlined above which may affect



many other flights on the same day. In this regard, air carriers should provide the Coordinator with information demonstrating that the consequential impact is directly a result of the event/action should it be requested by the Coordinator.

On the contrary, the following are examples of cancellations which should not be considered as 'force majeure':

- Cancellations due to public holidays
- On-the-day technical/mechanical cancellations within the airline's control (e.g. AOG)
- Commercial cancellations within the airlines discretion

ACL Guidance:

In relation to public holiday, should a holiday be declared post the SRD resulting in the closure or partial closure of an airport, ACL will consider request for alleviation.

ACL would not consider any technical/mechanical cancellations on the day for alleviation and such cancellation should be funded from the 20% afforded to airlines by the Regulation.

Additional examples of cancellations which ACL would not consider as force majeure:

- *Late delivery of aircraft*
- *Air Bridge Breakdown*
- *Lack of parking stands*
- *Lack of operational crew*
- *Lack of standby aircraft*
- *Late return of aircraft from maintenance*
- *Scheduled/planned maintenance*
- *ATC slot restrictions*
- *Infeasible Schedules*
- *Religious Festivals such as Ramadan, Easter, Christmas etc*
- *Tour Operators ceasing trading*
- *Tour Operator Hotels not being ready*

A regular and transparent dialogue and exchange of information between the air carriers concerned and the Coordinator, as well as with other relevant stakeholders when applicable (e.g. the airport managing body, the ANSP, the regulatory authority, etc.), is strongly advised for the clarity of the process regarding the interpretation of 'force majeure'.

Additionally, the exchange of information amongst the coordinators of the airports concerned, about those circumstances and events leading to 'force majeure', should also be made by noticing them appropriately (e.g. on the relevant websites).

5. ENFORCEMENT

The air carrier concerned is highly encouraged to contact the Coordinator and request alleviation from the 80/20 rule at the soonest (in advance when the non-utilisation of the slot can be anticipated or, alternatively, as soon as possible after the non-utilisation or disruption occurred), and to discuss how the Coordinator intends to treat the historic entitlements for the affected services, so that there can be certainty about the process. Air carriers must not leave it until the SHLs are sent out to advise the Coordinator of claims for 'force majeure'.

Slots made available by circumstances justified under Article 10(4) (e.g. serious disturbance of operations at Community airports for a substantial part of the season) may be reallocated to other operators on a non-historic basis. The operators will be informed, at the time of allocation, that they will not be entitled to claim historic status.