



COVID-19: Air Passenger Rights



Peter Schäfer
Partner



Zhu Lin Ly
Attorney, LL.M

On 18 March 2020, the European Commission issued an official Notice aimed at clarifying the guidelines on passenger rights amid the COVID-19 crisis.

Among other things the European Commission sets limits to the right to compensation, by deeming the Closing of borders an extraordinary circumstance.

COVID-19 has caused massive disruptions around the world, not least disruptions to the international air traffic, where most commercial air traffic has been grounded.

In light of these challenges and at the request of the organisations of the airlines, the European Commission has issued an official Commission Notice to provide clarity and transparency over the EU rules on compensation and assistance to air passengers who suffer delayed or cancelled flights or who are denied boarding of overbooked flights.

The Commission Notice limits the right to compensation, which may help ease the financial burden on airlines, which are already under severe pressure due to the impact of COVID-19.

Closing of borders is an extraordinary circumstance

The provisions of Regulation no. 261 entitle passengers to compensation of up to EUR 600 if a flight is delayed or cancelled or passengers are denied boarding of an overbooked flight.

Since its adoption in 2004, the Regulation has placed a heavy financial burden on the European airlines and the number of cases relating to the provisions of the Regulation is increasing every year.

One provision in particular set out in Regulation no. 261 has presented major challenges to airlines and is constantly subject to interpretation by courts at both national and supranational levels. Article 5(3) of the Regulation provides that an airline is not obliged to pay compensation if the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

According to case law, the provision stipulates two conditions in order for an airline to be exempt from paying compensation:

1. the disruption of the scheduled travel plans was caused by extraordinary circumstances; and
2. the consequences could not have been avoided by taking reasonable measures.

In its Notice dated 18 March 2020, the Commission limits the right to compensation in cases where cancellation is attributable to the COVID-19 outbreak, as the Commission makes it clear that COVID-19 is an extraordinary circumstance falling within the scope of Article 5(3) where a flight is cancelled due to an outright flight ban by national authorities or due to individual states closing their borders – depending on the circumstances, even if the closing of the borders does not apply to the citizens of the relevant state or any other residents in that state.

The Commission announces that – depending on the circumstances – it may also be legitimate to cancel flights not directly affected by national restrictions at the final destination of the flight. For instance, flights departing from a state that has closed its borders.

Similarly, if an airline finds it necessary to cancel both legs of a stopover flight as a result of COVID-19, for instance due to national restrictions from one or more of the states on the flight route, that may also be legitimate, depending on the circumstances. However, these situations are expected to depend on an individual assessment of the specific circumstances.

One of the overarching considerations expressed in the Commission Notice is that forcing airlines to operate empty flights is in no one's interest.

The Commission goes one step further and says that cancellation may also be justified on grounds of protecting the health of the crew, which will constitute extraordinary circumstances. Consequently, the Commission makes it clear that a direct order or ban from the authorities is not necessarily required in order for extraordinary circumstances to exist in relation to COVID-19, but other measures as a result of COVID-19 may also constitute extraordinary circumstances and thus exempt airlines from having to pay compensation.

Under Article 5(3), airlines must, however, still prove that the cancellation or delay could not have been avoided even if all reasonable measures had been taken. However, the threshold for this requirement must be assumed to be lowered in the face of COVID-19.

Less strict approach to the Regulation

The Commission Notice seems generally to reflect a less strict approach to the interpretation of extraordinary circumstances and the criteria set out in Article 5(3) of the Regulation for the duration of the coronavirus outbreak.

Based on the Commission Notice, it would be reasonable to assume that airlines are exempt from paying compensation to passengers for any cancelled flight scheduled to arrive in Denmark after 12.00 noon on 14 March 2020, when the Danish borders closed.

It will, however, depend on an individual assessment of the considerations made and measures taken by the airline prior to its decision to cancel the flight in question – particularly whether it would make sense to operate the flight despite national restrictions, for instance because the majority of the passengers on the flight are Danish citizens.

The burden of proof of the existence of extraordinary circumstances continues to be on the airlines and, consequently, it is for the airlines to provide documentation showing that the cancellation is, in fact, related to COVID-19. All things considered, discharging this burden of proof is, however, expected to be easier, as states in Europe as well as globally launch measures to combat COVID-19.

Even though the Commission Notice is not directly binding on the Court of Justice of the European Union or national courts of law, the Notice must be deemed a powerful interpretative aid, which also seems to be in line with the principles already laid down by the courts of law regarding Regulation no. 261.

Right to reimbursement, rerouting and care

In addition to the right to compensation, Regulation no. 261 affords a number of other rights to any passenger suffering a cancelled or delayed flight. These rights include the right to reimbursement of the flight ticket and/or rerouting (Article 8) as well as the right to care, if necessary (Article 9).

In its Notice of 18 March 2020, the Commission has made it clear that these rights are *not* affected by COVID-19. As a result, the extraordinary circumstances that may exempt airlines from their obligations to provide compensation do not extend to the rest of the Regulation. In other words, regardless of COVID-19, the Commission maintains the case law already laid down by the Court of Justice of the European Union in its decision C-12/11, McDonagh v Ryanair.

That decision was made in the wake of the closure of part of the European air space following the eruption of the Icelandic volcano Eyjafjallajökull in 2010. Whereas it was held that the closure of the air space constituted extraordinary circumstances exempting the airlines from their obligations to provide compensation, these extraordinary circumstances could not suspend the obligations of the airlines to provide care to the passengers.

In keeping with the Court of Justice of the European Union, the Commission thus makes it clear that neither the provisions of the Regulation nor the aims of the Regulation substantiate any interpretation of *super* extraordinary circumstances exempting the airlines from all of their obligations under the Regulation.

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