



## Aviation during Covid-19: Defending passenger claims

### The issues:

The aviation sector is in uncharted territory. Passenger air travel across the globe has virtually come to a halt, with no immediate end in sight. The plethora of issues facing airlines include rights and obligations arising out of aircraft leasing, accepting state aid to stay afloat and the prospect of passenger claims arising out of the cancellation of flights. In this article, we consider the legal implications of cancelling flights pursuant to Regulation (EC) No. 261/2004 [“the Regulation”].

### Compensation for cancellation of flights

In the UK, airlines have cancelled almost all flights for the foreseeable future. Pursuant to Article 5 of the Regulation, passengers are entitled to compensation if a flight is cancelled, unless the airline can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (Article 5(3) of the Regulation).

A long line of authorities establish that an extraordinary circumstance is one which is beyond the control of the airline and not inherent in the normal exercise of the activity of the carrier. In *Denise McDonagh v Ryanair Ltd* (C-12/11), a case concerning cancellation of flights as a result of the Icelandic ash clouds across Europe, the Court of Justice of the European Union stated that natural disasters could constitute an extraordinary circumstance as they are beyond

the control of the airline. From the EU Commission's Guidance "Interpretive Guidelines on EU passenger rights...in the context of...Covid-19" ["the Guidance"], it appears this global pandemic will be viewed in a similar vein. Airlines may avail themselves of the defence under Article 5(3) of the Regulations where "public authorities take measures intended to contain the Covid-19 pandemic" (3.4 of the Guidance). This can include the cancelling of flights in situations where only certain people will be allowed to take the flight. For example, the FCO has advised against "all but essential travel" meaning only a very small percentage of the people who were booked to travel will now actually be travelling. In such circumstances, it may be legitimate for the airline to cancel the flight in good time to take appropriate organisational measures.

In addition, airlines that cancel flights on the grounds of protecting the health and safety of their crew may also be able to show that this was an "extraordinary circumstance". Given the government's current laws pertaining to the restriction of movement and the social distancing guidelines, it is likely that this will amount to a justified excuse for the purposes of the Regulation.

In any event, the Regulations do not entitle a passenger to compensation if the cancellation is made at least two weeks before the scheduled time of departure (Article 5(1)(c)(i)). As the pandemic has already been going on for a number of weeks and looks to carry on for some while yet, it is likely that many airlines will be cancelling flights well in advance of two weeks before the time of departure.

Accordingly, it is likely passengers will face an uphill struggle to claim compensation for the cancellation of flights arising as a result of Covid-19.

### Re-routing or reimbursement

In the event a flight is cancelled, passengers have the right to be re-routed or reimbursed. The regulation is silent as to the position in the event of a global pandemic which stops almost all flights in the world. It would be disproportionate and potentially economically fatal for airlines to reimburse all passengers who have had their flights cancelled especially when re-routing is not possible until flights resume.

## Right to assistance

Passengers are ordinarily entitled to assistance in the form of meals, refreshments and a hotel stay (where an additional stay becomes necessary) if their flight is cancelled. However, it is arguable that the current scenario where almost all flights in the world are grounded for a prolonged period of time was not envisaged as one that would be covered by the right to assistance in the Regulation. Proportionality is a key component of the Regulation and the substantial financial cost of providing assistance to all passengers for an indeterminate time would be disproportionate.

## Conclusion

Airlines are unlikely to be liable to pay compensation for cancellation of flights due to Covid-19. However, the position is less certain with regards the right to reimbursement or re-routing or assistance. It would appear the drafters of the Regulation did not envisage a global pandemic of this nature sweeping across the world. Airlines would be advised to seek clarity on the position from the European Commission as the implications of this are far reaching, particularly as a number of airlines have suffered substantial financial losses due to grounding of aircrafts and the closing of borders.

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