

COVID-19: non-application of reimbursement obligations under EU Flight Delay Compensation Regulation

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Introduction

The spread of COVID-19 has had a significant impact on air traffic. The result of this once-in-a-century pandemic has been the global collapse of air travel.

Following the air traffic prohibitions and restrictions on mobility imposed by many countries, most airlines have been forced to cancel flights which passengers had already paid for.

This has obviously led to many complaints from affected passengers. In the European Union, most claims have been for the reimbursement of ticket prices and compensation under the EU Flight Delay Compensation Regulation (261/2004).

Interpretative Guidelines and flight compensation

On 18 March 2020 the European Commission published its Interpretative Guidelines on EU passenger Rights Regulations in the Context of the Developing Situation with COVID-19 (Interpretative Guidelines). These guidelines clearly establish that the measures taken by national authorities to contain the COVID-19 pandemic must be considered as extraordinary circumstances within the meaning of Article 5(3) of the EU Flight Delay Compensation Regulation. As a consequence, airlines are not obliged to pay the compensation set out in Article 7 thereof.

However, the rights of assistance under Articles 5 and 8 of the EU Flight Delay Compensation Regulation remain in force. According to consumer associations and many consumer protection authorities, this would oblige airlines to return the price of tickets within the short seven-day deadline set out by Article 8.1(a). According to the International Air Transport Association (IATA), the devastating financial impact that this obligation will have on the industry could result in "the end of many airlines, and with that an enormous number of jobs will also disappear".⁽¹⁾

A number of EU member states have urged the European Commission to indicate whether airlines can offer vouchers for future travel instead of refunds.⁽²⁾ Further, some EU member states have adopted provisions to regulate or clarify that airlines do not need to refund cancelled tickets and can instead issue travel vouchers or establish a period of mandatory negotiation between airlines and passengers in this regard.⁽³⁾

Other countries, such as Canada, have also discarded any obligation to reimburse tickets cancelled due to COVID-19.⁽⁴⁾ In the view of the Canadian legislature, the primary objective of passenger protection consists in providing assistance to transport disrupted passengers to their final destination when possible. Under these regulations, disrupted passengers will have to wait for airports to reopen in order to take flights convenient to them at that time and without any possibility of refund as a result of their flight cancellation.

This raises the question of whether the obligations of reimbursement established under Article 8.1(a) of EU Flight Delay Compensation Regulation apply to flights cancelled due to COVID-19. A deeper analysis may indicate that there are reasons to support a different view.

Article 8.1 contemplates three alternative obligations for flight cancellations, which are in principle at the passenger's discretion:

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- reimbursement in seven days plus return to their point of departure;
- rerouting to their final destination at the earliest opportunity; or
- rerouting to their final destination at a later date at their convenience.

The primary objective of this provision is to provide passengers with a quick and urgent solution in relation to the aim of transport contracts (ie, ensuring that passengers reach their final destination as soon as possible). Article 8(b) provides for a specific obligation to provide transportation to a final destination "at the earliest opportunity", while Article 8(a) provides for the prompt reimbursement of the value of a cancelled ticket "within seven days". The short deadline to process ticket refunds is designed to allow passengers to reorganise their flight plans and make new travel arrangements in view of flight disruptions (eg, booking alternative transport and reaching their final destination "at the earliest opportunity").

It can thus be argued that the EU Flight Delay Compensation Regulation is a specific piece of legislation that serves a particular goal which is inextricably linked to the general availability of flight services. The regulation does not grant an independent right to a ticket refund, but rather an opportunity for passengers to buy new tickets to their final destination if the alternative transportation offered by the airline is not convenient for whatever reason. Recitals 12 and 13 of the regulation support this view.

Separately, Article 8.1(c) sets out a different, mid-term option, not aimed at the primary objective of transporting passengers to their final destination at the earliest opportunity. Rather, it sets out a subsidiary objective of providing transportation "at a later date at the passenger's convenience". Article 8.1(c) applies when a passenger has lost interest in reaching their final destination "at the earliest opportunity" and expresses interest in being transported "at a later date".

In the context of COVID-19, in the case of most flight cancellations, the disrupted passengers simply did not have the opportunity to reach their final destination with their original carrier or another. The Interpretative Guidelines expressly acknowledge that:

- it may be impossible for carriers to reroute their passengers; and
- it may not even be clear for some time when rerouting will become possible.

The sudden and large-scale airport closures prevented airlines from offering any kind of rerouting alternatives. It is therefore clear that passengers cannot be protected by the primary objective of Article 8.1 of the EU Flight Delay Compensation Regulation (ie, receiving short-term material assistance that enables passengers to quickly reach their final destination, be it with their original carrier or another). Clearly, in the present context, passengers cannot reach their final destination with another carrier by using the refunded amount of their initial ticket purchase.

Balance of interests

From a balance of interests perspective, forcing airlines to make potentially substantial and swift reimbursements would be in breach of the principle of proportionality. This principle requires that measures implemented through EU provisions are appropriate to attain the objective pursued and must not go beyond what is necessary to achieve this aim in order to strike an equitable balance of interests.⁽⁵⁾ Further, the principle of good faith, which is embodied in many national legal systems and international texts and has been accepted by the European Court of Justice as applicable to international contracts, must also be respected.⁽⁶⁾

The balance of interests established under Article 8.1 is based on the assumption that air carriers will generally be in a position to offer and provide alternative transportation and ticket refunds will be an exception. This position and the good faith principle are obviously not respected when airlines cannot provide alternative transportation but, instead, must process large-scale refunds for passengers. The necessary balance between parties affected by disrupted contracts must include the opportunity for airlines to offer alternative rerouting options to passengers. This possibility for airlines deserves appropriate legal protection. Thus, in a COVID-19 context, it can be argued that airlines should be allowed to legally exclude the repayment and rerouting obligations set out under paragraphs Articles 8.1(a) and Article 8.1(b) of the regulation.

Conversely, COVID-19 does not seem to have impaired the secondary objective of Article 8.1: airlines should still be obliged to provide alternative transportation as set out in Article 8.1(c) "at a later date at the passenger's convenience". From this perspective, the aviation industry's proposal to offer travel vouchers to disrupted passengers makes perfect sense and can be held to comply with the regulation.

Some airlines have even gone as far as offering vouchers for other destinations and not just the initially scheduled destination. As the IATA indicates, "passengers have the right to get their money". Thus, such vouchers will need to be issued with a final option to be cashed in or renewed

after a reasonable period to avoid situations of unjust enrichment and comply with Article 8.1(a), duly adapted to the COVID-19 fallout. A 12-month validity period for such vouchers would be reasonable in accordance with the EU Commission Recommendation 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic.(7)

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Endnotes

(1) [Passenger Ticket Refunds During COVID-19 Crisis](#).

(2) Belgium, Bulgaria, Cyprus, the Czech Republic, Greece, Ireland, Latvia, Malta, Poland, Portugal, Germany, Spain, Romania and Estonia.

(3) Italy (Article 28.8 of Decree-Law 9/2020 and Article 88.1 of Decree-Law 18/2020, Greece (Article 70 of the Act of Law issued on 13 April 2020), Spain (Article 36 of Royal Decree-Law 11/2020).

(4) Under the Canadian Air Transportation Act ([Air Passenger Protection SOR/2019-150](#)), the COVID-19 pandemic obliges airlines to provide effective alternative transportation to final destination only when possible but does not entail any reimbursement obligation ("require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs").

(5) Case C-210/00 *KäsereiChampignon Hofmeister* [2002] ECR I-6453, paragraph 59; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122; and *SwedishMatch*, paragraph 47.

(6) Such as the 1980 UN Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Draft Common Frame of Reference.

(7) C/2020/3125, Official Journal L-151 of 14 May 2020.

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