

The logo features a stylized orange arch above the number '3', which is centered between two horizontal lines. Below the '3' is the text 'HARE COURT' in a serif font.

# 3 HARE COURT

## **Flight Cancelled or Delayed by Coronavirus? - EU Guidelines Suggests Claims Will Fail**

By Regulation (EC) No 261/2004 air passengers are given various rights when a flight on which they are booked (and have presented themselves on time to check-in for) suffers cancellation or a long delay. The suite of rights concerned generally apply to flights leaving from or arriving into a European Union airport and these remain applicable (at the time of writing) to flights leaving from or arriving into a United Kingdom (or Gibraltar) airport.

One such right is the right to be paid a fixed sum of compensation for a cancelled flight, or one which is delayed by at least 3 hours. Here, passengers are automatically entitled to such compensation unless the airline can show that the cancellation or delay was caused by 'extraordinary circumstances' that could not have been avoided even if all 'reasonable measures' had been taken by the airline (note, there is no right to compensation if the cancellation is made more than 14 days in advance).

The question of whether an extraordinary circumstance exists is often hotly contested. In terms of the applicable legal test, the Court of Justice of the European Union has recently restated that:

'events may be classified as "extraordinary circumstances", within the meaning of article 5(3) of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control, both conditions being cumulative.' *Moens v Ryanair Case C-159/18*

Concerningly for airlines given the ongoing COVID-19 pandemic (and, it may be felt, unfairly), the United Kingdom courts have generally not regarded illness as amounting to an extraordinary circumstance (see, for example, *Bass v EasyJet Airline Co Ltd* [2019] 10 WLUK 731 in which [Daniel Black](#) of [3 Hare Court](#) appeared for easyJet).

As such, the European Commission's Guidelines published on 18 March 2020 (and available at <https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf>) are likely to bring some considerable relief to an industry which is already facing an unprecedented financial challenge. While not binding, the Guidelines make clear that extraordinary circumstances should be established in three COVID-19 related circumstances. These are:

- Where public authorities prohibit certain flights;
- Where public authorities prohibit the movement of persons in a manner that, as a matter of practical reality, means the flight in question cannot be operated. Indeed, the European Commission further suggested that in circumstances where public authorities prohibit the movement of persons but allow for the movement of people who have a relevant derogation (for example, nationals or residents of the state in question) then an extraordinary circumstance may also be deemed to exist;
- Importantly, the Guidelines also envision that a cancellation which is shown to be justified 'on the grounds of protecting the health of the crew' should be considered as being 'caused' by extraordinary circumstances, something which it is expected will limit the effect of the restrictive approach taken by UK courts to 'illness,' as seen in *Bass* above;

Additionally, the European Commission advised that an extraordinary circumstance may also be deemed to exist:

- Where no person would take a particular flight so that it would remain empty if it was not cancelled, remarking that it can be appropriate for airlines to act in 'good time' in this regard; and,
- In other specific instances related to COVID-19, it otherwise being made clear by the Commission that the examples in Guidelines are not exhaustive;

Ultimately, these Guidelines are characterised by their pragmatism as well as their adaptiveness to the extraordinary times which the industry – and passengers – currently face. It is respectfully suggested that the Courts would be acting appropriately in following them.

*Article written by [Daniel Black](#)  
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