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Placing *Wallentin-Hermann* in Line with Continuing Airworthiness
A Possible Guide for Enforcers of EC Regulation 261/2004

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On December 2008, the European Court of Justice (ECJ) in its preliminary ruling in Wallentin-Hermann v. Alitatlia *(Case No. C-549/07) tried to give more guidance on whether a technical defect can be regarded as an 'extraordinary circumstance' in the sense of EU Regulation 261/2004. For this, the Court came up with a further specification of this doctrine, namely that in order to make a technical defect an extraordinary circumstance, two requirements must have been fulfilled. First, the event must not be inherent to the normal activity of the air carrier, and second, the event must be beyond the actual control of the air carrier on account of its nature or origin. For courts and enforcement bodies, it seems to be tempting to consider nearly every event that creates an aircraft on ground (AOG) situation as inherent to the normal activity of an air carrier. Whether such event comprises bird strike, collision, or instant failure of components is not relevant as long as you argue that such events are inherent to the normal activity. This article intends to put the* Wallentin-Hermann v. Alitalia *doctrine in perspective by comparing its take on technical defects with how technical defects are seen in the field of airworthiness and flight safety.*

1. INTRODUCTION

A Transavia flight from Eindhoven, the Netherlands, to Alicante, Spain, was scheduled to depart at 12:00 hours on 7 April 2007. Unfortunately, on the previous day at the Airport of Tenerife at 22:35 hours, a removable passenger stair collided with an aircraft (Boeing 737) of Transavia, causing severe damage leading to a so-called AOG (aircraft on ground) situation, meaning, the aircraft was outside the limits of airworthiness and therefore not able to operate. Due to this unexpected loss of capacity, the schedule for the next day (i.e., 7 April) was no longer executable as planned. Transavia was, however, able to lease a larger Boeing 767 aircraft from another carrier. The passengers were carried from Eindhoven to Alicante via an intermediate stop at Amsterdam, with the hired 767. Passengers arrived six hours later at Alicante than originally scheduled.

Passengers claimed compensation for the cancellation of their flight, and the case was heard by the Haarlem lower court. The court ruled[1] that taking part in aviation entails the

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[1] Subdistrict Court Haarlem, The Netherlands, 6 May 2009, CV Expl. 08-10902.

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risk of accidents, and therefore, the collision with a passenger stair was not to be seen as an extraordinary circumstance within the meaning of EC Regulation 261/2004 (hereinafter 'the Regulation').

This view on technical defects related to the application of the Regulation is standard in the Netherlands. In its decisions, the Dutch National Enforcement Body (NEB) and courts up to now nearly always view technical defects – based on its application of the *Wallentin-Hermann v. Alitatlia* (hereinafter '*Wallentin-Hermann*') judgment, dated 22 December 2008 of the European Court of Justice (ECJ) (Case No. C-549/07) – as not being an extraordinary circumstance in the sense of the Regulation, because they consider any technical difficulty as inherent to the normal operation of the air carrier. In doing so, a strict liability is created and thereby makes the term, and exculpation on the basis of 'extraordinary circumstance' (Article 5(3) Regulation), moot.

The intention of this article is to offer some guidance in the practical application – by courts and enforcement bodies – of the said *Wallentin-Hermann* judgment.

2. Correct Test of Extraordinary Circumstance

For the assessment of the question whether a certain cancellation entails an obligation to pay compensation pursuant to Article 7 of the Regulation, it is relevant whether the cancellation is the result of an extraordinary circumstance that could not have been avoided even if all reasonable measures had been taken (see Article 5(3) in conjunction with Recital 14 of the Regulation).

In this connection, it must be stressed that Article 5(3) uses as a criterion whether the cancellation is caused by *an extraordinary circumstance that could not have been avoided even if all reasonable measures had been taken* and *not* whether the *cancellation* could not have been avoided even if all the 'reasonable measures' had been taken (such as the acute or structural hiring of expensive additional reserve aircraft capacity).

To put it differently, on the strength of the Regulation, the essence is to determine what measures the air carrier could possibly have taken in all reason to avoid the occurrence of the extraordinary circumstance itself (weather conditions, strike action, bird strike, lightning strike, collision, technical defect, etc.).

3. Technical Defect and Wallentin-Hermann

In the case of a technical defect as a result of which safe operation is no longer possible (outside the limits of airworthiness), the Regulation applies the test whether the occurrence of that technical defect may be viewed as *an extraordinary circumstance that could not have been avoided even if all reasonable measures had been taken*; this is in the sense of Article 5(3) of the Regulation.

The question is therefore whether the air carrier could have avoided the relevant technical defect by taking 'all reasonable measures'.[2]

In the *Wallentin-Hermann* judgment,[3] the Court did an attempt to define in more detail the phrase 'extraordinary circumstance' (*which could not have been avoided even if all reasonable measures had been taken*) as included in Article 5(3) and defined in more detail in Recital 14 of the Regulation. This to be able to eventually answer the question whether a technical defect can be regarded as such an extraordinary circumstance.

The Court has provided (Ground 23) that a technical defect may be an 'unexpected flight safety shortcoming' – as referred to in Recital 14 of the Regulation.

However, in order to make a technical defect an extraordinary circumstance – in the sense of the Regulation – the Court holds that two requirements must have been met (cumulatively):

- an event that is *not* inherent to the normal activity of the air carrier concerned and
- an event that is *beyond the actual control* of that carrier on account of its nature or origin.[4]

It follows therefore from *Wallentin-Hermann* that one must assess whether or not, with regard to the relevant technical defect, it is a matter of an event that is 'inherent' to the normal activity of the air carrier and is beyond the actual control of the air carrier.

In that way, the issue is the meaning of the term 'inherent to'. Inherent means 'belonging to the intrinsic nature of' or 'forming an essential element of'. Within that framework, *Wallentin-Hermann* can also be understood because the carrier relied on a technical (engine) defect that surfaced during the performance of a regular maintenance check.

It is indeed – in my opinion – an essential element of the normal activity of an air carrier that (1) proper and timely maintenance is performed and (2) technical defects/ problems may emerge while performing such maintenance. The Court consequently holds this subject in *Wallentin-Hermann* (Grounds 24 and 25) – *that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is, moreover, in order to avoid such problems and to take*

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[2] The first time that prejudicial questions were asked about the term 'extraordinary circumstances' in the sense of Art. 5(3) of the Regulation was in C-396/06 (*Kramme/SAS*), on which occasion Attorney General Sharpston gave an advisory opinion on 27 Sep. 2007. That case was eventually settled, so that the European Court of Justice (ECJ) did not discuss the substance of the case. According to Attorney General Sharpston, the issue in the force majeure provision of Art. 5(3) is whether an air carrier must prove that the cancellation was the result of (1) circumstances that could not have been avoided even if all reasonable measures had been taken and (2) were extraordinary (s. 31). According to the Attorney General, technical problems whereby an aircraft must remain on the ground are not automatically excluded from the term 'extraordinary circumstances' (s. 52).

[3] ECJ, judgment of 22 Dec. 2008, *Wallentin-Hermann v. Alitatlia*, Case C-549/07.

[4] In fact, this gives a further explanation of the phrase 'an extraordinary circumstance which could not have been avoided even if all reasonable measures had been taken'. The fact is that the term 'extraordinary circumstance' is elaborated by the statement that it must be an 'event which is not inherent to the normal activity of the air carrier'. Besides the standard 'which could not have been avoided even if all reasonable measures had been taken' is elaborated further in *Wallentin-Hermann v. Alitatlia* by the statement that 'the event is beyond the actual control of the air carrier'.

precautions against incidents comprising flight safety that those aircraft are subject to regular checks, which are particularly strict and are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent to the normal exercise of an air carrier's activity.

Consequently, technical problems that come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No. 261/2004.

According to the Court, an air carrier will thus be faced 'as a matter of course' with technical defects and it is part and parcel of the normal performance of the activities of the air carrier that it tries to avoid and solve these technical defects by performing regular inspections (maintenance).

In this way, the Court states that technical defects that are the result of poor or imperfect maintenance[5] or that become known during maintenance *cannot* be considered an extraordinary circumstance.

This is logical because the performance of regular and proper maintenance is an 'essential element of' (inherent to) the normal performance of the activity of an air carrier and the air carrier can also exercise actual control over that.

It is, in my view, only reasonable not to make the passengers bear the burden of the necessity to repair a technical defect that emerges during regular maintenance.

Contrary to the above, it is then also true that a technical defect:

- that emerges outside the activity of regular maintenance or
- that is not the result of imperfections in regular maintenance must be viewed as not inherent to the normal activity of an air carrier. At any rate, it cannot be called 'inherent to' by definition. After all, only technical defects as a result of imperfections in maintenance or technical defects that emerge during maintenance were considered 'inherent to' by the Court (Ground 25 *Wallentin-Hermann*).

Relevant in this respect is the conclusion that the Court recognizes that technical problems may occur that are not inherent to the normal exercise of the activity of an air carrier and are therefore not 'inherent to' as required by *Wallentin-Hermann*. In addition, such technical defects may possibly qualify as an extraordinary circumstance that could not be avoided even if all reasonable measures had been taken (see the Regulation). The Court even comes with examples (not exhaustive) of such events (see Ground 26 *Wallentin-Hermann*).

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[5] The fact that the Court says that poor and imperfect maintenance cannot be seen as an extraordinary circumstance does not constitute correct reasoning in my opinion. One would hope that imperfect or poor maintenance is, in reality, indeed an 'extraordinary circumstance' for the aviation industry. The reasoning by the Court has then a hidden premise: namely, that the carrier has not taken all reasonable measures to avoid poor and/or imperfect maintenance.

For all other technical defects, it will have to be assessed on a case-by-case basis whether or not it is a matter of an extraordinary circumstance (Ground 27 *Wallentin-Hermann*).[6]

A court's or enforcement body's assessment of each specific case where a technical defect is an issue will therefore have to be based on whether:

(1) the occurrence of circumstances advanced by the air carrier resulting in a technical defect can or cannot be considered inherent to the normal performance of the activity of an air carrier and
(2) the air carrier could in reason have taken measures whereby the occurrence of the technical defect could be avoided (degree of control).

4. Proposal for Qualification of 'Technical Defects'

In connection with the above, one could distinguish the following qualification of technical defects within the framework of the application of the Regulation:

(1) technical defects that emerge during regular maintenance (base maintenance);
(2) technical defects that are the result of poor or imperfect maintenance, which could have been avoided by taking all reasonable measures;
(3) technical defects of an intrinsic nature (not as a result of poor or imperfect maintenance) emerging while the aircraft is operational (e.g., the engine breaks down, the computer system does not work; HF antenna breaks down);
(4) technical defects as a result of an external cause (e.g., bird strike, lightning strike, accident, FOD, etc.).

With regard to a technical defect as referred to under (1) and (2), it should then be true that it cannot be an extraordinary circumstance as intended by virtue of the Regulation (*Wallentin-Hermann* in a strict sense).

With regard to a technical defect within the categories mentioned under (3) or under (4), it could possibly be a matter of an extraordinary circumstance, in so far as it should be established that the occurrence of that technical defect could not have been avoided even if all reasonable measures had been taken.

The spontaneous breakdown of components (in spite of proper and timely maintenance), a lightning strike or the occurrence of an accident/collision, are all matters that, in my opinion, are 'not forming an essential element of' (are not inherent to) the ability to perform the normal activity of an air carrier. Clearly the air carrier would prefer to always avoid these events, but no measures can be taken to realize this. [7]

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[6] In this way, the Court – rightly – adheres to a 'culpability test' as intended by the term 'extraordinary circumstance' in conformity with the Regulation and, with regard to the obligation of compensation, deliberately elects not to create a strict liability for air carriers on the basis of casuality only ('the occurrence of a technical defect is always inherent to the activity of an air carrier and thereby not an extraordinary circumstance').

[7] Relevant in this respect is also the explanatory memorandum accompanying the original proposal of the Commission (COM 2001/784 final, 21 Dec. 2001) in which the Commission clearly explained its principal intention to extend the provisions on compensation, reimbursement/re-routing, and care to cancellations, but 'an exception would naturally be made for cancellations that an operator can prove were made for reasons outside its responsibility'.

5. Suggestions for the Application of the Assessment of Technical Defects of an Intrinsic Nature in Practice (as Referred to above under Section 4 as Technical Defect Type (3))

The various NEBs across the EU designated pursuant to Article 16 of the Regulation are in general also the Civil Aviation Authority (CAA) of such EU Member State. Alongside their responsibility as upholder of the Regulation, they are also responsible for the supervision of the airworthiness and flight safety.

With regard to this supervision, it is accepted that there is a limit to airworthiness and flight safety. Aircraft and their parts show an accepted risk of failure. With regard to both the maintenance program (subject to CAA's approval) and the Master Minimum Equipment list (MMEL) of the air carrier, there is a recognition of the fact that all objects/parts/components will eventually fail. There is a limit to the reliability (expressed among other things in Mean Time Between Failure).

Replacement and/or maintenance intervals, as included in the maintenance program, are based on the calculation of this risk of failure. If the air carrier fulfils its obligations under the maintenance program and the MMEL, it complies with the requirement of continuing airworthiness, imposed by its CAA as the competent authority.

In my opinion, the recognition of a limit to the reliability of objects/parts/components with regard to the supervision of the safety and airworthiness as referred to above should also apply to such NEB/CAA in its other responsibility as upholder of the Regulation.

Even in the case of full compliance with the requirement of continuing airworthiness, it may be true that objects fail/break down, as a result of which it is a matter of a technical defect. In such case, the technical problem should be judged as an extraordinary circumstance as referred to in the Regulation.

As system for practical purposes, I would therefore propose the following:

- The maintenance program and the MMEL should constitute the testing frameworks or benchmark, with regard to the occurrence of technical defect of an intrinsic nature (see above technical defect type (3)).
- Compliance with the obligations pursuant to the maintenance program and the MMEL by the air carrier should imply compliance with the requirement under the Regulation of having taken all reasonable measures to avoid the occurrence of the 'extraordinary circumstance' (technical defect of an intrinsic nature). If a part then breaks down while the aircraft is operational, this should in principle qualify as an extraordinary circumstance in the sense of the Regulation.

Following this suggestion will ensure that there are no more double standards as to the qualification of technical defects in the enforcement of the Regulation on the one hand and the supervision of airworthiness and flight safety on the other hand.