Punctuality or a Safe Flight: Which Should Have Priority?

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On the 4 May 2017, the European Court of Justice (EUCJ) delivered its judgment in the Pešková v. Travel Service *case. The authors see a very thin ray of hope for the aviation industry in this judgment. It could be viewed as a break in a dangerous trend by the EUCJ of prioritizing punctuality over safety. In Pešková, the Court has for the first time recognized safety as being part of a 'high level of protection for air passengers', as referred to in the EU 'passenger rights' Regulation 261/2004. This article looks at both objectives, which are paramount for the industry. The authors take an 'inside out' view of the aviation industry through an overview of the reasoning of the Court regarding technical problems, on the one hand and, on the other hand, the entitlement of passengers to very high financial compensation from airlines pursuant to EU Regulation 261/2004 and subsequent EUCJ case law.*

1 INTRODUCTION

To anyone working in the aviation industry it is obvious: the objective of aircraft maintenance is to deliver safe, on-time air transportation. Air carriers do their utmost to deliver both safety and punctuality.

However, sometimes these objectives are not always possible to achieve at the same time. In such cases, safety must *always* take priority. The divergence of the two objectives often occurs while the aircraft is in operation (usually before or just after the aircraft 'pushes back' from the stand, or sometimes even when the aircraft is already in flight and must return to stand). The sheer complexity of an aircraft, with thousands of components and moving parts, means that, even with the very strict industry standards for scheduled maintenance, technical issues with an aircraft can (and often do) arise at the last minute and must be properly dealt with, in the interest of the passengers and crew (and the public at large[1]).

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1 In the rare instances where an aircraft fails in flight, damage and loss of lives can often occur to those on the ground, as well as the unfortunate passengers and crew on the flight.

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However, unfortunately, in respect of EU Regulation 261/2004 ('EU 261' or 'the Regulation'),[2] the European Court of Justice (EUCJ or 'the Court') has consistently prioritized punctuality over safety in its long line of cases interpreting this deeply troublesome piece of European legislation. Not only has the Court seriously strayed into the role of the legislator by extending the scope of the Regulation to force air carriers to pay compensation to passengers in the event of a delay of over three hours[3] but, more worryingly, has at the same time seriously restricted the ability of air carriers to rely on the extraordinary circumstances defence to avoid having to pay punitive levels of compensation in the event of such delays – compensation which is often several times what the passenger has actually paid for the flight.[4]

2 PUNCTUALITY OVER SAFETY

This dangerous trend of prioritizing punctuality over safety already started in the Wallentin-Hermann case[5] ('Wallentin-Hermann'), where the Court first ignored the importance of ensuring that technical issues that may affect the safety of the flight must be properly dealt with and should always take priority over the flight leaving on time.

The Wallentin-Hermann case involved an Alitalia flight where a complex engine defect affecting the engine turbine was discovered the night before the flight in question was due to depart. The air carrier was unable to fix the problem before the flight and was forced to cancel it. Passenger Wallentin-Hermann requested compensation under the Regulation, which eventually triggered a reference to the EUCJ.

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2 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, at 1).

3 *See* Sturgeon (Case C-402/07). It should be noted that delays were specifically excluded from the scope of the Regulation (*see* para. 23 of the Explanatory Memorandum for the Regulation, Com 2001/784 final, dated 21 Dec. 2001) as the intent was to punish airlines for denied boardings and commercial cancellations as these were seen to be against the consumer interest and causing serious inconvenience for those consumers. Delays, on the other hand, are usually **not** within the control of the air carriers and it is in their interest to ensure punctuality as they lose money if an aircraft is sitting on the ground. The interests of the air carriers and their passengers are therefore aligned when it comes to delays and there is therefore no need or justification to force the airline to pay punitive compensation, on top of the cost of the care and assistance they are already required to pay under the regulation (*see* Art. 9 of the Regulation).

4 The fixed levels of compensation in the Regulation take no account of the actual fare paid by the passenger. In no other industry is there a requirement for a company to pay 'compensation' to their customer which is more than what the customer actually paid for the service in question, and the customer still receives the service they paid for. It is no wonder many air carriers are in such precarious financial situations.

5 Wallentin-Hermann (Case C-549/07).

The Court in Wallentin-Hermann provided the 'test' for determining whether a technical issue rises to the level of 'extraordinary circumstances' as per Article 5(3) of the Regulation, i.e., whether the airline had to pay compensation for something that was essentially a safety issue. The Court held that:

> *[A] technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of [Article 5(3)], unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned* ***and*** *are beyond its actual control.*[6] (Emphasis added by the authors).

The Court also worryingly found that:

> *The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken 'all reasonable measures' within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.*[7]

This means that although an air carrier follows all of the maintenance requirements set down by the industry, which they must do in order to uphold continuing airworthiness and flight safety (and retain their operating license), this is not sufficient to protect them from punitive compensation payable to their passengers where 'unexpected safety shortcomings' nevertheless arise. This has set a very dangerous precedent from which other subsequent EUCJ and national cases have drawn.

The reality in aviation is that when a technical failure or indication thereof occurs during operation of the aircraft, the air carrier *must* act on it – also as part of the prudent performance of the contract with the passenger – in order to maintain continuing airworthiness and flight safety.

However, if an air carrier then has to pay compensation to the passengers as arbitrarily set by Article 7 of the Regulation, the air carrier is in fact penalized for actually doing exactly what it is legally required to do, i.e., to ensure the safe operation of the flight, which again is clearly in the interest of the passengers (and crew).

Moreover, the Wallentin-Hermann ruling still left open the question of what happens in a case where there is no 'source' or 'event' which caused the technical issue, i.e., a *spontanous failure* of a component or system of an aircraft while in operation. That is, a technical problem for which there is no clear cause. By its nature it is 'spontaneous'.[8]

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6 *Ibid.*, para. 34. Thus, according to the EUCJ the technical problem itself is not the extraordinary circumstance. The focus should be on the source or event, which caused the technical problem. That 'source' or 'event' must be extraordinary.

7 *Ibid.*, para. 44(3).

8 *See* Jochem Croon, '*If You Do Not Know Where You Are Going, You Will End Up Somewhere Else': Update on the Continuing Discussion on Technical Problems and Passenger Rights*, 40(4&5) Air & Space L. 331–340 (2015).

3 SPONTEANOUS FAILURE OF A COMPONENT

In September 2015, when the EUCJ issued its ruling in the KLM/Van der Lans case,[9] ('Van der Lans') the aviation industry was waiting with bated breath in the hope that the Court would address this issue, i.e., where proper maintenance had been performed but when a component nevertheless failed, for no apparent reason.

The Van der Lans case involved a 29-hour delay on a flight from Ecuador to Amsterdam. When pushing back from the stand to depart, one of the aircraft engines failed to start due to a failure of two components. Given the fact that these parts were not available at the outstation, they had to be flown from Amsterdam, thus further contributing to the delay. KLM defended the case on the basis that these components had been changed as part of the normally scheduled maintenance programme, that they were defective, and no maintenance procedure could have detected their failure.

The reasoning in this case is extraordinary and very concerning as it essentially eviscerates the exemption under Article 5(3) for *unexpected flight safety shortcomings*[10] and limits it only to latent manufacturing defects affecting all aircraft of a particular type. The Court's reasoning is as follows:

> '*Since the functioning of aircraft inevitably gives rise to technical problems, air carriers are confronted as a matter of course in the exercise of their activity with such problems. In that connection, technical problems which 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'.*[11] (Emphasis added by the authors).
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> *'[I]t appears, first of all, as is clear from the preceding paragraph of this judgment, that such a technical problem affects only one particular aircraft. Furthermore, there is no evidence of any kind in the documents before the Court that the manufacturer of the aircraft in the fleet of the air carrier concerned or a competent authority have disclosed, that not only that specific aircraft but also others in the fleet have been affected by a hidden manufacturing defect affecting the safety of flights.'*[12] (Emphasis added by the authors).

The Court's twisted logic continues:

> *'[I]t is true that a breakdown, such as that at issue in the main proceedings, caused by the premature malfunction of certain components of an aircraft, constitutes an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult*

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9 (Case C-12/11).

10 *Unexpected Flight Safety Shortcomings* is explicitly mentioned in the Regulation as an example of an event what could be seen as an extraordinary circumstance. *See* recital (14) of the preamble.

11 *Ibid.*, para. 37.

12 *Ibid.*, para. 40. It is very rare that a defect in a component or part would affect several aircraft of the same fleet type. What is more common is that individual components or parts on an aircraft fail for no apparent reason or for some defect affecting only that particular component or part.

or even extreme, it being understood moreover that no component of an aircraft lasts forever.'[13] (Emphasis added by the authors).

'Therefore, it must be held that, in the course of the activities of an air carrier, that unexpected event is inherent in the normal exercise of an air carrier's activity, as air carriers are confronted as a matter of course with unexpected technical problems.'[14]

'Second, the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.'[15] (Emphasis added by the authors).

The evidence showed that KLM had correctly undertaken required maintenance procedures according to its applicable and government (the Dutch CAA) approved maintenance program. The defective components had not exceeded their average lifetime and they had been tested during the last 'A Check', which was carried out one month before the flight at issue. And yet the Court nevertheless holds the air carrier to a standard that is impossible to achieve since it was accepted that the component failed spontaneously (as *'no component lasts forever'* and *'the functioning of an aircraft inevitably gives rise to technical problems'*) – there was therefore no way for the air carrier to predict its failure, let alone try to prevent it from happening. Or put in the context of Article 5(3) of the Regulation, there were no reasonable measures available to the air carrier to prevent the components from failing.

But perhaps the most telling statement in this very concerning decision, is the following:

Lastly, it must be stated that, even assuming that, depending on the circumstances, an air carrier takes the view that it may rely on the fault of the manufacturer of certain defective components, the main objective of Regulation No 261/2004, which aims to ensure a high level of protection for passengers, and the strict interpretation to be given to Article 5(3) of that regulation, preclude the air carrier from justifying any refusal to compensate passengers who have experienced serious trouble and inconvenience from relying, on that basis, on the existence of an 'extraordinary circumstance'.[16]

Here the Court is clearly prioritizing *'the serious trouble and inconvenience'* of a 29-hour delay over the safe operation of the flight.[17]

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[13] *Ibid.*, para. 41.
[14] *Ibid.*, para. 42.
[15] *Ibid.*, para. 43.
[16] *Ibid.*, para. 45.
[17] It also deserves mentioning that this case involved a delay not a cancellation. As noted above, it was never the intention of the regulator to include delays in the requirement to pay compensation as it was recognized that delays are normally not within the control of the air carriers and certainly are not done for commercial gain, which was the behaviour that the Regulation was originally aimed at. Also, it is often very difficult to resolve a technical issue within the three hours arbitrarily required by the Sturgeon ruling. By forcing air carriers to do so or risk having to pay punitive compensation, the Court is creating a serious safety issue, which is clearly not in the interest of passengers, crew or the general public.

This decision was deeply disappointing and contradictory to the reality of air carrier operations, which is that technical failures and warning indications of possible failures frequently occur while the aircraft is in operation, despite the fact that the proper, rigorous maintenance procedures have been followed to the letter. Unfortunately, even with the best technology and very stringent procedures for both aircraft and component manufactures, technical failures still occur.[18]

4 HIGH LEVEL OF PROTECTION FOR PASSENGERS: WHAT DOES IT MEAN?

Based on the Wallentin-Hermann and Van der Lans cases, it appears that the EUCJ has interpreted the concept of a *'high level of protection for passengers'* in relation to unexpected safety shortcomings as avoiding the *'serious inconvenience and trouble from delays'* as opposed to ensuring the safe operation of the flight.

However, there may be a very faint light at the end of the tunnel. On the 4 May 2017, the EUCJ ruled on the *Pešková v. Travel Service* case ('*Pešková*').[19] The case involved a technical failure of a component, the repair of which took one hour and 45 minutes. Subsequently, the aircraft experienced a bird strike, which necessitated technical examination to ensure its airworthiness. However, the owner of the aircraft was not happy with this check/examination and ordered a further check, which added to the delay, totalling 5 hours and 20 minutes.

In answer to the question of whether a collision between an aircraft and a bird constitutes an 'extraordinary circumstance' within the meaning of Article 5(3) of the Regulation, thankfully the court confirms this to be the case:

> *In the present case, a collision between an aircraft and a bird, as well as any damage caused by that collision, since they are not intrinsically linked to the operating system of the aircraft, are not by their nature or origin inherent in the normal exercise of the activity of the air carrier concerned and are outside its actual control. Accordingly, that collision must be classified as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.*[20]

But the key finding of the EUCJ, and a concept that should be the standard used in the Court's consideration of <u>any</u> technical issues in this area, is the following:

> *In that regard, it is irrelevant whether the collision actually caused damage to the aircraft concerned. The objective of ensuring <u>a high level of protection for air passengers</u> pursued by Regulation No 261/2004, as specified in recital 1 thereof, means that <u>air carriers must not be encouraged to refrain from taking the measures necessitated by such an incident by prioritising the maintaining and punctuality of their flights over the objective of safety</u>.* (Emphasis added by the authors).

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[18] *See* Jochem Croon, '*Wallentin Hermann' and a Safe Flight*, Zeitschrift fur Luft- und Weltraumrecht, ZWL 61.J9.4/2012.

[19] (Case C-315/15).

[20] *Ibid.*, para. 24.

Given the blatant focus of the EUCJ in previous decisions, such as Wallentin-Hermann and Van der Lans, on punctuality and minimizing the 'inconvenience' for passengers, this is a significant statement. Namely, for the first time the Court sees maintaining continuing airworthiness and a safe flight to be a priority in maintaining a high level of protection for air passengers as pursued by the Regulation. Until this case, such protection for passengers only related to punctuality, i.e., penalizing the air carrier for failing to reach the destination on time.

However, the EUCJ unfortunately then goes on to find that the second check required by the owner was unnecessary and the time it took for that second check to be undertaken could not be considered as *'exceptional circumstances'*.[21]

There is also a tortuous discussion as to whether the air carrier had taken *'all reasonable measures'* to avoid the collision with the bird.[22] The whole issue is bizarre in the extreme, considering that in certain cases bird strikes result in fatal incidents and such incidents are clearly not within the control of air carriers.[23]

Moreover, the court slavishly toed the party line from Wallentin-Hermann and Van der Lans in finding that:

> *[T]he premature failure of certain parts of an aircraft does not constitute extraordinary circumstances, since such a breakdown remains intrinsically linked to the operating system of the aircraft.*[24]

The Court even went so far as to 'deduct' the amount of time it took to fix the technical issue from the overall delay (i.e., in cases of multiple sources of a delay a technical issue cannot be considered as an extraordinary circumstance).[25]

5 CONCLUSION

The combination of Wallentin-Hermann and subsequent cases involving unexpected safety shortcomings, together with the legislative overreaching of the EUCJ in Sturgeon in requiring compensation also in delays – against the clear intention of the legislator – is now creating perverse incentives when it comes to the area of unexpected safety shortcomings, as well as financial instability for air carriers.[26] The

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21 *Ibid.*, para. 37. It is clearly overstepping for a court to opine on whether two separate checks are necessary in the event of a bird strike. It should also be recalled that it was the owner of the aircraft, not the airline, who required the check, so it was completely beyond the air carrier's control and they should not have been held responsible for that decision.

22 The Court ultimately passes this nonsensical question on to the national court to decide.

23 It is true that airport operators take several measures to try to prevent birds from being present in areas where aircraft are operating around their airports. However, birds clearly do not have any concept of aircraft operating in what has traditionally been 'their' airspace.

24 *Ibid.*, para. 23.

25 *Ibid.*, para. 49.

26 Particular reference is made to recent airline bankruptcies in Europe, including Air Berlin, Alitalia and Monarch Airlines. Although it is clear EU 261 on its own was not the cause of these bankruptcies, given the thin profit margins that air carriers generally operate under and the growing financial burden

overemphasis of EUCJ rulings in this area on 'passenger convenience' and punctuality as opposed to ensuring – at all times – the safe operation of the flight, is unacceptable by any measure.

Although the *Pešková* case pays lip service to the priority of safety over punctuality, the EUCJ nevertheless reverts to type by confirming the highly restrictive Wallentin-Hermann and Van der Lans case line and raises all kinds of qualifiers around bird strikes – frankly an issue that should never have ended up in court in the first place.

The fact that passengers would even think to request 'compensation' for a delay caused by something that is so clearly a safety issue means that EU 261 has created unreasonable expectations with consumers and there is something very wrong with this piece of legislation.[27]

Flying is one of the safest forms of transport and this must remain the case. Air carriers and their pilots operating aircraft should not be concerned with the threat of punitive compensation having to be paid to passengers in the event of a technical problem affecting the punctuality of the flight. Safety must always take priority over punctuality and efforts to ensure safety should not be punishable under consumer legislation.

The European Commission needs to urgently take this situation in hand and proceed with its intended revision of the Regulation before there is a serious safety incident or further European air carriers go bankrupt.

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that this Court-expanded Regulation is causing, it was likely a contributing factor. The huge financial burden of the remaining EU 261 compensation claims often precludes a 'restart' of the air carrier and the only solution is a complete bankruptcy.

[27] The proliferation in the various EU Member States of so-called 'Claims Farms' or 'Claims Management Companies', a business model that takes advantage of this legislation and of passengers, is also driving this expectation of passengers that they have a 'legal right' to claim compensation from airlines for the inconvenience caused by delays and cancellations in any circumstance. There is zero understanding of the efforts airlines make to ensure both the safety and punctuality of their flights.