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## **Bird Strikes ruled as 'Extraordinary Circumstances' by the European Court of Justice**

A collision between an aircraft and a bird may now be defined as an 'extraordinary circumstance', according to the Court of Justice for the European Union ("the Court") in a judgment delivered on 4 May 2017.

The ruling means that any collision with birds may exempt an air carrier from the need to pay compensation under Regulation (EC) No.261/2004 ("the Regulation") to passengers in respect of flight cancellations or delays of over three hours.

The case concerned Ms Marcela Pešková and Mr Jirí Pešká, who encountered a long delay to their flight from Burgas (Bulgaria) to Ostrava (Czech Republic) in August 2013 with the Czech airline Travel Service. The aircraft set to complete their trip had already flown from Prague to Burgas, Burgas to Brno and from Brno to Burgas before commencing their journey. During the flight from Prague to Burgas (the first sector), it exhibited a technical failure in a valve. The valve was repaired but this led to a delay of 1 hour and 45 minutes. When the aircraft then flew from Burgas to Brno (the second sector), it collided with a bird during landing necessitating mandatory safety checks at Brno. Its condition was checked first by a local company and then by a Travel Service technician as the owner of the aircraft, Sunwing, refused to authorise the first check.

The aircraft passed both safety checks but this resulted in a total delay of 5 hours and 20 minutes to Ms Pešková's and Mr Pešká's flight to Ostrava. They then brought an action against Travel Service under the Regulation in the Prague 6 District Court for CZK 6,825 (approximately €250 each) in compensation.

The Czech court referred several questions to the Court, including whether the collision of an aircraft with a bird is an “extraordinary circumstance” within the meaning of Article 5(3) of the Regulation.

The Third Chamber held that extraordinary circumstances within the meaning of the Regulation are events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and are outside its actual control. At paragraph 24 of the judgment, the Court explained its reasoning thus:

*‘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.’*

The Court’s definition on inherency – whether an event is *‘intrinsically linked to the operating system of the aircraft’* – appears to mark a departure from its previous rulings on the definition of extraordinary circumstances. So far as bird strikes are concerned, it means aircraft carriers will no longer be obliged to pay passengers compensation for delays or cancellations caused by such events if they can prove that all measures were taken to prevent the collision occurring.

In this case, the Court ruled that the checks carried out on the aircraft by the local, authorised technician at Brno airport amounted to Travel Service taking all reasonable measures to prevent the delay of the flight. It held that the second check to the aircraft was unnecessary, which meant that it was not counted as part of the time resulting from the extraordinary circumstance.

The Court took a practical view of the reasonable measures that an air carrier can take to prevent bird collisions and also noted that a carrier is not responsible for the failure of other entities, such as airports and air traffic controllers, to take their own measures to prevent such a collision.

The Court made the important point that, when a flight delay is caused not only by a collision with a bird, but also by other circumstances which are not extraordinary, such as a technical failure, the duration of the delay caused by the extraordinary circumstance will be deducted from the total length of the delay in the arrival of the flight. This means that whether the aircraft carrier is required to pay its passengers compensation will depend upon whether the portion of the delay for which the carrier is responsible is itself three hours or more. In the claimants' case, the delay caused by the technical fault was 1 hour and 45 minutes, whilst the bird strike had led to a delay of 3 hours and 35 minutes.

The ruling is a welcome one for an airline industry which has seen an ever diminishing pool of events that constitute extraordinary circumstances. The Court was keen to stress that whilst consumer protection was paramount, *'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'* (para.25). Whether the ruling will imbue courts in England & Wales with a renewed focus on this inherent trade-off remains to be seen.

The full judgment of the case can be read online at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190327&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=475264>

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