The Extraordinary Circumstances Defence in Regulation (EC) 261/2004

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This Article explores the main features of the 'extraordinary circumstances' defence in Regulation 261/2004. The Regulation, as interpreted by the Court of Justice of the European Union (CJEU), grants air passengers a right to a standardized, lump-sum compensation in cases of denied boarding, cancellation, and long delay at arrival. However, in the two last situations, air carriers may exonerate from paying such compensation if they have been caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'. The present study systematises the CJEU's case-law on the defence while analysing three issues. First, the notion of extraordinary circumstances, constructed around two cumulative criteria – they must stem from an event which is not inherent in the normal exercise of the activity of the air carrier concerned, and be beyond its actual control. Yet recently a distinction between events 'internal' to the operating air carrier and those 'external' has gained importance. The second issue is causation between the disruptive event and the cancellation or delay. Basically, the causal link must be 'direct', but it may be established with regard to knock-on effects as well. Finally, the third aspect is the interpretation of the unavoidability even if all reasonable measures were taken, which is extensive on two limbs. The carrier will have to prove that it actually took measures for preventing as much as possible the event from resulting in a cancellation or long delay, and to this effect it must deploy all its resources – without making 'intolerable sacrifices' with respect to its capacities.

Keywords: Regulation 261/2004, air transportation, compensation, cancellation, delay, extraordinary circumstances, causation, reasonable measures

1 INTRODUCTION

Air travel has been one of the most affected sectors by the Coronavirus disease 2019 (COVID-19) pandemic. There are many legal issues specifically raised to the forefront by the dramatic sanitary situation that merit study, for who knows when aviation will come back to the pre-virus times.[1] But let us bring some hope. The world will overcome the pandemic and people will fly more again. This happy outcome will nevertheless be accompanied by usual disruptions travelling entails sometimes. Denied boarding, cancellations and delays may not currently be among

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1 *See* the special issue of *Air & Space Law* published in July 2020.

Pazos, Ricardo. 'The Extraordinary Circumstances Defence in Regulation (EC) 261/2004'. *Air & Space Law* 46, no. 6 (2021): 739–762.
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the main worries for many people. Yet, we cannot forget these classical legal challenges of 'ordinary' times. The present article deals with one of the most significant elements of Regulation (EC) 261/2004 (the 'Regulation' or 'Regulation 261') on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.[2] Namely, the 'extraordinary circumstances' defence against a claim for a standardized, lump-sum compensation in cases of cancellation or delay at arrival.

Obviously, the more room for air carriers to invoke it, the less costly cancellations and delays are for them, but the worse is the passengers' position. Furthermore, the defence is important from a regulatory point of view, as it will be noted below in section 2. A regulatory dimension that should be had in mind, because there is an open – yet on a standstill – procedure to modify Regulation 261, with texts susceptible of discussion such as the Proposal of amending Regulation of 13 March 2013[3] and the subsequent European Parliament legislative resolution of 5 February 2014.[4] The relevance of a study about the defence at this moment in time is due to the recent case-law of the Court of Justice of the European Union (CJEU). Since 2011, the CJEU had been steadily addressing questions related to it at an approximative ratio of one case per year. But in the last years such ratio has increased, and the last rulings address notable situations. This justifies leaving mostly aside national cases and strongly emphasizing on the CJEU's decisions.[5]

The structure of the paper is as follows. In the next section, the extraordinary circumstances defence will be placed in its regulatory context. Then, the elements that characterize such defence, as set out in the European Union (EU)'s case-law, will be analysed. In this regard, three issues need to be covered. Section 3 is devoted to the notion of extraordinary circumstances and its application in particular situations. Section 4 deals with the necessary causal link between the event and a subsequent cancellation or delay. Finally, the exemption requires the cancellation or delay to be caused by extraordinary circumstances 'which could not have been avoided even if all reasonable measures had been taken', so section 5 focuses on how this is interpreted.

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2 Regulation (EC) 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) 295/91 (OJ L 46/1, 17 Feb. 2004).

3 COM(2013) 130 final.

4 P7_TA(2014)0092 (OJ C 93/336, 24 Mar. 2017).

5 For numerous references of national cases, *see Chapter 7 to 16 of Air Passenger Rights. Ten Years On* (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition).

2 THE REGULATORY CONTEXT OF THE EXTRAORDINARY CIRCUMSTANCES DEFENCE

2.1 Scope of Regulation 261/2004

As affirmed in Article 1(1), Regulation 261 establishes minimum rights for air passengers in three basic situations. These are denied boarding, cancellation, and long delay. Upgrading and downgrading are also contemplated (Article 10), but they receive less attention. Among the measures adopted to protect passengers, the one to be highlighted now for our purposes is the right to compensation – but an in-depth presentation is not necessary, and it will therefore not be done.

The compensation amounts to 250, 400, or 600 Euros, depending on the distance of the flight and its intra or extra-EU character (Article 7(1)). Air carriers may nevertheless reduce the compensation to be paid by 50%, if they re-route passengers by way of an alternative flight, and the arrival time of which does not exceed the scheduled arrival time of the one booked by more than a certain number of hours (Article 7(2)). The Regulation grants the standardized compensation to passengers who are denied boarding against their will (Article 4(3)), and to passengers whose flight is cancelled and who are informed two weeks or less prior to departure, unless the air carrier offers them re-routing allowing them to depart and arrive within a given time frame with respect to the initial schedule (Article 5(1)). The wording of the Regulation does not contemplate cases of mere delay at arrival – Article 6 envisages delays on the departure time. However, after the CJEU's decision in *Sturgeon and Others*, passengers who suffer a long delay at arrival may claim the lump-sums laid down in Article 7, too.[6]

2.2 The 'extraordinary circumstances' defence

We turn now to the issue this article revolves around. Specifically with regard to cancellations, Article 5(3) exempts an operating air carrier from paying the standardized compensation – and not from any other duty such as that of providing care (Article 9)[7] – if it proves that the cancellation was caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'. The extension of the right to compensation to delays at arrival

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[6] Cases C-402/07 and C-432/07, *Sturgeon and Others* [2009] ECLI:EU:C:2009:716; Cases C-581/10 and C-629/10, Nelson and Others [2012] ECLI:EU:C:2012:657; Case C-11/11, *Folkerts* [2013] ECLI:EU:C:2013:106; Case C-413/11, *Germanwings* [2013] ECLI:EU:C:2013:246.

[7] Case C-344/04, *IATA and ELFAA* [2006] ECLI:EU:C:2006:10, paras 37, 75–76; Case C-294/10, *Eglītis and Ratnieks* [2011] ECLI:EU:C:2011:303, paras 23–24; Case C-12/11, *McDonagh* [2013] ECLI:EU:C:2013:43, paras 30–31, 38–39. This would change were the 2013 Proposal of amending Regulation adopted (Art. 9(4) and recital 16).

makes the defence applicable in this situation as well.[8] On the contrary, the exemption cannot be relied upon in the event of a denied boarding.[9] When the delay has been caused partially by extraordinary circumstances and partially by reasons not falling within that concept, only the duration of the delay attributable to the latter can be taken into consideration to assess whether the passenger is entitled to the sums provided for in Article 7.[10]

Besides its impact on the immediate position of passengers and airlines, the extraordinary circumstances defence has another implication, less evident, but important from a regulatory perspective. When the CJEU extended the lump-sum compensation to delays at arrival, one of the several criticisms raised against pointed at the principle of proportionality any measure adopted by EU institutions must comply with.[11] Basically, the measure in question must be kept within the limits of what is appropriate and necessary to attain the objectives pursued, if there are several appropriate alternatives the least onerous one must be chosen, and the drawbacks of the measure must not be disproportionate in relation to its aims.[12] The CJEU offered several arguments to support that its case-law passed the proportionality test, and one of them was the possibility for air carriers not to pay the compensation if the delay was caused by extraordinary circumstances.[13] Therefore, how the defence is developed also influences the assessment of the referred proportionality.[14]

3 THE NOTION OF 'EXTRAORDINARY CIRCUMSTANCES'

3.1 Basic rules of interpretation

The notion of 'extraordinary circumstances' is not defined in the Regulation, and recital 14 merely provides examples where they may occur, mentioning 'cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier'. These do not constitute extraordinary circumstances themselves, but simply situations that may give rise to

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8 *Sturgeon and Others*, paras 67, 69; Nelson and Others, paras 39–40.
9 Case C-22/11, *Finnair* [2012] ECLI:EU:C:2012:604, paras 35–36.
10 Case C-315/15, *Pešková and Peška* [2017] ECLI:EU:C:2017:342, paras 50–54.
11 As reported by Cees van Dam, *Air Passenger Rights After Sturgeon*, 36(4/5) Air & Space L. 266–267 (2011) – author who did not share the criticism towards the CJEU's case-law.
12 Nelson and Others, para. 71.
13 *Ibid.*, para. 79.
14 Alan Meneghetti & Thomas van der Wijngaart, *Disproportionate Jurisprudence: The CJEU's Approach to Proportionality in Regulation 261/2004*, in *From Lowlands to High Skies – A Multilevel Jurisdictional Approach Towards Air Law* 169 (Pablo Mendes de Leon ed., Martinus Nijhoff Publishers 2013).

them.[15] Furthermore, recital 15 specifically refers to an air traffic management decision 'in relation to a particular aircraft on a particular day' – affirming that extraordinary circumstances should be deemed to exist.

Given the absence of any definition, the notion is determined based on three aspects. Its usual meaning in everyday language, the context in which the term is used, and the purposes of Regulation 261.[16] In addition to that, it must be interpreted strictly, considering that the defence constitutes a derogation from a rule aimed at increasing the level of passenger protection.[17] Moreover, although Article 19 of the 1999 Montreal Convention (the Convention), contains a similar ground for exemption from liability, it cannot determine the interpretation of the studied concept in the sense that it is not 'decisive' for it.[18] The Convention should however remain 'relevant'.[19] Finally, the Regulation leaves no room for 'super extraordinary circumstances' or 'particularly extraordinary events' going beyond 'extraordinary circumstances'.[20]

Most of the previous insights are present in the CJEU's 2008 judgment *Wallentin-Hermann*. But this landmark case also supplied the two criteria that constitute the pillars the concept has been ultimately built upon. In order to be qualified as extraordinary, the circumstances must stem from an event which, on account of its nature or origin, is not inherent in the normal exercise of the activity of the air carrier concerned and remains outside of its actual control.[21] It is worth noting that 'part of' such activity would probably be a better expression, for the language of the case was German, and the English word 'inherent' is meant to translate *Teil* ('part').[22]

The two criteria have been reiterated on many occasions, the most recent rulings underlining their cumulative character.[23] And the 2013 Proposal to amend

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15 Case C-549/07, *Wallentin-Hermann* [2008] ECLI:EU:C:2008:771, paras 21–22; Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, *Krüsemann and Others* [2018] ECLI:EU:C:2018:258, para. 34.

16 *Wallentin-Hermann*, para. 17; *McDonagh*, para. 28.

17 *Wallentin-Hermann*, paras 17–20; *Finnair* [2012], para. 38; Case C-394/14, *Siewert* [2014] ECLI:EU:C:2014:2377, para. 17; Case C-257/14, *van der Lans* [2015] ECLI:EU:C:2015:618, para. 35; *Krüsemann and Others*, para. 36; Case C-28/20, *Airhelp* [2021] ECLI:EU:C:2021:226, para. 24.

18 *Wallentin-Hermann*, paras 28–34.

19 Jochem Croon & Fina Verbeek, *Regulation (EC) 261/2004 and Internal Strikes Under Article 5.3: 'It's All About Control, Stupid'*, 44(6) Air & Space L. 491–493 (2019).

20 *McDonagh*, para. 30.

21 *Wallentin-Hermann*, paras 23, 27, 34.

22 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. 336–337 (2015).

23 *Sturgeon and Others*, paras 70–72; *McDonagh*, para. 29; *Siewert*, para. 18; *van der Lans*, para. 36; *Pešková and Peška*, para. 22; *Krüsemann and Others*, paras 32, 34; Case C-501/17, *Germanwings* [2019] ECLI:EU:C:2019:288, para. 20; Case C-159/18, *Moens* [2019] ECLI:EU:C:2019:535, para. 16; Case C-832/18, *Finnair* [2020] ECLI:EU:C:2020:204, para. 38; Case C-74/19, *Transportes Aéreos Portugueses*

the Regulation introduces a definition of extraordinary circumstances in line with them (Article 2(m)) – together with a non-exhaustive list of circumstances that are clearly identified as extraordinary or not (Annex 1). The construction around the ideas of inherency and control seems reasonable, but its application is problematic,[24] and that is why the *Wallentin-Hermann* approach has been sometimes criticized.[25] Lastly, it can be noted that the CJEU diverged from the approach taken by the Advocate General in *Kramme*, an earlier case that ended without a judgment because the questions for a preliminary ruling were withdrawn. The Advocate had used other two cumulative criteria, namely the unusual character of the incident and its unavoidability – thus anchoring the extraordinariness on the atypical or unexpected nature of the problem.[26]

The broadness of the pillars that conform the notion of extraordinary circumstances makes it indispensable to explore how they worked in connection with specific scenarios, based on judgments of the CJEU and briefly describing the legal reasoning used. To organize the presentation, a criterion of 'proximity' to the aircraft concerned will be used. This allows to deal first with technical failures and collisions, something convenient because it was in those scenarios where the CJEU implicitly drew a distinction between events whose origin is 'internal' and those whose origin is 'external' to the operating air carrier. And such distinction has been both made explicit recently, and ultimately generalized to assess any given incident.[27]

The following sections will explain how 'circumstances' affecting the operation of air services have, or have not, been interpreted as 'extraordinary circumstances' under Regulation 261. The following events will be addressed: Technical failures and collisions (3.2), unruly passengers and flight diversions (3.3), strikes and the unavailability of crew members (3.4), the closure of the airport's runway (3.5), and natural phenomena and adverse weather (3.6).

[2020] ECLI:EU:C:2020:460, para. 37; Case C-264/20, *Airhelp* [2021] ECLI:EU:C:2021:26, para. 21; *Airhelp* [C-28/20], para. 23.

[24] John Balfour, *The 'Extraordinary Circumstances' Defence in EC Regulation 261/2004 after Wallentin-Hermann v. Alitalia*, 58(2) Zeitschrift für Luft- und Weltraumrecht 228–229 (2009).

[25] Croon & Verbeek, *supra* n. 19, at 493–496.

[26] Opinion of the Advocate General in Case C-396/06, *Kramme*, ECLI:EU:C:2007:555, points 48–62; Alexander Milner, *Regulation EC 261/2004 and 'Extraordinary Circumstances* 34(3) Air & Space L. 216–218 (2009).

[27] *Airhelp* [C-28/20], paras 39–42. *See also* the opinion of the Advocate General, ECLI:EU:C:2021:203, points 41–51.

3.2 Technical Failures and Collisions

Technical failures that affect a specific aircraft, in principle, do not qualify as extraordinary circumstances. As noted in *Wallentin-Hermann*, they are intrinsic to air carriage, due to both the conditions in which it takes place and the technological sophistication of aircrafts. Air carriers regularly confront this type of incidences, which cannot be regarded as extraordinary if identified during maintenance operations or if arisen because of not carrying out such maintenance. Nevertheless, some technical problems do amount to extraordinary circumstances. Two examples are the revelation of a manufacturing defect compromising safety once the aircraft is already in service, and failures due to acts of sabotage or terrorism.[28] Some kind of 'external' feature could be glimpsed here. The frequency of a technical problem is not a factor that allows in itself to conclude the presence or absence of extraordinary circumstances.[29]

The *Wallentin-Hermann* approach was succinctly reaffirmed in *Sturgeon and Others*[30] and later applied in other cases. One instance was *van der Lans*. The technical problem was due to a defect in two components that had been tested one month before and that had not exceeded their average lifetime. The problem occurred unexpectedly, it was not caused by a lack of or defective maintenance, and the regular tests the aircraft was subjected to did not allow to detect it. The breakdown was deemed 'intrinsically linked to the very complex operating system of the aircraft', and therefore inherent in the normal exercise of an air carrier's activity. Besides, considering that the air carrier must ensure the maintenance and proper functioning of the aircraft, the prevention of the breakdown remained within its control.[31] The reasoning is the same even if the failure affects an 'on condition' part – one that is not replaced until it becomes defective – such as in *Finnair* [2020]. Technical problems, including those premature or unexpected, are regular incidences in the course of an air carrier's business. The failure of an 'on condition part' is therefore inherent in the activity of the carrier and within its control unless it cannot be deemed intrinsically linked to the operating system of the aircraft.[32]

Some authors had argued before *Wallentin-Hermann* that technical faults could not be deemed extraordinary, for they were a typical risk of air

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[28] *Wallentin-Hermann*, paras 24–26. Coherently, if failure to comply with airworthiness rules leads to a suspension of the air operating licence, such suspension cannot be regarded as an extraordinary circumstance – Spanish Supreme Court, Administrative Chamber, 1 July 2013, ECLI:ES:TS:2013:3495.

[29] *Wallentin-Hermann*, paras 35–37. *See also Lipton v. BA City Flyer* [2021] EWCA Civ 454 at [39].

[30] Paragraphs 70–72.

[31] *van der Lans*, paras 37–44.

[32] *Finnair* [2020], paras 39–42.

transportation and not outside the air carrier's control – along with the fact that they do not affect 'security' or 'flight safety' as referred to in recital 14, but 'airworthiness'.[33] The case-law seems to confirm such risk-based approach.[34] But Article 5(3) of the Regulation possibly generates the idea of a subjective liability,[35] and that is why the CJEU's interpretation could be considered too-harsh for airlines. These are subjected to very strict controls, and yet, they must bear the risk of incidents they cannot avoid.[36]

In the sphere of technical problems – and collisions – the criterion of inherency gave way to a more particularized one. The CJEU referred to an intrinsic link to the very complex operating system of the aircraft. Such a change might look slight but has important consequences when the origin of the problem is found outside the aircraft itself. The proximity of the incident to the aircraft remains high, but an external element appears. However, the external character may have varying degrees.

In *Siewert*, an airplane had to be replaced after being hit by an airport's set of mobile boarding stairs. Since the object colliding with the plane was one regularly used in air transport, the incident was deemed inherent in the normal exercise of the activity of the air carrier, and consequently not an extraordinary circumstance.[37] That ruling was issued before the CJEU had made a reference to the operating system of the aircraft, and later cases were used to develop it. In *Germanwings* [2019], the CJEU observed that the sets of mobile boarding stairs are ordinarily used in collaboration with the crew of the aircraft concerned.[38] Therefore, even if one might argue that such equipment is external to the airplane, it is not entirely alien to the air carrier.[39] The situation is not the same when the incident involves two different airlines and consists of a collision between an aircraft in motion and a parked aircraft – the facts in *Airhelp* [C-264/20]. The collision is not intrinsically

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[33] Ronald Schmid, *May a Technical Fault with an Aircraft be Considered as 'Extraordinary Circumstances' in the Meaning of the Regulation (EC) No 261/2004?*, 32(4–5) Air & Space L. 376–379 (2007).

[34] Kåre Lilleholt, *Case: CJEU – Sturgeon and Others*, 6(2) Euro. Rev. Contract L. 190 (2010); Wouter Verheyen & Bregtje Dikker, *10 Years of 261/2004: Any Excuses Left?*, L(6) Eur. Transport L. 665–666 (2015).

[35] Belén Ferrer Tapia, *El contrato de transporte aéreo de pasajeros: sujetos, estatuto y responsabilidad* 257, 299, 301 (Dykinson 2013).

[36] This idea is inspired by Kinga Arnold & Pablo Mendes de Leon, *Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a Change?!*, 35(2) Air & Space L. 105–107 (2010); Jochen Croon, *'Wallentin-Hermann' and a Safe Flight*, 61(4) Zeitschrift für Luft- und Weltraumrecht 610–615 (2012); Isabelle Tosi-Dupriet, *Transport aérien, retard et sources du droit. CJUE, 17 Sept. 2015, n° C-257/14, Corina van der Lans c/ Koninklijke Luchtvaart Maatschappij NV*, 337 Gazette du Palais 20 (3 Dec. 2015) (accessed online); Laurent Siguoirt, 'L'inexécution involontaire de ses obligations par le transporteur aérien soumis au règlement n° 261/2004', *L'indemnisation et l'assistance des passagers du transport aérien* 89–90 (Nicolas Balat et al. dir., LexisNexis 2019).

[37] *Siewert*, paras 19–20.

[38] *Germanwings* [2019], para. 30.

[39] *Lipton v. BA City Flyer* [2021] EWCA Civ 454 at [40].

linked to the operating system of the latter, nor can be said to remain within the actual control of the air carrier concerned, because its staff does not intervene or collaborate in the motion of the other aircraft.[40]

Another hypothesis is the collision between an aircraft and a bird that compels to subject the aircraft to checks. Whether actual damage that has been sustained is irrelevant in order to rely on the defence.[41] Birdstrikes constitute a typical risk of air transportation, so one could maintain that they are internal and therefore an ordinary event.[42] However, in *Pešková and Peška*, the CJEU observed that such collisions and any eventual damage derived thereof are not intrinsically linked to the operating system of the aircraft. This means the 'inherency' condition is not fulfilled, nor the event lies within the actual control of the air carrier.[43] At the time, scholars wondered whether the CJEU had implicitly admitted that it had previously gone too far protecting passengers.[44] And this was a fair question in light of the differing opinion of the Advocate General, who dismissed the criterion on whether 'the risk is situated within the structure of the aircraft or outside' and stated that upholding it 'would amount to a reversal of settled case-law'.[45]

A third instance is the replacement of a tyre where a screw is found, screw that was lying on the runway of the airport – as in *Germanwings* [2019]. Surely, for air transportation, using the runway is indispensable and tyres are an essential component. The incident could thus be considered inherent in its normal exercise. But the runway is to be used by all airlines, its cleaning is not responsibility of a given air carrier, and foreign objects on runways are a risk outside its actual control. It is the second set of arguments which prevailed. Provided that the malfunctioning has for sole cause the impact with a foreign object, the malfunctioning is not intrinsically linked to the operating system of that aircraft. Consequently, it is extraordinary.[46]

3.3 Unruly Passengers and Flight Diversions

Another scenario to consider is the presence of an unruly passenger that compromises security, as in *Transportes Aéreos Portugueses*. The pilot had to divert the flight

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40 *Airhelp* [C-264/20], paras 22–24.
41 *Pešková and Peška*, para. 25; *Airhelp* [C-264/20], para. 25.
42 Opinion of the Advocate General in *Pešková and Peška*, ECLI:EU:C:2016:623, points 28–34. *See also* – e.g., – provincial court of Barcelona (s. 15th), 6 Apr. 2011, ECLI:ES:APB:2011:3926; Valérie Michel, *Transports – Avion vs oiseau: 1/0 – Consommateurs vs transporteur: 0/1: vers un assouplissement de la jurisprudence de la Cour ?*, 7 Europe comm. 272 (July 2017) (accessed online).
43 *Pešková and Peška*, para. 24.
44 Michel, *supra* n. 42.
45 Opinion of the Advocate General in *Pešková and Peška*, points 38–40.
46 *Germanwings* [2019], paras 21–27.

and make an unexpected stop, this causing a delay that affected the next flight, too. According to the CJEU, when the gravity of the conduct is so high as to force a diversion, it cannot be said to be inherent in the normal exercise of carriage by air. Whereas air carriers must manage the behaviour of their passengers, certain conducts are completely unexpected. In addition, the carrier cannot control a highly unruly one, since the passenger's reactions cannot be foreseen and aboard there are little means of containing the person.[47] Nevertheless, in some cases an unruly conduct could in fact be regarded within the operating air carrier's control, thus preventing it from relying on the defence. The CJEU firstly mentions the hypothesis in which the air carrier has somehow contributed to the occurrence of the unruly behaviour, but this is not developed nor explained. A second example is when the carrier had reasons to foresee a conflictive attitude before or during the boarding operations, because it could have validly denied boarding and avoid the problematic situation at an early stage without significantly impairing the carriage.[48]

As an ancillary point regarding flight diversions, it is worth saying that in the 2013 Proposal to amend the Regulation, 'life-threatening health risks or medical emergencies necessitating the interruption or deviation of the flight concerned' are considered extraordinary circumstances (point 1(iv) of Annex 1).

3.4 Strikes and the unavailability of crew members

For many years, an expressive decision of the CJEU regarding whether strikes fall within the notion of extraordinary circumstances has been lacking.[49] And this gave rise to contrasting trends among European national courts.[50] Now, after two judgments issued in 2018 and 2021, the situation will probably change.

In *Krüsemann and Others*, it has been ruled that a 'wildcat strike' is not an extraordinary circumstance. An exceptionally high number of members of the air carrier's staff placed themselves on sick leave, a spontaneous action that followed an announcement by the managers of the airline of restructuring plans. Such staff action is not covered by freedom of association, but it is connected with the referred announcement. Since (re)structuring and (re)organization are regular features of any undertaking that may trigger confrontations with its staff, the risks associated fulfil the inherency criterion. Furthermore, the air carrier had control of the event because the origin of the absenteeism was a decision of the

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47 *Transportes Aéreos Portugueses*, paras 38–44.
48 *Ibid.*, paras 45–47.
49 Opinion of the Advocate General in *Airhelp* [C-28/20], point 34.
50 Magdalena Kučko, *The Decision in TUIfly: Are the Ryanair Strikes to Be Seen as Extraordinary Circumstances?*, 44(3) Air & Space L. 327–329 (2019).

carrier's managers and it ceased after an agreement was reached.[51] The fact that such action constituted a 'wildcat' strike was irrelevant. Otherwise, this would mean subjecting the right to compensation to the applicable national rules on labour law, thus going against the unification sought by the Regulation 261.[52] Some voices have criticized the judgment on several grounds, but it is beyond the scope of this article making an in-depth analysis.[53]

In *Airhelp* [C-28/20], the strike conducted by the pilots of the air carrier was lawful, called by the trade unions, initiated after having given proper notice in accordance with the applicable national legislation, and absent any particular decision of the managers of the airline that explained the reaction by its workers. In the Advocate General's view, this situation had to be considered an extraordinary circumstance.[54] The opposite view was taken by the CJEU. A strike is an available tool within collective bargaining, and the discussion points it was expected to put pressure on – salaries, work schedules, and working hours – made it an event inherent in the normal exercise of the air carrier's activity.[55] At the same time, the strike remained within the actual control of the airline, based on mainly two premises. First, the foreseeability of the strike.[56] Second, that due to the strict interpretation of the notion of extraordinary circumstances, only events for which the air carrier has no control at all will qualify as such. This does not happen in a strike, for the airline may reach an agreement with its workers and end the conflict. The unreasonableness or disproportionality of the demands do not change the previous assessment.[57]

Moreover, *Airhelp* [C-28/20] enshrines the distinction between the 'external' and the 'internal' origin of the event. The CJEU identifies an external element when the strike action is taken by air traffic controllers or airport staff, thus leading to regard it as an extraordinary circumstance. The opposite happens when the airline is affected by a strike action taken by its own workers – unless their demands can be satisfied exclusively by public authorities.[58] This internal-external approach to strikes could already be found among scholars.[59] But the judgment also received notable criticism by some authors

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51 *Krüsemann and Others*, paras 38–45.
52 *Ibid.*, paras 46–47.
53 Kučko, *supra* n. 50, 331–332.
54 Opinion of the Advocate General in *Airhelp* [C-28/20], points 40, 41, 51–92.
55 *Airhelp* [C-28/20], paras 27–30.
56 On this aspect, *see* question no. 8 of the European Commission's press release IP/05/181, 16 Feb. 2005; Karolina Lyczkowska, *Retrasos y cancelaciones de vuelo: responsabilidad del transportista*, 2 Revista CESCO de Derecho de Consumo 13 (2012).
57 *Airhelp* [C-28/20], paras 31–38.
58 *Ibid.*, paras 39–45.
59 Alejandra Porto Cortés, *La huelga como causa de fuerza mayor en el transporte aéreo, conforme al Reglamento (CE) 261/2004, desde la perspectiva del consumidor* 23–24, 52–53, 79–80 (Difusión Jurídica y Temas de Actualidad 2012); Verheyen & Dikker, *supra* n. 34, at 668–669.

whose analysis cannot be explored here.[60] It is easier to hold that an internal strike is inherent in the normal exercise of the activity of an air carrier than concluding that such carrier has actual control.[61]

In the 2013 Proposal to amend the Regulation, labour disputes at the operating air carrier and at essential service providers are extraordinary circumstances (point 1 (vii) of Annex 1). The unavailability of flight or cabin crew is not extraordinary, unless it were caused by labour disputes (point 2(ii) of Annex 1).[62] The mention of the latter hypothesis allows a brief, ancillary remark. The unavailability of the pilot due to a sudden illness has not been deemed 'unusual' by the French *Cour de cassation*, which concluded it did not amount to extraordinary circumstances – a common approach among national courts.[63] After all, the operation of an air carrier depends not only on its material resources, but also on its staff. Illnesses are ordinary events, so the need to respond to this kind of situations seems inherent in the normal exercise of carriage by air.[64]

3.5 The closure of the airport's runway

A particular flight may also be affected by disruptions that equally affect many other aircrafts from different air carriers, such as the closure of the runway due to the presence of petrol on it. In the proceedings before the CJEU where this had occurred – *Moens*, it was assumed that the petrol had not been spilled by the aircraft concerned or by any other operated by the same carrier. If this had been the case, the situation would probably have been regarded analogous to a regular technical failure.[65] The presence of petrol on a runway is not intrinsically linked to the operation of the aircraft, and the air carrier has no control over it because both maintaining runways and deciding their closure are not within its competence.[66]

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60 Croon & Verbeek, *supra* n. 19, at 488–491.

61 Valérie Michel, *Transports – Grève légale et exonération du transporteur*, 5 Europe comm. 165 (May 2021) (accessed online).

62 *See* however amendments nos 167 and 168 of the European Parliament legislative resolution.

63 Cass. Civ. 1st, 5 Feb. 2020, Nos 19–12.294, ECLI:FR:CCASS:2020:C100113. *See also* provincial court of Barcelona (s. 15th), 17 Dec. 2010, ECLI:ES:APB:2010:10821; and the judgments reported by Irena Gogl-Hassanin, *Austria and Germany: Well-Informed Passengers, Extensive Case Law and a Strong Demand for Legal Certainty*, in *Air Passenger Rights. Ten Years On* 93, 98 (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition), and Krystyna Kowalik-Bańczyk, *Poland: Do Not Adjust Your Seat, Passengers' Right are Assured*, in *Air Passenger Rights. Ten Years On* 196 (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition).

64 *Lipton v. BA City Flyer* [2021] EWCA Civ 454 at [30], [33], [35], [36].

65 Juan Flaquer Riutort, *De nuevo sobre el concepto de circunstancias extraordinarias utilizado en el Reglamento (CE) nº261/2004, sobre compensaciones a los pasajeros en caso de gran retraso de los vuelos*, 61 La Ley mercantil (2019) (accessed online; 'La Ley' database reference: LA LEY 11692/2019).

66 *Moens*, paras 18–22.

The scenario has some parallelisms with the case of a screw in a tyre and received the same answer by the CJEU. These two instances have been seen as the translation of a more 'realistic' and 'practical' approach towards extraordinary circumstances.[67]

3.6 Natural phenomena and adverse weather

A notable incident that affected air transportation well beyond a single airport was the eruption of the Eyjafjallajökull volcano in 2010, whose severity led to close the airspace over several Member States. In *McDonagh*, such closure was qualified as an extraordinary circumstance.[68]

However, doubts remain with regard to mere adverse weather conditions. This factor is external to the airline, but adverse weather is relatively frequent and consequently not exceptional.[69] According to section 5.d of the Interpretative Guidelines on Regulation (EC) No. 261/2004 issued by the European Commission on 10 June 2016 (Interpretative Guidelines),[70] cancellations and delays due to bad weather conditions resulting on an airport congestion do stem from extraordinary circumstances. Although the Warsaw and Montreal Conventions are not decisive for the interpretation of the Regulation 261, they could support a reading in which adverse weather amounts to extraordinary circumstances, including both severe events such as hurricanes and typhoons, and lighter and more usual ones such as fog, hailstorms, or snowfalls.[71] Indeed, it does not seem rare for national courts to consider – at least *a priori* – events derived from bad weather as extraordinary circumstances.[72] A slightly different approach can nevertheless be taken. Recital 14 mentions meteorological conditions 'incompatible with the operation of the flight concerned' among the events from which extraordinary circumstances may stem. That might be a formula simply having in mind a cancellation, the situation where the defence is applicable in the wording of the Regulation. But it could also be understood as requiring a high degree of

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67 Aurélia Cadain & Chloé Rezlan, *Overview of Recent Case-Law and Trends on Regulation (EC) 261/2004, Both from a European and a French Law Perspective*, 44(6) Air & Space L. 483 (2019).

68 *McDonagh*, para. 34.

69 Verheyen & Dikker, *supra* n. 34, at 667.

70 C(2016) 3502 final.

71 Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35(3) Air & Space L. 212, 221 (2010); Walter Schwenk & Elmar Giemulla, *Handbuch des Luftverkehrsrechts* 754 (4th ed., Carl Heymanns Verlag, Köln 2013).

72 *See* the cases reported in Gogl-Hassanin, *supra* n. 63, at 93, 98, 100; Pablo Mendes de Leon & Wouter Oude Alink, *The Benelux: Small Is not Less*, in *Air Passenger Rights. Ten Years On* 105, 112–113 (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition); Fabien Le Bot, *France: Air Passengers Facing Long-Haul Judicial Journeys*, in *Air Passenger Rights. Ten Years On* 169 (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition).

severity for adverse weather to be an extraordinary circumstance, or at least being of a highly uncommon nature in the airport at hand. With this perspective, only very heavy snowfalls and extremely rough weather would allow an airline to rely on the defence, unlike – for instance – mere fog.[73]

The distinction between internal and external events now enshrined in EU's case-law probably implies that any kind of adverse weather falls within the notion of extraordinary circumstances, because airlines have no control or influence at all over it.

As a closing remark, it can be noted that the 2013 Proposal to amend the Regulation includes 'meteorological conditions incompatible with flight safety' within the circumstances that shall be considered as extraordinary (paragraph 1(vi) of Annex 1). In the European Parliament Legislative Resolution of 5 February 2014, Amendment No. 166 extends the situation contemplated to cover 'meteorological conditions […] that have damaged the aircraft in flight or on the tarmac after service release and rendering the safe operation of the flight impossible', too. In this regard, the French *Cour de cassation* has qualified as an extraordinary circumstance a lightning strike affecting an aircraft while it was parked at the airport,[74] but this is allegedly not a unanimous position among national courts.[75]

4 THE CAUSAL LINK BETWEEN THE EXTRAORDINARY CIRCUMSTANCES AND THE CANCELLATION OR DELAY

It is obvious that, in order to be exonerated from paying the lump-sum compensation, there must be some degree of closeness between the extraordinary circumstances and the cancellation or delay.[76] The Regulation offers only one glimpse of such a link, in recital 15, while mentioning an air traffic management decision as an extraordinary circumstance. It is said that such decision concerns 'a particular aircraft on a particular day' and that it may give rise to delays or cancellations in 'one or more flights by that aircraft'. In spite of this, whether an event could be

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[73] Ferrer Tapia, *supra* n. 35, at 258–259; María Victoria Petit Lavall, '*La protección de los pasajeros en la Unión Europea*, in *Derecho aéreo y del espacio* 648 (María José Morillas Jarillo et al. eds, Marcial Pons 2014) – citing several judgments from Spanish lower courts. *See also* Kinga Arnold, *Application of Regulation (EC) No 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights*, 32(2) Air & Space L. 105 (2007); Tatjana Evas & Silvia Ustav, *Estonia: All Well or Is There Something in the Air?*, in *Air Passenger Rights. Ten Years On* 156 (Michal Bobek & Jeremias Prassl ed., Hart Publishing 2018 – paperback edition); Kowalik-Bańczyk, *supra* n. 63, at 196.

[74] Cass. Civ. 1st, 12 Sept. 2018, Nos 17–11.361, ECLI:FR:CCASS:2018:C100803.

[75] Cadain & Rezlan, *supra* n. 67, at 473–474.

[76] Opinions of the Advocate General in *Kramme*, point 31, and *Krüsemann and Others*, ECLI:EU:C:2018:243, point 24; s. 5a of the Interpretative Guidelines.

invoked to get exempted from compensating passengers of subsequent flights carried out using the same airplane remained doubtful.[77]

Later, in two cases before the CJEU, the incidents were considered extraordinary circumstances even if the delay had been caused by problems arising in previous flights operated by the same aircraft.[78] However, the CJEU did not explicitly declare that in those situations the causation requirement was satisfied. This could be interpreted either as a void, or as an implicit assertion that causation can be established even if the disruption does not affect the very same flight where the delay occurs. However, the judgment in *Finnair* [2012] seemed to go against the second possibility, although in that case a strike by airport staff had given rise two days later to a denied boarding – where the extraordinary circumstances defence does not apply.[79]

Some doubts regarding the so-called 'knock-on effect' were cleared in *Transportes Aéreos Portugueses*. A conflictive passenger forced to divert the flight immediately preceding the one taken by the delayed passenger who asked for compensation, the diversion being the mediate or indirect reason for the delay. The CJEU noted that the wording and recitals of the Regulation 261 do not exclude the extraordinary circumstances defence when the event affects the same aircraft but a previous flight. It also underlined the need to balance the interests of passengers and carriers, something that implies considering the way aircrafts are used in air transportation. Since aircrafts may carry out successive flights in a short period of time, it is unavoidable that any incident occurring during one of them affects the subsequent ones. For that reason, the Regulation does not prevent air carriers from relying on the defence on the basis of events taking place in a previous flight, subjected to two conditions – in order to ensure a high level of protection for passengers. First, the extraordinary circumstances must have affected a previous flight the carrier operated using the very same aircraft. Second, the causal link between the event disrupting one flight and the cancellation or delay of the subsequent flight must be 'direct'. This is for national courts to ascertain after examination of all the facts available and, in particular, the operating conditions of the aircraft concerned.[80]

It could be said that *Transportes Aéreos Portugueses* left two questions on the table. The first one, whether it was required for the extraordinary circumstances to

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77 Arnold, *supra* n. 73, at 106.

78 *Pešková and Peška*, paras 7–12; *Germanwings* [2019], para. 9; and opinion of the Advocate General in *Germanwings* [2019], ECLI:EU:C:2018:945, points 8–10.

79 *See* Verheyen & Dikker, *supra* n. 34, at 670; opinion of the Advocate General in *Krüsemann and Others*, points 48, 62–65; and *Krüsemann and Others*, paras 17, 19.

80 *Transportes Aéreos Portugueses*, paras 51–54; and opinion of the Advocate General, ECLI:EU:C:2020:135, paras 58–60.

affect the flight immediately preceding the one in which the air carrier aims at relying on the defence. The second, whether the aircraft had to be covering the same route but in the opposite direction.[81] The CJEU has recently answered the first question in the negative. In *Austrian Airlines*, it reaffirmed its reasoning while admitting the defence for incidents occurring three flights back in the rotation sequence of the aircraft. It is however necessary for the aircraft concerned to be the same, and the causal link to be direct.[82] The CJEU provides no explicit insights on the second question. But the fact of making a reference to the antepenultimate 'operation' or three flights back in the 'rotation sequence' could be put forward to support that it is not needed for the aircraft concerned to carry out the same route. Even if it is relatively frequent that one airplane covers both directions of a single itinerary, it is not rare that it is used for different routes for the most efficient distribution of resources.

In light of the preceding case-law, three remarks can be made.

The CJEU's position diverges from the Proposal to amend the Regulation of 13 March 2013 – Article 5(3) would be modified, and Article 6 would include a paragraph 4 according to which extraordinary circumstances could only be invoked insofar they affect 'the flight concerned or the previous flight operated by the same aircraft'.

The CJEU finds no element in recitals 14 and 15 to exclude the defence when the extraordinary circumstances have affected a previous flight operated by the same aircraft. Therefore, an air carrier may rely on the exemption for a knock-on delay derived from adverse weather. The doubts came because recital 14 states that extraordinary circumstances may occur in cases of 'meteorological conditions incompatible with the operation *of the flight concerned*'.[83]

The third and last remark connects with two aspects that will be commented in section 5. On the one hand, air carriers must reasonably organize their flights and resources, so they are in position to mitigate detrimental consequences derived from extraordinary circumstances. At the same time, an air carrier may make use of the exemption only if it has actually adopted measures appropriate to the situation in order to prevent the cancellation or long delay from taking place. Consequently, the less closeness in time to the concrete flight affected, the more difficult to prove that the causal link remains direct, for such link would be deemed broken because of the lack of adequate action – preventive or reactive – by the air carrier.

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[81] This was the case in *Germanwings* [2019] and *Transportes Aéreos Portugueses*, but not in *Pešková and Peška*.

[82] Case C-826/19, *Austrian Airlines* [2021] ECLI:EU:C:2021:318, paras 53–56.

[83] Arnold, *supra* n. 73, at 106; Verheyen & Dikker, *supra* n. 34, at 668.

5 THE UNAVOIDABILITY OF THE EXTRAORDINARY CIRCUMSTANCES EVEN IF ALL REASONABLE MEASURES HAD BEEN TAKEN

5.1 What airlines must (really) prove

In conformity with Article 5(3) of Regulation 261, the air carrier does not have to compensate passengers under Article 7 if the cancellation – also applicable to delays – is caused by extraordinary circumstances 'which could not have been avoided even if all reasonable measures had been taken'. While reading the provision, two aspects jump out, as the Advocate General noted in *Kramme*. First, it does not require the carrier to effectively have taken measures, but only to prove that even if it had taken them the extraordinary circumstances could not have been avoided. Second, the aspect to be unavoidable is not the cancellation or delay, but those circumstances.[84] However, the CJEU's first judgments on the issue were ambiguous on two limbs. On the one hand, it was not clear whether the unavoidable had to be the extraordinary circumstances or that such circumstances ultimately led to the cancellation or delay.[85] On the other hand, it was not clear either whether the carrier had to prove only the unavoidability even if it had taken measures, or that it effectively took them. According to the wording of the judgments, it seemed the air carrier had to prove both aspects regarding the former question, and an actual adoption of measures.[86] For some authors, this was a 'wrongful stretching' of Article 5(3).[87]

The development of the case-law has not been straightforward. If one reads *Germanwings* [2019], the air carrier is required to prove two things – the CJEU uses the conjunction 'and' while connecting them. First, that the extraordinary circumstances could not have been avoided even if all reasonable measures had been taken. And second, when such circumstances do arise, that it actually adopted appropriate measures to prevent a cancellation or delay as their outcome.[88] Nevertheless, according to *Moens* and *Finnair* [2020], the carrier apparently needed to prove only one of those two aspects, because both rulings use the conjunction

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[84] Points 25–26. *See also* Milner, *supra* n. 26, at 215; Morten Broberg, *Air Passengers' Rights in the European Union: The Air Carriers' Obligations vis-à-vis their Passengers Under Regulation 261/2004*, 7 J. Bus. L. 736 (2009); Arnold & Mendes de Leon, *supra* n. 36, at 107; Siguoirt, *supra* n. 36, at 88.

[85] Thibault Douville, 'L'indemnisation du passager – aspects substantiels', *L'indemnisation et l'assistance des passagers du transport aérien* 110–111 (Nicolas Balat et al. dir., LexisNexis 2019). s. 5a of the Interpretative Guidelines went in the second direction.

[86] *Wallentin-Hermann*, paras 38–43; *Eglītis and Ratnieks*, paras 25, 27–30; *Pešková and Peška*, paras 28–29, 34.

[87] Croon, *supra* n. 36, at 616–617.

[88] *Germanwings* [2019], para. 19.

'or'.[89] Later, the CJEU used again 'and' in two cases.[90] Finally, possibly wanting to erase any uncertainty, it ended separating both propositions and linking them by a 'moreover'.[91] Having said that, it will be seen below in Sections 5.3 and 5.4 that both preventive and reactive measures are in fact required.[92]

An air carrier can only be asked to prove that it effectively took measures when it was in position to do so. And only options of its responsibility will be considered.[93] This is important because sometimes events can be tackled with measures to be put in practice by different operators, inter alia air carriers, airport managers, and air traffic controllers (birdstrikes).[94] There are also incidents where a quick answer can be demanded because of the existence of standard procedures (the replacement of a tyre).[95] In a similar vein, when the event takes place in the main hub of the air carrier, a faster response can be asked because it should have more available resources to limit the impact of extraordinary circumstances, including a higher number of spare sparts.[96] In other occasions, such as the closure of a runway by airport authorities due to the presence of petrol, airlines have their hands completely tied.[97] It may also happen that an air carrier is constrained in terms of the measures it can adopt not only because of factual limitations, but also regulatory ones.[98]

All kinds of difficulties should be taken into account, including the time it takes to comply with formalities and obtain the necessary authorizations.[99] Finally, it is to be seen whether grounds beyond private law can be used as well. For instance, a national court tempted to conclude that an air carrier should have sent other aircrafts to tackle the knock-on effect, might dismiss it on the basis of sustainability concerns – it would not be very environment-friendly to make more airplanes fly when the carrier can reallocate stranded passengers in a reasonable period of time. These considerations cannot be used because passengers' rights should not be undermined by general policy concerns which are not contemplated in the applicable normative text.

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89 *Moens*, para. 15; *Finnair* [2020], para. 37.
90 *Transportes Aéreos Portugueses*, paras 36, 57; *Airhelp* [C-264/20], para. 28.
91 *Airhelp* [C-28/20] para. 22.
92 Pascal Dupont & Ghislain Poissonnier, *Y a-t-il un autre pilote dans l'avion ?*, 18/7863[e] Recueil Dalloz 1031 (14 May 2020).
93 *Pešková and Peška*, para. 43; *Moens*, para. 27.
94 *Ibid.*, paras 39–44.
95 *Germanwings* [2019], paras 32–33.
96 Arnold, *supra* n. 73, at 106; s. 5e of the Interpretative Guidelines.
97 *Moens*, para. 28. *See also* Cadain & Rezlan, *supra* n. 67, at 477.
98 Opinion of the Advocate General in *Airhelp* [C-28/20], points 117–121.
99 *See* Cass. Civ. 1st, 12 Sept. 2018, Nos 17–11.361, ECLI:FR:CCASS:2018:C100803.

5.2 What 'all reasonable measures' are

The concept of 'all reasonable measures' has been characterized by the CJEU as 'individualised and flexible' because it is for national courts to determine whether or not the measures adopted by the air carrier were adequate in the particular context.[100] They must be 'appropriate' to the situation and technically and economically viable for the air carrier concerned. The standard is for the carrier to deploy all its resources – staff, equipment, and financial means – without making 'intolerable sacrifices' with respect to its capacities at the relevant time, in order to avoid as far as possible a cancellation or delay.[101] It seems national courts will have to make a cost-benefit analysis between the risks involved and the cost of measures.[102] As summarized by the Advocate General in *Airhelp* [C-28/20], the conditions for exemption are strict due to the high level of consumer protection aimed, thus 'requiring the air carrier to do everything objectively possible with the available means to avoid the cancellation or long delay'.[103] Obviously, airlines cannot be asked to have – for example – replacement aircrafts and crew members everywhere,[104] although they are incentivised to do so indeed because neither technical failures nor the sudden illness of a staff member are in principle extraordinary circumstances.

The presented case-law constitutes a clear example of the strict interpretation corresponding to a derogation from a passenger-oriented norm.[105] But after the first judgment where the standard was established, some voices rightly pointed out both the subjectivism introduced, for each airline has different means and resources, and the doubts on whether it is truly in line with the concept of all 'reasonable' measures.[106]

5.3 Preventive measures and planification

Air carriers must organize its flights and routes so as to be able to counter extraordinary circumstances and reduce the risk of them leading to a cancellation

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[100] *Eglītis and Ratnieks*, para. 30; *Pešková and Peška*, para. 30; *Moens*, para. 27. A 'relativistic' approach – as described by Siguoirt, *supra* n. 36, at 87 – is thus followed.

[101] *Wallentin-Hermann*, paras 40–42; *Eglītis and Ratnieks*, paras 25, 29; *Siewert*, para. 17; *Pešková and Peška*, paras 28–29, 34; *Germanwings* [2019], para. 19; *Moens*, para. 15; *Finnair* [2020], para. 37; *Transportes Aéreos Portugueses*, paras 36, 57; *Airhelp* [C-264/20], para. 28; *Airhelp* [C-28/20] para. 22.

[102] Xavier Delpech, *Le règlement n° 261/2004 du 11 février 2004 sur les droits des passagers aériens et le droit civil: un mariage plus que de raison*, in *L'indemnisation et l'assistance des passagers du transport aérien* 146 (Nicolas Balat et al. dir., LexisNexis 2019).

[103] Point 102.

[104] Schwenk & Giemulla, *supra* n. 71, at 754; Dupont & Poissonnier, *supra* n. 92, at 1029–1031.

[105] Fabien Le Bot, *La protection des passagers aériens dans l'Union européenne*, 4 Revue trimestrielle de droit européen 763 (2013).

[106] Balfour, *supra* n. 24, at 229.

or delay. CJEU's case-law obliges carriers to provide for some reserve time in order to normally restart operations after such circumstances have disappeared, without establishing a minimum.[107] A particular dimension of this might possibly be organizing the slots for maintaining a reasonable period of time between connecting flights, so passengers affected by extraordinary circumstances in the first leg do not necessarily get stranded.[108] Carriers are also required to foresee the time that will be lost due to 'secondary complications' that arise once the extraordinary circumstances have disappeared, as a consequence of the initial delay incurred. However, they cannot be forced to make intolerable sacrifices, so the duration of the necessary reserve time must be assessed in light of this. Furthermore, the time periods set forth in Article 6(1) of the Regulation that trigger the right to assistance are not a reference while doing such assessment.[109] The case-law just described compels air carriers to adapt their operation and management, thus adding a normative function to the right to compensation.[110]

Another scenario where contingency plans are essential is that of technical failures that might force the withdrawal of the airplane. It would be fair to ask carriers to elaborate those plans having in mind their past experience and aiming at accelerating the diagnosis and correction of the problem to avoid a withdrawal.[111]

5.4 Reactive measures including re-routing

Entering now the domain of reactive measures, it is crucial to underline that these are not to be excessive, so passengers do not suffer further, unnecessary trouble and inconvenience. For example, the CJEU has established that air carriers are free to use the experts they see fit to proceed to checks. But when a first check has been carried out by an authorized expert, a second one is not an 'appropriate' measure.[112]

Sometimes, extraordinary circumstances give rise to stranded passengers who lose their connecting flights, and the air carrier will have to provide satisfactory and timely re-routing. The CJEU has recently confirmed that flights to be sought are direct or indirect, and also those operated by other airlines, including carriers of a different alliance. The air carrier concerned can only limit itself to reallocate the passenger in its next flight when there are no other ones allowing an earlier arrival

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[107] *Eglītis and Ratnieks*, paras 26–31. *See also* opinion of the Advocate General in *Airhelp* [C-28/20], points 112–113.

[108] *See* Ferrer Tapia, *supra* n. 35, at 260; Ricardo Pazos Castro, *La protección del consumidor en el transporte aéreo de pasajeros* 199–201 (Wolters Kluwer Bosch 2018).

[109] *Eglītis and Ratnieks*, paras 32–36.

[110] Douville, *supra* n. 85, at 111.

[111] Opinion of the Advocate General in *Kramme*, points 46–47.

[112] *Pešková and Peška*, paras 33–35.

at the final destination, when there are no seats available in those other flights, or when reallocating the passenger in such a way would be 'an unbearable sacrifice' with regard to its capacities at the time.[113] This is another dimension of the duty to reasonably prevent inconveniences that shapes the operation and management of airlines.[114]

Other doubts regarding re-routing persist. For instance, whether carriers must also seek other modes of transportation such as coach and railway, plausible solutions for not-so-long trips. The wording of Article 8 might support both a positive and a negative answer because of the reference to 'comparable *transport* conditions'. The Regulation 261 is probably having in mind a flight and it could be problematic to hold that offering a different mode respects the 'comparable conditions' standard, but a more flexible understanding is possible. For example, a duty to provide first-class railway tickets to passengers who were expecting to fly in business class. However, Article 7(2) refers to the offer of re-routing to the final destination 'on an alternative *flight* pursuant to Article 8'. Having said that, if a literal reading of the Regulation gives way to or is somehow modelled after a passenger-oriented approach – which is not uncommon[115] – it can be supported that the air carrier is indeed required to consult alternative means of transport. Such interpretation would help passengers especially when the airspace is closed and the distance to cover is moderate.[116] One hint on the matter can be found in section 4. b of the Interpretative Guidelines. While elaborating on the notion of 'comparable transport conditions' and right after proclaiming a case-by-case approach, some good practices are recommended. And one of them takes as starting point the use of another air carrier 'or an alternative mode of transport' for the remaining part of the journey.

Asking air carriers to offer railway and coach services should be limited to the hypothesis when the delay is expected to last much. Otherwise, the alternative will rarely be reasonable, because getting to the respective stations may be not so easy and fast for passengers, and the duration of the trip using the alternative means of transport would usually not allow an earlier arrival. The 2013 Proposal to amend the Regulation contains an interesting provision in this regard. On re-routing, eventual new Article 8(5) grants passengers the right to be taken 'via another air carrier or another mode of transport', provided that the air carrier 'cannot transport the passenger on its own services and in time to arrive at the final destination within twelve hours of the scheduled arrival time'.

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113 *Transportes Aéreos Portugueses*, paras 58–60; *Airhelp* [C-264/20], paras 29–32.

114 Pascal Dupont & Ghislain Poissonnier, *Quand le passager enragé doit être débarqué sur une île*, 39/7884[e] Recueil Dalloz 2228 (12 Nov. 2020).

115 Le Bot, *supra* n. 105, at 769–774.

116 On re-routing, including the issue dealt with now, *see* Broberg, *supra* n. 84, at 731–732, 739–740.

If the air carrier finds various reasonable alternatives to take passengers to their final destination, it must inform them about the existing options and let them choose. In *Rusu*, a case where a denied boarding had occurred, the CJEU affirmed that the passenger has the right to be given comprehensive information so as to enable an effective and informed choice.[117] When disturbed by extraordinary circumstances, passengers may prefer not arriving at the earliest opportunity, but making no stopover or flying with a particular airline. However, it seems fair to nuance such choice in the sense that it should only be given when all options of re-routing represent a similar cost for the carrier. This idea could be inspired in the EU rules on remedies for lack of conformity, in particular Article 3(3) of Directive 1999/44/EC on the sale of consumer goods,[118] and Article 13(2) of Directive (EU) 2019/771 on contracts for the sale of goods[119] – according to which the consumer may choose between repair and replacement unless one of the remedies imposes disproportionate costs on the seller in comparison with the other.

6 CONCLUSIONS

The interpretation of the extraordinary circumstances defence contained in the Regulation 261 has great implications not only for the immediate position of passengers and air carriers, but also regarding the proportionality of the CJEU's case-law that granted the right to compensation to passengers suffering a long delay at arrival. Consequently, the decisions coming from Luxembourg deserve much attention and study, something this article has tried to do. In order to be able to rely on the defence, three conditions must be fulfilled. First, the disruptive event must qualify as an extraordinary circumstance. Second, between the event and the cancellation or delay there must a be a direct causal link. And third, the event must be unavoidable even if all reasonable measures had been taken, and the air carrier must have taken actual measures to prevent as much as possible the incident from resulting in a cancellation or long delay.

The notion of extraordinary circumstances has been built upon two cumulative conditions. Namely, not being inherent in the normal exercise of the activity of the air carrier and remaining beyond its actual control. However, in cases that concerned technical failures and collisions, another criterion complementing, if not de facto replacing, the first one was used – not being intrinsically linked to the

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[117] Case C-354/18, *Rusu* [2019] ECLI:EU:C:2019:637, paras 53–61.

[118] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171/12, 7 July 1999).

[119] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136/28, 22 May 2019).

operating system of the aircraft. In doing so, the CJEU implicitly developed a distinction between 'external' and 'internal' events. Such distinction has recently been made explicit and enshrined as a tool to determine whether an event of any nature falls within the notion of extraordinary circumstances. In this context, new questions arise. Do the two 'classical' conditions remain settled, or must the notion of extraordinary circumstances be understood from now on using solely or mainly the referred distinction? If the assessment integrates all criteria, how will they exactly interplay? Is the 'control' element to take a preponderant role in the future?

Causation between the disruptive event and the subsequent cancellation or delay has been placed on the right position by the CJEU. A fair balance has been struck. An interpretation of the extraordinary circumstances defence ignoring the knock-on effect would turn the back on reality and impose a heavy burden on airlines. However, at the same time, the aim of protecting air passengers requires causation to be direct. Surely, this will bring some uncertainty and diversity between the approaches followed by national courts. But in a field not characterized by certainties, this does not seem a major problem.

Finally, the judgments on the unavoidability of the extraordinary circumstances 'even if all reasonable measures had been taken' do not clear all doubts. Currently, it can be considered settled that there are two things for the air carrier to prove. First, that even if those measures had been taken, the disruptive event would have taken place the same. Second, that there was an actual adoption of measures to prevent extraordinary circumstances from resulting in a cancellation or delay. The standard with regard to the measures adopted is defined as deploying all resources without making intolerable sacrifices. A question that remains open is whether, in the event of a stranded passenger due to extraordinary circumstances, carriers must also consider re-routing using other modes of transport such as coach and railway.

The wording of the Regulation leads to a negative answer, but the goal of ensuring a high level of protection to air passengers supports an affirmative one. After all, non-aerial alternatives will be of interest only in extreme cases, so a passenger-oriented interpretation does not imply a notable number of situations when airlines will have to seek those alternatives. In any case, if a passenger-oriented interpretation is followed, air carriers should be asked to consider non-aerial re-routing only when the delay is expected to be long. If this is not the case, seeking such re-routing would probably not be a reasonable measure.

Please fasten your seatbelts, new discussions on the extraordinary circumstances defence are ready for take-off!