

Aviation Update: Possibilities for airlines to deny claims for cancellation and delay

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Yesterday (4 May 2017), the EU Court of Justice ruled that a bird strike (a collision between a bird and an aircraft) is an extraordinary circumstance under EU Regulation 261/2004. In a long series of rulings by this Court regarding Regulation 261/2004, this is arguably the first that is favourable to airlines. Where the Advocate-General had argued that a bird strike is inherent to the airline industry, the Court on the other hand recognises that such an event is outside the actual control of the airline.

De The Court held that:

“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 emphasises that a bird strike is an extraordinary circumstance, regardless of whether such bird strike caused damage to the aircraft:

“In that regard, it is irrelevant whether the collision actually caused damage to the aircraft concerned. The objective of ensuring a high level of protection for air passengers pursued by Regulation No

261/2004, as specified in recital 1 thereof, means that 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.”

The Court states that an airline can deny compensation for delay or cancellation, if it shows that it took all ‘reasonable measures’ in order to reduce or even prevent the risks of collision with a bird, provided (i) that, in particular at the technical and administrative levels, such measures can actually be taken by that airline, (ii) that those measures do not require the airline to make intolerable sacrifices in the light of the capacities of its undertaking and (iii) that the airline has shown that those measures were actually taken as regards the flight affected by the collision with a bird. Only those measures must be taken into account which can actually be the airline’s

responsibility. The Court explicitly excludes those measures which are the responsibility of other parties, such as, airport managers or the competent air traffic controllers. Arguably, it is therefore not relevant whether it is known that an airport has problems with dealing with birds in the vicinity.

Also, the airline must show that after a bird strike occurs, the airline adopted measures appropriate to the situation, deploying all its resources in terms of staff or equipment and the financial means at its disposal, in order to avoid the cancellation or delay of its flights due to such a bird strike. However, also after the bird strike occurs, the airline is not obligated to adopt measures which are intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

In the matter that gave rise to the Court's judgment, the delay was not only caused by (1) the bird strike but was also the result of (2) the instruction by the airline of a second expert after the necessary checks had already been carried out

by an expert authorised under the applicable rules. This second check was required by the owner of the aircraft. The Court ruled that cause no. 2 is not an extraordinary circumstance under Regulation 261/2004. In the Court's view the second check was not necessary in order to ensure the airworthiness of the aircraft and therefore cannot qualify as an extraordinary circumstance. When ascertaining whether the airline is held to compensate the passengers for such delay, the amount of delay caused by circumstance no. 1 must be deducted from the total delay.

This ruling and the Court's considerations are not in line with recent Dutch case law in which compensation was awarded in case of delay caused by bird strikes. It should therefore lead Dutch courts to reconsider and provides airlines a new basis for denying passengers' claims for compensation under Regulation 261/2004.

Zaken helder maken.



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