Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 22 November 2018 [1]

**Case C-501/17**

**Germanwings GmbH**
**v**
**Wolfgang Pauels**

(Request for a preliminary ruling from the Landgericht Köln (Regional Court, Cologne, Germany))

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Compensation to passengers in the event of denied boarding and of cancellation or long delay of flights — Right to compensation — Exemption — Notion of 'extraordinary circumstances' — Foreign object damage (FOD) — Damage to an aircraft tyre caused by a screw lying on the take-off or landing runway)

1. In the present reference for a preliminary ruling the Court will literally have to get down to the 'nuts and bolts' of the notion of 'extraordinary circumstances' in the context of compensation to passengers in the event of denied boarding, cancellation, or long delay of flights. This is so because, in this case, damage to an aircraft tyre was caused by a screw lying on either the take-off or landing runway of the flight concerned ('the event at issue').

2. The reference seeks interpretation of Article 5(3) of Regulation (EC) No 261/2004, [2] and has been submitted by the Landgericht Köln (Regional Court, Cologne, Germany) in the context of a dispute between Mr Wolfgang Pauels and Germanwings GmbH, an air carrier, in relation to a refusal by the latter to compensate this particular passenger, who suffered a significant delay to his flight.

3. The underlying economic stakes are considerable. According to statistics that the UK Civil Aviation Authority has provided to the European Commission, the extraordinary circumstances defence makes up 'about 30 % of all complaints' and deplete 'more than 70 % of the resources of national authorities'. [3] The importance of the notion of extraordinary circumstances can therefore not be overstated. [4]

1 Original language: English.

2 Regulation of the European Parliament and of the Council of 11 February 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 ('the Flight Passenger Rights Regulation').

3 See Prassl, J., 'Exceptionally Unexceptional: C-257/14 Corina van der Lans v KLM and the end of Regulation 261/2004's Exceptional Circumstances Defence', EuCML, 2016, p. 136. The author also cites the airlines' exceptionally 'stubborn refus[al] to comply in full with their obligations, until dragged to court'.

4 Malenovsky, J., 'Regulation 261: Three Major Issues in the Case Law of the Court of Justice of the EU', in Bobek, M., and Prassl, J. (eds), *EU Law in the Member States: Air Passenger Rights, Ten Years On*, Hart, 2016, pp. 25 and 30.

## I. Legal context

4. Recitals 1, 4, 14 and 15 of the Flight Passenger Rights Regulation read as follows:

‘(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

…

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

…

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in 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.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.’

5. Under the heading ‘Cancellation’, Article 5(1) and (3) of the regulation provides as follows:

‘1. In case of cancellation of a flight, the passengers concerned shall:

…

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival;

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

…

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7 if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

6. Under the heading 'Right to compensation', Article 7(1)(a) of the Flight Passenger Rights Regulation provides:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

…'

7. Article 13 of this regulation, entitled 'Right of redress', reads as follows:

'In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.'

## II. Facts giving rise to the dispute in the main proceedings and the question referred for a preliminary ruling

8. Mr Pauels booked a flight with Germanwings for 28 August 2015 from Dublin to Düsseldorf. The flight was scheduled to arrive in Düsseldorf at 14.30 local time.

9. In fact, the flight arrived in Düsseldorf at 17.48 local time, that is to say, more than three hours late.

10. Germanwings counters Mr Pauels' demand for compensation by stating that, during the preparations for take-off of the flight at issue, a screw was found in a tyre of the aircraft used for the flight. The screw had inserted itself into the tyre on the take-off runway in Düsseldorf, or on the landing runway used by the preceding flight in Dublin. For that reason, the tyre had to be changed, which led to the delay.

11. Germanwings takes the view that the harmful event is an extraordinary circumstance within the meaning of Article 5(3) of the Flight Passenger Rights Regulation, on the basis of which it is exempt from liability. Accordingly, it submits, it is not required to pay compensation.

12. The Amtsgericht Köln (Local Court, Cologne, Germany) ordered Germanwings, in accordance with the terms of the application, to pay to Mr Pauels EUR 250, together with interest on that amount as from 16 September 2015 until payment, at the rate of 5 % above the base rate.

13. The above court accepted as true Germanwings' submission, disputed by Mr Pauels, as to the cause of the significant delay in arrival in Düsseldorf, and essentially stated in that connection that Germanwings was not exempt, by virtue of that fact, from its obligation to pay compensation, because damage to an aircraft tyre by a screw lying on the take-off or landing runway is a circumstance that may arise in the course of normal flight operations and is controllable. This is also in line with the German legislature's view, as evidenced by the statutory rules on airfield supervision. The

management of air-travel operations covers not only the flight operations of the relevant undertaking in the narrower sense, such as take-off, flight and landing, but also all airport services provided by third parties and used by the airline, without which normal flight operations would not be possible. According to the Amtsgericht Köln (Local Court, Cologne), this was made clear by the Court of Justice in its order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377).

14. Germanwings lodged an appeal against the judgment of the Amtsgericht. It contends that the lower court is overestimating what is within Germanwings' control, and is disregarding the fact that the Court did not rule that all services provided by a third party and used by the air carrier form part of its flight operations.

15. The referring court points out that the above order in *Siewert* concerned damage to an aircraft by mobile boarding stairs which are brought alongside the aircraft in order to enable passengers to embark, that is to say, the employment of a service provider in connection with a specific flight operated by the air carrier. To enable passengers to embark on the flight they have booked is one of the air carrier's tasks. To that extent, the facts of the present case are by their very nature not comparable. In the present case, the aircraft was accidentally damaged owing to use of the take-off and landing runway which is similarly used by all air carriers. Accordingly, such use is to be attributed to general air traffic and cannot be considered as one of the specific tasks of the air carrier. Nor, it argues, does the cleaning of the take-off and landing runways form part of the duties of the air carrier, and is therefore also not a matter within Germanwings' control. The cleaning of runways is not specific to any individual flight operated by an air carrier, or to the safe embarkation or disembarkation of passengers to and from the flight that has been booked, but rather relates to airport safety and thus the safety of air traffic in general.

16. Germanwings further contends that it cannot share the view of the first-instance court because, under that view, it would be impossible for a circumstance preventing the operation of a planned flight to constitute a circumstance 'not inherent in the normal exercise of the activity of an air carrier'. Thus, the fundamental requirement for a finding that there is an extraordinary circumstance, in the event of a technical defect, that is to say, that it is an event 'not inherent in the normal exercise of the activity of the air carrier concerned' would thereby be rendered otiose.

17. All this being so, the Landgericht Köln (Regional Court, Cologne) considers that the determination of the appeal depends on whether the damage to an aircraft tyre by a screw lying on the landing or take-off runway is an extraordinary circumstance within the meaning of Article 5(3) of the Flight Passenger Rights Regulation. Therefore, it decided to refer the following question to the Court for a preliminary ruling:

'Is the damage to an aircraft tyre caused by a screw lying on the take-off or landing runway (foreign object damage/FOD) an extraordinary circumstance within the meaning of Article 5(3) of [the Flight Passenger Rights Regulation]?'

## III. Procedure before the Court

18. Written observations were submitted by Mr Pauels, the German and Polish Governments as well as by the Commission. At the hearing, which took place on 17 September 2018, Germanwings and all the above parties (except for the Polish Government) presented oral argument.

## IV. Analysis

### *A. Brief summary of the observations of the parties*

19. First of all, so far as concerns *admissibility*, the Commission submits that the present reference for a preliminary ruling potentially raises doubts in this respect. As regards the content of the reference, the Commission submits that the reference refers to allegations of the parties which the referring court has presumed to be correct, rather than to established facts. The Commission takes the view that if subsequent measures of inquiry were to call into question the facts presumed to be correct by the referring court, then the pertinence of the reference for a preliminary ruling could disappear. In any event, the Commission concludes that the reference is admissible.

20. As regards *substance*, Mr Pauels submits that damage to the aircraft tyre caused by a screw lying on the take-off or landing runway is not an extraordinary circumstance. He contends that such an event is inherent in the activity of an air carrier. The presence of foreign objects on the runway is a situation which may arise on a daily basis, the air carriers are well aware of this problem and the cleaning of the runway is among the habitual tasks of airport operators. He adds that aircraft tyres, which are subject to extreme pressure, are regularly inspected in the context of pre-flight checks and need to be regularly replaced. Therefore, an event such as the one at issue here may not be regarded as not inherent in the air carrier's activity; not least because the notion of an 'extraordinary circumstance' must be interpreted strictly.

21. Should such an event be nevertheless regarded as not inherent in the air carrier's activity, it should be regarded as effectively controllable, by reason of its nature or its origin, given that runways are subject to regular inspection by airport operators.

22. The German and Polish Governments as well as the Commission contend that the damage to the aircraft tyre caused by a screw lying on the take-off or landing runway constitutes an 'extraordinary circumstance'.

23. According to the German Government, the risk related to the presence of foreign objects on runways is inevitable for the air carrier and is not controllable by it. The presence of foreign objects has a cause which is external to the air carrier, without any link to the carrying out of the flight in question — contrary to the premature defects of certain parts of an aircraft which arise in spite of regular service and which were at issue in *Wallentin-Hermann*[5] and *van der Lans*.[6] The fact that air carriers may be exposed more regularly to a situation where a tyre is damaged by a foreign object on the runway does not exclude its qualification as an extraordinary circumstance, given the fact that the frequency of events has not been taken into account as a differentiating criterion.[7] Moreover, the German Government insists on the absence of misconduct on the part of the airport operator which could be attributed to the air carrier in question. *In casu*, that operator did not fail to comply with its obligations as to maintenance and operation. Were one to impose stricter controls than those already in place, it would have a seriously adverse effect on air traffic.

24. The Polish Government submits that damage such as that at issue, caused by a third person failing to fulfil its obligations, is not among the normal activities of an air carrier. Given the fact that it cannot foresee that the airport operator will fail to fulfil its obligations, the air carrier does not have to take into account the risk that its aircraft may be damaged in this respect. In that context, the air carrier may merely be held responsible for speedy repairs to the damaged aircraft.

5 Judgment of 22 December 2008 (C-549/07, EU:C:2008:771).

6 Judgment of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618).

7 Judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342).

25. According to the Commission, the event at issue is not inherent in the normal exercise of an air carrier's activity and is not controllable by it. In this respect, it is not intrinsically linked to the functioning of the system of an aircraft — contrary notably to mobile boarding stairs. In this sense, it is comparable to a bird strike, which is also not controllable by the air carrier. This absence of control of the air carrier is confirmed by the fact that the security and inspection of runways falls under the responsibility of airport operators. Finally, the fact that the incident took place at the landing or take-off of the preceding flight does not preclude its qualification as an 'extraordinary circumstance'. [8]

## *B. Assessment*

### *1. Preliminary remarks*

26. In my view, the admissibility of the reference for a preliminary ruling is not a live issue in this case in so far as it is only the Commission that has raised it [9] — in what are effectively theoretical remarks — and the Commission concludes itself that the reference is not, in any case, inadmissible. First, in the context of the cooperation between the Court and the national courts, questions relating to EU law benefit from the presumption of relevance. [10] Secondly, it follows from the Court's case-law that EU law does not prohibit the referring court, after the delivery of the preliminary ruling, from hearing the parties again and/or from undertaking further inquiries, which might lead it to alter the findings of fact or law made in the request for a preliminary ruling, provided that the referring court gives full effect to the interpretation of EU law adopted by the Court. [11]

27. So far as concerns substance, in the order for reference, the referring court considers that there is an extraordinary circumstance in the present case. Indeed, the referring court has already held in several sets of proceedings prior to the current legal dispute that damage to a tyre or other technical aircraft malfunction caused by small items lying on the runway, such as nails or similar objects, constitutes an extraordinary circumstance exempting the air carrier from the duty to pay compensation to its passengers.

28. I have reached the conclusion that this approach is correct. [12] In my analysis below I will deal, in particular, with the Court's case-law and with the notion of extraordinary circumstances in relation to technical problems. Next, I will apply the Court's two-limb test: (i) the problem must be attributable to an event which is not inherent in the normal exercise of the activity of the air carrier concerned; and (ii), owing to its nature or origin, it is beyond the air carrier's control. Finally, I will address the additional condition of reasonable measures and the avoidance/prevention of the extraordinary circumstance(s). I will conclude that the damage to an aircraft tyre caused by a screw lying on the take-off or landing runway *falls within the scope of the notion of an 'extraordinary circumstance'* within the meaning of Article 5(3) of the Flight Passenger Rights Regulation.

8 This follows from the judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342).

9 Moreover, none of the parties considered it necessary to address this issue at the hearing before the Court.

10 See, for instance, judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 67).

11 Judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 30 and point 2 of the operative part).

12 On the concept of extraordinary circumstances, see Milner, A., 'Regulation EC 261/2004 and "Extraordinary Circumstances"', *Air & Space Law*, 34, no. 3 (2009), pp. 215-220; van der Wijngaart, T., 'van der Lans v. KLM and 'Extraordinary Circumstances"', *Air & Space Law*, 41, no. 1 (2016), pp. 59-62; Michel, V., 'Commentaires: Une grève sauvage ne constitue pas une circonstance extraordinaire exonérant le transporteur', Europe, Number 6, June 2018, pp. 22-23; Flöthmann, M., 'Verbraucherschutz: Ausgleichszahlungen nach Flugausfall trotz "wilden Streiks" des Flugpersonals (Anmerkung)', EuZW, 2018, 457; Herrmann, C., 'Entschädigung der Fluggäste bei „wildem Streik" — das TUIfly-Urteil des EuGH', RRa, 3/2018, p. 102; Führich, E., 'Innenbetrieblicher "wilder Streik" als außergewöhnlicher Umstand der Fluggastrechte-Verordnung', *Monatsschrift fúr Deutsches Recht*, 13/2018;

29. I add that it is particularly necessary for the Court to clarify this issue in so far as in Germany (as well as in other Member States [13]) the national case-law does not treat in a uniform manner the question whether or not an event such as the one at issue here should constitute an 'extraordinary circumstance' within the meaning of that provision.

30. For instance, in Germany, various first-instance courts and indeed a decision of a different chamber of the referring court [14] (which are consequent upon the decision of the Court on the mobile boarding stairs in *Siewert* [15]) have taken the opposite view and ruled that there is no 'extraordinary circumstance' in a case such as this one.

31. Therefore, clarification of this issue has clear practical significance and will also help improve legal certainty for passengers and air carriers alike.

32. The Court has already had several opportunities to interpret Article 5(3) of the Flight Passenger Rights Regulation. A brief overview of these cases follows.

33. In *Pešková and Peška*, [16] which is particularly pertinent in this case, the Court held that a collision between an aircraft and a bird, as well as the damage caused by it, are not intrinsically linked to the operating system of the aircraft and are not by their nature or origin inherent in the normal exercise of the activity of the air carrier, and, furthermore, escape its actual control — thus such a collision constitutes an extraordinary circumstance.

34. In *McDonagh*, [17] the Court also included in that notion the closure of air space due to the eruption of the Icelandic volcano Eyjafjallajökull.

35. On the other hand, in *van der Lans*, [18] the Court ruled that a technical problem which occurs unexpectedly, which is not attributable to poor maintenance and which is also not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' within the meaning of Article 5(3).

36. In *Wallentin-Hermann* [19] and *Sturgeon and Others*, [20] the Court established that a technical problem which befell an aircraft does not fall within that notion, unless it is due to events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and escape its actual control.

37. In *Siewert*, [21] the Court ruled that a situation in which an airport's set of mobile boarding stairs collides with an aircraft cannot be categorised as 'extraordinary circumstances'. I will come back to this case later.

*2. The notion of extraordinary circumstances in relation to technical problems*

38. First of all, it is important to note that this notion is neither defined nor clearly established in the Flight Passenger Rights Regulation.

13 This follows inter alia from Prassl, J., 'Tackling Diversity Through Uniformity?', in Bobek, M., and Prassl, J., op. cit., p. 335, van der Wijngaart, T., op. cit., Führich, E., op. cit., and Politis, A., 'Rechtsprechung: Anmerkung — Pešková u. Peška', NJW, 37/2017, p. 2669.

14 I.e. the 24th Civil Chamber of the Landgericht Köln (Regional Court, Cologne).

15 Order of 14 November 2014, *Siewert* (C-394/14, EU:C:2014:2377).

16 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342).

17 Judgment of 31 January 2013 (C-12/11, EU:C:2013:43).

18 Judgment of 17 September 2015 (C-257/14, EU:C:2015:618).

19 Judgment of 22 December 2008 (C-549/07, EU:C:2008:771).

20 Judgment of 19 November 2009 (C-402/07 and C-432/07, EU:C:2009:716).

21 Order of 14 November 2014 (C-394/14, EU:C:2014:2377).

39. In response to this, the Court has set out a rule-exception principle: as a rule technical defects fall under the operational risk of the air carrier, because they are part of the normal exercise of its activity and it is only exceptionally that they can constitute an extraordinary circumstance (in principle, when they are not inherent in the normal exercise of the air carrier's activity and when they are outside its control).

40. The Court has recalled recently in *Pešková and Peška*[22] that the EU legislature has laid down the obligations of air carriers to compensate passengers in the event of cancellation or long delay of flights — that is, a delay equal to or in excess of three hours — in Article 5(1) of the Flight Passenger Rights Regulation. By way of derogation from Article 5(1) of that regulation, recitals 14 and 15 and its Article 5(3) state that an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of the Flight Passenger Rights Regulation if the carrier can prove that the cancellation or delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Article 5(3) must therefore be interpreted strictly.[23]

41. The Court has held that 'it cannot be ruled out that technical problems are covered by those [extraordinary] circumstances to the extent that they stem from events which are *not inherent* in the normal exercise of the activity of the air carrier concerned and are *beyond its actual control*. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism'.[24]

42. The event (and the damage) at issue here belongs to the category of technical problems and, thus, 'unexpected flight safety shortcomings' mentioned in recital 14 of the Flight Passenger Rights Regulation.

43. As such, we are clearly not dealing with a hidden manufacturing defect impinging on flight safety, which is one example of a technical problem the Court has considered may amount to an 'extraordinary circumstance' (judgments in *Wallentin-Hermann* and *van der Lans*[25]).

44. However, I agree with the Commission that the above case-law ought to be interpreted in the sense that the Court, when giving the example of a hidden manufacturing defect, simply sought to make it clear that technical defects ensuing from events which are outside the scope of the control of the air carrier concerned should be considered to constitute extraordinary circumstances.

45. Indeed, as pointed out by the German Government, the Court held in *McDonagh*[26] that, 'in accordance with everyday language, the words "extraordinary circumstances" literally refer to circumstances which are "out of the ordinary". In the context of air transport, they refer to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin … In other words, … they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity'.

22 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342, paragraphs 19 et seq.). See also Wienbracke, M., 'Verbraucherrecht: Ausgleichsleistungen bei Flugverspätung nach Kollision des Flugzeugs mit einem Vogel', EuZW, 2017, 571.

23 Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 20).

24 Judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 26) (emphasis added).

25 Judgments of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771, paragraph 26) and of 17 September 2015, *van der Lans* (C-257/14, EU:C:2015:618, paragraph 38 et seq.). In relation to the latter case, see the judgment of the Court of Appeal (England and Wales) in *Huzar* v. *Jet2.com Limited* [2014] EWCA Civ 791 (concerning a wiring defect in the fuel valve circuit). See also van der Wijngaart, T., op. cit.

26 Judgment of 31 January 2013 (C-12/11, EU:C:2013:43, paragraph 29).

46. Moreover, this is also supported by the *travaux préparatoires* relating to Article 5(3) of the Flight Passenger Rights Regulation. In the course of these, the term 'force majeure' was altered to 'extraordinary circumstances'. According to the Council's statement in the Common Position, this change was made in the interests of legal clarity. [27]

47. It follows from the above that the Court did not seek to restrict the terms 'extraordinary circumstances' so as to include technical defects only where their origin is similar to that of a hidden manufacturing defect.

48. The Court's case-law to date on technical problems as extraordinary circumstances under Article 5(3) of the Flight Passenger Rights Regulation has established a two-limb test: (i) the problem must be attributable to an event — such as the events set out in recital 14 of that regulation — which is not inherent in the normal exercise of the activity of the air carrier concerned (first limb); and (ii), owing to its nature or origin, it is beyond the air carrier's control (second limb). It should be pointed out that these two limbs (conditions) need to be assessed on a case-by-case basis and are cumulative. [28] I shall deal with them in turn below.

*(a) Inherency*

49. In relation to the first limb mentioned in the point above (inherency), one needs to bear in mind that the Court took a restrictive approach to the availability of the defence in the event of technical problems in its *Wallentin-Hermann* [29] line of case-law.

50. All the parties (save for Mr Pauels) submit that the event at issue (i.e. the damage to the aircraft tyre caused by a screw lying on the take-off or landing runway) is not inherent in the normal exercise of the activity of the air carrier concerned.

51. The Court held in *Pešková and Peška* [30] that 'the 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. That unexpected event is not outside the actual control of the air carrier, since it is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business'.

52. However, it ruled in the next paragraph (24) of that judgment 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 [the Flight Passenger Rights Regulation]'.

53. To my mind, the facts underlying that judgment and those at issue here are comparable. Indeed, while the event at issue is comparable to a bird strike (*Pešková and Peška* [31]), I stress that it is not comparable to the collision of mobile boarding stairs with an aircraft (*Siewert* [32]).

27 See my Opinion in Joined Cases *Krüsemann and Others* (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, EU:C:2018:243, point 57).

28 Judgment of 17 April 2018, *Krüsemann and Others* (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, EU:C:2018:258, paragraph 34). The Court also points out therein that the circumstances referred to in this recital are not necessarily and automatically grounds of exemption from the obligation to pay compensation provided for in Article 5(1)(c) of the Flight Passenger Rights Regulation.

29 Judgment of 22 December 2008 (C-549/07, EU:C:2008:771).

30 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342, paragraph 23 and the case-law cited).

31 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342).

32 Order of 14 November 2014 (C-394/14, EU:C:2014:2377).

54. What was decisive for the Court in *Siewert* was that the stairs were indispensable to air passenger transport, and there lies the decisive difference between that case and the damage to a tyre caused by a foreign object on the runway at issue here.

55. Unlike mobile boarding stairs, which are used purposefully by air carriers to board and disembark passengers, a screw was lying in this case on the runway without the air carrier's knowledge and independently of/against its will.

56. As the Commission has pointed out, these objects may lead to damage, but this falls outside the scope of the normal exercise of the activity of the air carrier concerned.

57. It is true that the use of a runway undoubtedly forms part of the normal exercise of the activity of the air carrier concerned, as Mr Pauels has repeated on several occasions. However, that in and of itself is not decisive. Indeed, the use of the airspace also undoubtedly forms part of the normal exercise of the activity of an air carrier and yet the Court has ruled that a bird strike constituted an extraordinary circumstance: this is not intrinsically linked to the operating system of the aircraft.

58. It follows that screws lying on runways are also not intrinsically linked to the operating system of the aircraft. On the contrary, screws and other foreign objects on the runway are to be avoided in so far as possible, since they pose a considerable safety risk and aircraft should not come into contact with such objects.

59. Next, Mr Pauels argued in substance that the event at issue is a frequent and common problem and on that basis could not constitute an extraordinary circumstance.

60. It follows from the order for reference that a situation in which an aircraft tyre is damaged in the course of take-off or landing by a screw or comparable foreign object which has fallen on to the runway is not an extremely infrequent occurrence. This does not mean, in my view, that the frequency of the event should constitute a limiting/differentiating criterion.

61. A similar argument was defended by Advocate General Bot in *Pešková and Peška*.[33] He argued that such events (bird strikes) could not constitute an extraordinary circumstance, because collisions between birds and aircraft were a common occurrence and a phenomenon known to the various economic actors operating in air transport. However, the Court did not follow this reasoning and came to the conclusion that, in spite of those arguments, a bird strike did constitute an extraordinary circumstance.

62. It follows from the above that the event at issue is not inherent in the normal exercise of the activity of the air carrier concerned.

*(b) Control*

63. Next, as far as the second limb of the test is concerned (control), I consider that, in the present case, the air carrier whose aircraft suffers damage to one of its tyres due to a foreign object lying on the runway is faced with an event which is outside its actual control.

64. This is because the maintenance and cleaning of the runways is not the responsibility of the air carrier, but that of the airport operator.

33 Opinion of Advocate General Bot in *Pešková and Peška* (C-315/15, EU:C:2016:623).

65. As the referring court has already rightly held in its judgment of 19 January 2016,[34] in recital 14, relating to Article 5(3) of the Flight Passenger Rights Regulation, the EU legislature merely gave examples of extraordinary circumstances but the examples listed show that these are factors arising outside the organisational and technical responsibility of the carrier, which cannot be influenced by it and, accordingly, cannot be averted. They are also outside the so-called operational risk to which the aircraft is exposed. Since runway safety and supervision are the obligation of the relevant airport operator, and runways are regularly checked by it for foreign objects, the air carriers themselves have no influence on the carrying out, and the number, of checks, nor are they allowed to carry them out themselves (nor, for that matter, do they have means for doing so).

66. In fact, the referring court holds that foreign objects on runways are a risk beyond the control of the air carriers and, unlike the premature malfunction of specific aircraft components, notwithstanding regular maintenance, they constitute a supervening extraneous event.[35]

67. Be that as it may, I agree with the referring court that foreign objects on runways which cause damage to the aircraft are to be classified as extraordinary circumstances within the meaning of Article 5(3) of the Flight Passenger Rights Regulation.

68. As the Polish Government pointed out, the surveillance of the condition of the runway falls under the responsibility of the airport operator and not under that of the air carrier. Thus, the damage to a part of aircraft caused by a foreign object could at most be the result of the failure to fulfil obligations on the part of the airport operator.

69. Indeed, this responsibility of the airport operator follows notably from Commission Regulation (EU) No 139/2014[36] as well as from applicable national law.

70. Annex IV to that regulation, 'Subpart C — Aerodrome maintenance (ADR.OPS.C)', provides under 'ADR.OPS.C.010 Pavements, other ground surfaces and drainage' that '(a) The aerodrome operator shall inspect the surfaces of all movement areas including pavements (runways, taxiways and aprons), adjacent areas and drainage to regularly assess their condition as part of an aerodrome preventive and corrective maintenance programme' and '(b) The aerodrome operator shall inter alia: (1) maintain the surfaces of all movement areas with the objective of avoiding and eliminating any loose object/debris that might cause damage to aircraft or impair the operation of aircraft systems; (2) maintain the surface of runways, taxiways and aprons in order to prevent the formation of harmful irregularities'.

71. I consider (as does the referring court) that, as foreign bodies on the runway, screws, nails or other small items, do not serve flight-operation purposes, they constitute a safety risk. The fact that they fall onto the runway is a randomly occurring event which the air carrier is simply unable to predict and, within the operational sphere of the undertaking, is outside its control. As with measures for scaring birds away which are intended to prevent a bird strike, measures to preserve the runway from the presence of foreign objects on it do not relate to a specific flight by an air carrier or the safe boarding or disembarkation of passengers to and from the flight booked, but, rather, concern the safety of

34 Case 11 S 389/14.

35 It submits that, since such events are not inherent in the normal operation of a flight and are outside the control of the air carrier, they are to be classified as supervening extraneous events/circumstances.

36 Regulation of 12 February 2014 laying down requirements and administrative procedures related to aerodromes pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2014 L 44, p. 1).

airports and of air traffic in general. As a matter of principle, therefore, they do not come within the sphere of responsibility of the individual air carrier but are in a specific case the responsibility of the airport operator, which must assess the appropriateness of measures to be taken and must select suitable and effective means by which to remedy the situation. [37]

72. Mr Pauels argues that aircraft tyres are subject to extreme stress on take-off and landing, are regularly inspected in the context of pre-flight checks and need to be regularly replaced by the air carrier, [38] and that this should preclude the event at issue from being qualified as an extraordinary circumstance.

73. However, in my view, it does not follow from the above argument that the event at issue should be considered to be inherent in the normal exercise of the activity of the air carrier concerned and/or within its control.

74. Similarly to what the Court held in *Pešková and Peška* [39] in relation to a bird strike, the presence of a screw on the runway causing the damage to the aircraft is extraneous to the activity of the air carrier, because it has nothing to do with the extreme stress and the requirements during the take-off and landing of aircraft. The event at issue cannot be avoided by way of changing the tyres when they reach the limit of wear; indeed, even a brand-new tyre may be damaged by a screw lying on the runway.

75. Therefore, contrary to the arguments made in the written observations of Mr Pauels, the present case cannot be compared to *Siewert*. [40]

76. It may be helpful to point out the approach of the Bundesgerichtshof (Federal Court of Justice, Germany) with respect to what falls within the scope of normal exercise of the activity of an air carrier (in a judgment concerning a bird-strike case). [41] The Bundesgerichtshof (Federal Court of Justice) held that it would not fall within that scope if the measure adopted were to seek to ensure the *functioning of air transport as a whole*. It is therefore an air-safety measure and not a measure of the air carrier concerned. Thus, according to the Bundesgerichtshof (Federal Court of Justice), measures which concern the service or activity of a single aircraft come within the scope of the activity of the air carrier concerned (e.g. also the transport of passengers), but measures which do not concern the operation of a particular aircraft are measures which may constitute an extraordinary circumstance in so far as they do not come within the scope of the activity of the air carrier concerned.

77. Thus, in the present case the measures which could have been taken to avoid the damage to the tyre at issue in the main proceedings were beyond the powers of the air carrier. Moreover, the measures which could have been taken by the airport operator do not concern the operation of a specific flight, but rather the general guarantee that air traffic flows at the relevant airport. Runways are not maintained for a specific flight. They are maintained to ensure the smooth running of air traffic as a whole.

37 I cite here, to similar effect, a ruling of the Landgericht (Regional Court) Darmstadt (Germany) in respect of damage caused by a screw sucked into the engine (see BeckRS 2014, 23957). Moreover, it follows from the order for reference that the available technical systems for monitoring runways and for the removal of foreign objects present on them are not (yet) advanced and, accordingly, are unable to afford secure protection. A weather-resistant safety system which in future will continuously check the take-off and landing runways for foreign objects and is intended to sound an alarm in the event of danger has been under development for several years.

38 See point 20 of the present Opinion.

39 Judgment of 4 May 2017 (C-315/15, EU:C:2017:342).

40 Order of 14 November 2014 (C-394/14, EU:C:2014:2377).

41 BGH, NJW 2014, 861; VRR 2014, 100; NJW-RR 2015, 111.

78. Finally, I consider (as does the Commission) that the qualification of an 'extraordinary circumstance' in the present case is equally justified by the objective of ensuring a high level of protection for air passengers pursued by the Flight Passenger Rights Regulation; for that reason, one should not encourage air carriers to refrain from taking the measures necessitated by foreign object damage by prioritising the maintenance and punctuality of their flights over the objective of safety. [42]

79. It follows from the above that the event at issue meets the control test and is an event which is outside the air carrier's actual control.

*3. Reasonable measures to avoid extraordinary circumstances*

80. According to the Court's case-law, [43] 'since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say, by *measures* which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned. Indeed, that air carrier must … establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, *it would clearly not have been able*, unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time, *to prevent the extraordinary circumstances* with which it was confronted from leading to the cancellation of the flight' (emphasis added).

81. It is true that the question referred for a preliminary ruling does not relate explicitly to the additional condition of reasonable measures and the avoidance/prevention of the extraordinary circumstance(s).

82. However, given that the referring court will have the task of assessing whether, in the circumstances of the present case, the air carrier could be regarded as having taken all measures appropriate to the situation, I consider that — in order to provide the referring court with an appropriate answer for the purpose of the application of EU law in the dispute before it — it is helpful to address this condition as well. [44]

83. Indeed, the Court has held that 'the fact that a national court has, formally speaking, worded its request for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute'. [45]

84. It is established in the Court's case-law that the concept of reasonable measures is an individualised and flexible one, [46] and 'only those measures which can actually be [the air carrier's] responsibility must be taken into account, *excluding those which are the responsibility of other parties, such as, inter alia, airport managers or the competent air traffic controllers*'. [47]

42 cf. judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 25).

43 Judgment of 12 May 2011, *Eglītis and Ratnieks* (C-294/10, EU:C:2011:303, paragraph 25).

44 cf. judgment of 28 June 1978, *Simmenthal* (70/77, EU:C:1978:139, paragraph 57).

45 Judgment of 29 September 2016, *Essent Belgium* (C-492/14, EU:C:2016:732, paragraph 43).

46 Judgment of 12 May 2011, *Eglītis and Ratnieks* (C-294/10, EU:C:2011:303, paragraph 30).

47 Judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 43) (emphasis added).

85. The national court must, therefore, 'assess whether, in particular at the technical and administrative levels, the air carrier concerned was … actually in a position to take, directly or indirectly, preventative measures likely to reduce and even prevent the risks of [damage to tyres due to foreign objects lying on the runway]'.[48]

86. It follows from all the foregoing considerations that Article 5(3) of the Flight Passenger Rights Regulation must be interpreted as meaning that damage to an aircraft tyre caused by a screw lying on the take-off or landing runway falls within the scope of the notion of an 'extraordinary circumstance' within the meaning of that provision.

87. Having said that, I would point out that it is not each and every replacement of an aircraft tyre that will qualify as an extraordinary circumstance: it is necessary to distinguish the damage to the tyre in the present case from that which is due to normal wear and tear — with the result that the latter would not constitute an extraordinary circumstance.

## V. Conclusion

88. For those reasons, I propose that the Court answers the question referred for a preliminary ruling by the Landgericht Köln (Regional Court, Cologne, Germany) as follows:

Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights must be interpreted as meaning that damage to an aircraft tyre caused by a screw lying on the take-off or landing runway falls within the scope of the notion of an 'extraordinary circumstance' within the meaning of that provision.

48 Judgment of 4 May 2017, *Pešková and Peška* (C-315/15, EU:C:2017:342, paragraph 44).