Provisional text

JUDGMENT OF THE COURT (Third Chamber)
4 May 2017 (*)

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Article 5(3) — Compensation to passengers in the event of denied boarding and of cancellation or long delay of flights — Scope — Exemption from the obligation to pay compensation — Collision between an aircraft and a bird — Notion of 'extraordinary circumstances' — Notion of 'reasonable measures' to avoid extraordinary circumstances or the consequences thereof)

In Case C-315/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Obvodní soud pro Prahu 6 (Prague 6 District Court, Czech Republic), made by decision of 28 April 2015, received at the Court on 26 June 2015, in the proceedings

Marcela Pešková
Jiří Peška

v

Travel Service a.s.,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2016,

after considering the observations submitted on behalf of:

Ms Pešková and Mr Peška, by D. Sekanina, advokát,

Travel Service a.s., by J. Bureš, advokát,

the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

the German Government, by M. Kall, acting as Agent,

the Italian Government, by G. Palmieri, acting as Agent, and by F. Di Matteo, avvocato dello Stato,

the Polish Government, by B. Majczyna, acting as Agent,

the European Commission, by K. Simonsson and P. Ondrusek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

Judgment

This reference for a preliminary ruling concerns the interpretation of 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, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

The request has been made in proceedings between, on the one hand, Ms Marcela Pešková and Mr Jiří Peška and, on the other, Travel Service a.s., an air carrier, concerning Travel Service's refusal to compensate those passengers for a long delay to their flight.

Legal context

Recitals 1, 7, 14 and 15 of Regulation No 261/2004 state:

In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. Moreover, full account should be taken of the requirements of consumer protection in general.

In order to ensure the effective application of this regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.

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.

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.'

Article 5 of that regulation provides:

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

...

have the right to compensation by the operating air carrier in accordance with Article 7 ...

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.

...'

Article 7 of Regulation No 261/2004, headed 'Right to compensation', provides at paragraph 1:

'Where reference is made to this article, passengers shall receive compensation amounting to:

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

...'

Article 13 of Regulation No 261/2004, entitled 'Right of redress', provides:

'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.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

The applicants in the main proceedings booked a flight from Burgas (Bulgaria) to Ostrava (Czech Republic) with Travel Service.

That flight was carried out on 10 August 2013 with a delay in arrival of 5 hours and 20 minutes.

That flight formed part of the following scheduled circuit: Prague — Burgas — Brno (Czech Republic) — Burgas — Ostrava.

During the flight from Prague to Burgas, a technical failure in a valve was found. Its repair took 1 hour and 45 minutes.

During the landing of the flight from Burgas to Brno, according to Travel Service, the aircraft collided with a bird and so the aircraft was subject to checks, although no damage was found. Nonetheless, a Travel Service technician was taken by private aircraft from Slaný (Czech Republic) to Brno to put the aircraft back in operation. He was told by the aircraft's crew that the checks had already been performed by another firm but its authorisation to carry out the checks was not accepted by Sunwing, the owner of the aircraft. Travel Service once again checked the point of impact, which had earlier been cleaned, and found no traces on the engines or other parts of the aircraft.

The aircraft then flew from Brno to Burgas, then from Burgas to Ostrava, the flight taken by the applicants.

By application lodged on 26 November 2013 at the Obvodní soud pro Prahu 6 (Prague 6 District Court), the applicants in the main proceedings each claimed payment of a sum of around CZK 6 825 (6 825 Czech Crowns, approximately EUR 250) under Article 7(1)(a) of Regulation No 261/2004. By decision of 22 May 2014, that court upheld their claim on the ground that the facts of the case could not be considered 'extraordinary circumstances' within the meaning of Article 5(3) of that regulation since the choice of procedure to return an aircraft to service following a technical problem, such as a collision with a bird, lay with Travel Service. In that regard, the Obvodní soud pro Prahu 6 (Prague 6 District Court) added that Travel Service had not established that it had done all it could to prevent a delay to the flight, since it merely stated that 'it was necessary' after the aircraft suffered the collision with a bird to wait for the arrival of the authorised technician.

On 2 July 2014, Travel Service lodged an appeal against that decision. The Městský soud v Praze (Prague Municipal Court, Czech Republic) dismissed that appeal by an order of 17 July 2014, on the ground that it was inadmissible since the decision of the Obvodní soud pro Prahu 6 (Prague 6 District Court) ruled on two separate claims, neither of which exceeded CZK 10 000 (approximately EUR 365).

On 18 August 2014, Travel Service appealed to the Ústavní soud (Constitutional Court, Czech Republic) against the decision of the Obvodní soud pro Prahu 6 (Prague 6 District Court) of 22 May 2014. By decision of 20 November 2014, the Ústavní soud (Constitutional Court) upheld the appeal and set aside the decision of the Obvodní soud pro Prahu 6 (Prague 6 District Court) on the ground that it had infringed Travel Service's fundamental right to a fair hearing and the fundamental right to a hearing before the proper statutory court, since, as a court of last instance, it was required to refer a question for a preliminary ruling to the Court under Article 267 TFEU, given that the answer to the question of whether the collision of an aircraft with a bird, combined with other technical difficulties, should be classified as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004 was not clear from either that regulation or the Court's case-law.

The case was referred back to the Obvodní soud pro Prahu 6 (Prague 6 District Court). That court is doubtful as to whether, if a collision between an aircraft and a bird is classified under the concept of an 'event' within the meaning of paragraph 22 of the judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771), or under that of 'extraordinary circumstances' within the meaning of recital 14 of that regulation, as interpreted by the judgment of

31 January 2013, *McDonagh* (C-12/11, EU:C:2013:43), or whether those two concepts overlap. It entertains doubts, next, as to whether such events are inherent in the normal exercise of the activity of air transport, having regard, firstly, to their frequency and, secondly, to the fact that a carrier can neither foresee nor control them, that control being exercised by the managers of airports. It also asks whether technical failures consequent upon such a collision and the administrative and technical measures taken to deal with them must also be regarded as extraordinary circumstances and to what extent they may be regarded as necessary. Finally, it is doubtful as to how a delay of or greater than three hours is to be assessed when it is caused, as in the main proceedings, by a combination of several factors, namely the repair of a technical failure, then the checking procedures necessary after a collision with a bird.

In those circumstances, the Obvodní soud pro Prahu 6 (Prague 6 District Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Is a collision between an aircraft and a bird an event within the meaning of paragraph 22 of the judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771), or does it constitute extraordinary circumstances within the meaning of recital 14 of [Regulation No 261/2004], or is it impossible to classify it under either of those concepts?

If the collision between an aircraft and a bird constitutes extraordinary circumstances within the meaning of recital 14 of [Regulation No 261/2004], may preventative control systems established in particular around airports (such as sonic bird deterrents, cooperation with ornithologists, the elimination of spaces where birds typically gather or fly, using light as a deterrent and so on) be considered to be reasonable measures to be taken by the air carrier to avoid such a collision? What in this case constitutes the event within the meaning of paragraph 22 of [the judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771)]?

If a collision between an aircraft and a bird is an event within the meaning of paragraph 22 of [the judgment of 22 December 2008, *Wallentin-Hermann* (C-549/07, EU:C:2008:771)], may it also be considered to be an event within the meaning of recital 14 of [Regulation No 261/2004], and may, in such a case, the body of technical and administrative measures which an air carrier must implement following a collision between an aircraft and a bird which nevertheless did not result in damage to the aircraft be considered to constitute exceptional circumstances within the meaning of recital 14 of that regulation?

If the body of technical and administrative measures taken following a collision between an aircraft and a bird which nevertheless did not result in damage to the aircraft constitutes exceptional circumstances within the meaning of recital 14 of [Regulation No 261/2004], is it permissible to require, as reasonable measures, the air carrier to take into consideration, when it schedules flights, the risk that it will be necessary to take such technical and administrative measures following a collision between an aircraft and a bird and to make provision for that fact in the flight schedule?

How must the obligation on the air carrier to pay compensation, as provided for in Article 7 of [Regulation No 261/2004], be assessed where the delay is caused not only by administrative and technical measures adopted following a collision between the aircraft and a bird which did not result in damage to the aircraft, but also to a significant extent by repairing a technical problem unconnected with that collision?'

Consideration of the questions referred

The first question

By its first question, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 of that regulation, must be interpreted as meaning that a collision between an aircraft and a bird is classified under the concept of 'extraordinary circumstances' within the meaning of that provision.

As a preliminary point, it should be noted that the EU legislature has laid down the obligations of air carriers 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 Regulation No 261/2004 (judgments of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, paragraph 40).

By way of derogation from Article 5(1) of Regulation No 261/2004, recitals 14 and 15 and Article 5(3) of that regulation state that an air carrier is to be released from its obligation to pay passengers compensation under Article 7 of Regulation No 261/2004 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 (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 69, and of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, paragraph 38).

In this respect, recital 14 of Regulation No 261/2004 states that 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 air carrier (see judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 21).

Thus, the Court has deduced therefrom that events may be classified as extraordinary circumstances, within the meaning of Article 5(3) of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control (see, to that effect, judgment of 22 December 2008, *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 23; of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, paragraph 29; and of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraph 36).

Conversely, it is clear from the Court's case-law 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 (see, to that effect, judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraphs 41 and 43).

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

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.

Having regard to the foregoing considerations, the answer to the first question is that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 of that regulation, must be interpreted as meaning that a collision between an aircraft and a bird is classified under the concept of 'extraordinary circumstances' within the meaning of that provision.

The second and third questions

Preliminary observations

As has been recalled in paragraph 20 of this judgment, an air carrier is to be released from its obligation to pay passengers compensation under Article 5(1)(c) and Article 7 of Regulation No 261/2004 if the carrier can prove that the cancellation or delay of three hours or more is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

Since not all extraordinary circumstances confer exemption, the onus is on the air carrier seeking to rely on them to establish 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 (see judgment of 12 May 2011, *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 25 and the case-law cited).

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 or its delay equal to or in excess of three hours in arrival (see, to that effect, judgments of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 61, and of 12 May 2011, *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 25).

Thus, the Court therefore established an individualised and flexible concept of 'reasonable measures', leaving to the national court the task of assessing whether, in the circumstances of the particular case, the air carrier could be regarded as having taken measures appropriate to the situation (see, to that effect, 12 May 2011, *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 30).

It is in the light of the foregoing considerations that the second and third questions, by which the referring court asks as to the measures which an air carrier must take in order to be released from its obligation to pay compensation to passengers under Article 7 of Regulation No 261/2004, when a collision between an aircraft and a bird occurs which causes a delay to the flight equal to or in excess of three hours in arrival, must be answered.

The third question

By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that cancellation or delay of a flight is due to extraordinary circumstances when that cancellation or delay is the result of the use by the air carrier of an expert of its choice to carry out fresh safety checks necessitated by a collision with a bird after those checks have already been carried out by an expert authorised under the applicable rules.

It is clear from the order for reference that, following a collision with a bird, the aircraft concerned, operated by Travel Service, underwent, after landing, a safety check carried out by an authorised firm without any damage being found on the aircraft. Nonetheless, Travel Service sent a technician to the location to carry out a second safety check, since the owner of the aircraft refused to recognise the authorisation of the firm which carried out the initial check.

In that regard, it must be noted that it is for the air carrier, faced with extraordinary circumstances, such as the collision of its aircraft with a bird, to adopt 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, as far as possible, the cancellation or delay of its flights.

Thus, although Regulation No 261/2004 does not infringe the freedom of air carriers to use the experts of their choice to carry out the checks necessitated by a collision with a bird, the fact remains that, when a check has already been carried out after such a collision by an expert authorised to do so under the applicable rules, which it is for the referring court to ascertain, the view cannot be taken that a second check inevitably leading to a delay equal to or in excess of three hours to the arrival of the flight concerned constitutes a measure appropriate to the situation for the purposes of the case-law cited in paragraph 28 of this judgment.

Furthermore, and insofar as it is apparent from the order for reference that the owner of the aircraft had refused to recognise the authorisation of the local firm which carried out the check of the aircraft concerned, it must be recalled that the obligations fulfilled by air carriers under Regulation No 261/2004 are so fulfilled without prejudice to that carrier's right to seek compensation from any person who caused the delay, including third parties, as provided for in Article 13 of that regulation. Such compensation may accordingly reduce or even remove the financial burden borne by

carriers in consequence of those obligations (judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraph 46 and the case-law cited).

Having regard to the foregoing considerations, the answer to the third question is that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that cancellation or delay of a flight is not due to extraordinary circumstances when that cancellation or delay is the result of the use by the air carrier of an expert of its choice to carry out fresh safety checks necessitated by a collision with a bird after those checks have already been carried out by an expert authorised under the applicable rules.

The second question

By its second question, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that the 'reasonable measures' which an air carrier must take in order to reduce or even prevent the risks of collision with a bird and thus be released from its obligation to compensate passengers under Article 7 of that regulation, include control measures preventing the presence of such birds.

The referring court cites, as examples, sonic or light bird deterrents, cooperation with ornithologists or the elimination of spaces where birds typically gather or fly. Other technical devices typically fitted on board aircraft were, furthermore, referred to during the hearing before the Court.

It is also apparent from the order for reference and the arguments before the Court that anti-bird control measures could be the responsibility of various air transport operators, who are, inter alia, the air carriers, airport managers or even the Member States' air traffic controllers.

It is in that context that the second question must be answered.

As is apparent from Article 5(3) of Regulation No 261/2004, read in conjunction with recital 7 thereof, the reasonable measures which must be taken in order to avoid the delay or cancellation of flights are the responsibility of the air carrier itself.

It follows therefrom that, in order to assess whether an air carrier has actually taken the necessary preventative measures in order to reduce and even prevent the risks of any collisions with birds enabling it to be released from its obligation of compensating passengers under Article 7 of that regulation, only those measures which can actually be its 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.

Thus, in the context of the individual examination which it must carry out in accordance with the case-law referred to in paragraph 30 of this judgment, the national court must, first of all, assess whether, in particular at the technical and administrative levels, the air carrier concerned was, in circumstances such as those in the main proceedings, actually in a position to take, directly or indirectly, preventative measures likely to reduce and even prevent the risks of possible collisions with birds.

If it is not, the air carrier is not required to compensate the passengers under Article 7 of Regulation No 261/2004.

If such measures could actually be taken by the air carrier concerned, it is for the national court, next, in accordance with the case-law recalled in paragraph 29 of this judgment, to ensure that the measures concerned did not require it to make intolerable sacrifices in the light of the capacities of its undertaking.

Finally, if such measures could be taken by the air carrier concerned without making intolerable sacrifices in the light of the capacities of its undertaking, it is for that carrier to show that those measures were actually taken as regards the flight affected by the collision with a bird.

It follows from the foregoing conclusions that the answer to the second question is that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that the 'reasonable measures' which an air carrier must take in order to reduce or even prevent the risks of collision with a bird and thus be released from its obligation to compensate passengers under Article 7 of that regulation include control measures preventing the presence of such birds provided that, in particular at the technical and administrative levels, such measures can actually be taken by that air carrier, that those measures do not require it to make intolerable sacrifices in the light of the capacities of its undertaking and that that carrier has shown that those measures were actually taken as regards the flight affected by the collision with a bird, it being for the referring court to satisfy itself that those conditions have been met.

The fifth question

By its fifth question, which it is appropriate to examine next, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that, in the event of a delay to a flight equal to or in excess of three hours in arrival caused not only by extraordinary circumstances, which could not have been avoided by measures appropriate to the situation and which was subject to all reasonable measures by the air carrier to avoid the consequences thereof, but also in other circumstances not in that category, the delay caused by the first event must be deducted from the total length of the delay in arrival of the flight concerned in order to assess whether compensation for the delay in arrival of that flight must be paid as provided for in Article 7 of that regulation.

In a situation such as that at issue in the main proceedings where a delay equal to or in excess of three hours in arrival is caused not only by extraordinary circumstances but also by another event falling outside that category, it is for the national court to determine whether, with regard to that part of the delay which the air carrier claims is caused by extraordinary circumstances, that carrier has proved that that part of the delay was due to extraordinary circumstances and could not have been avoided even if all reasonable measures had been taken and in respect of which all reasonable measures had been taken by that carrier to avoid the consequences thereof. If so, that court must deduct from the total length of the delay in arrival of that flight the delay caused by those extraordinary circumstances.

In order to asses, in such a situation, whether compensation in respect of the delay in arrival of that flight must be paid under Article 7 of Regulation No 261/2004, the national court must thus take into consideration only the delay due to the event which was not part of the extraordinary circumstances, in respect of which compensation can be paid only if it is equal to or in excess of three hours in arrival of the flight concerned.

However, if it appears that, with regard to the delay which is alleged by the air carrier to be due to extraordinary circumstances, the cause of that delay was extraordinary circumstances which were not subject to measures satisfying the requirements set out in paragraph 50 of this judgment, the air carrier cannot rely on such an event and so deduct from the total length of the delay in arrival of the flight concerned the delay caused by those extraordinary circumstances.

In so doing, in order to assess whether Article 7 of Regulation No 261/2004 must be applied to such a situation, the national court must take into consideration not only the delay due to the event outside the extraordinary circumstances but also that due to those circumstances which were not subject to measures which satisfied those requirements.

Having regard to all the foregoing considerations, the answer to the fifth question is that Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that, in the event of a delay to a flight equal to or in excess of three hours in arrival caused not only by extraordinary circumstances, which could not have been avoided by measures appropriate to the situation and which was subject to all reasonable measures by the air carrier to avoid the consequences thereof, but also in other circumstances not in that category, the delay caused by the first event must be deducted from the total length of the delay in arrival of the flight concerned in order to assess whether compensation for the delay in arrival of that flight must be paid as provided for in Article 7 of that regulation.

The fourth question

By its fourth question, which it is appropriate to examine last, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that an air carrier, whose aircraft has collided with a bird, must, as part of the reasonable measures which it must take, provide, at the planning stage of its flights, for sufficient reserve time for the required safety checks to be made.

In the present case, it must be noted that it does not at all emerge from the description of the facts of the main proceedings made by the referring court that the delay equal to or in excess of three hours in arrival of the flight at issue could have been caused by any failure on the part of the air carrier concerned to provide for sufficient reserve time for the required safety checks to be made.

It is settled case-law that, despite the fact that, having regard to the division of competences in the preliminary ruling procedure, it is solely for the national court to determine the subject matter of the questions which it submits to the Court, the Court may nonetheless refuse to rule on a question referred for a preliminary ruling by a national court where the problem is purely hypothetical or where the Court does not have before it the factual material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 17 and the case-law cited).

That is the case here.

There is therefore no need to answer the fourth question.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

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, and repealing Regulation (EEC) No 295/91, read in the light of recital 14 thereof, must be interpreted as meaning that a collision between an aircraft and a bird is classified under the concept of 'extraordinary circumstances' within the meaning of that provision.

Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that cancellation or delay of a flight is not due to extraordinary circumstances when that cancellation or delay is the result of the use by the air carrier of an expert of its choice to carry out fresh safety checks necessitated by a collision with a bird after those checks have already been carried out by an expert authorised under the applicable rules.

Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that the 'reasonable measures' which an air carrier must take in order to reduce or even prevent the risks of collision with a bird and thus be released from its obligation to compensate passengers under Article 7 of Regulation No 261/2004 include control measures preventing the presence of such birds provided that, in particular at the technical and administrative levels, such measures can actually be taken by that air carrier, that those measures do not require it to make intolerable sacrifices in the light of the capacities of its undertaking and that that carrier has shown that those measures were actually taken as regards the flight affected by the collision with a bird, it being for the referring court to satisfy itself that those conditions have been met.

Article 5(3) of Regulation No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that, in the event of a delay to a flight equal to or in excess of three hours in arrival caused not only by extraordinary circumstances, which could not have been avoided by measures appropriate to the situation and which were subject to all reasonable measures by the air carrier to avoid the consequences thereof, but also in other circumstances not in that category, the delay caused by the first event must be

deducted from the total length of the delay in arrival of the flight concerned in order to assess whether compensation for the delay in arrival of that flight must be paid as provided for in Article 7 of that regulation.

[Signatures]

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* Language of the case: Czech.