Compensation for Passengers of Delayed Flights

Analysis of Airlines' Positions Regarding the *Sturgeon* judgment of the European Court of Justice

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Summary

In its *Sturgeon* judgment of 19th November 2009 the European Court of Justice decided that airline passengers are entitled to compensation when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier, unless the airline can prove that the delay was caused by extraordinary circumstances. A technical defect in an aircraft usually does not amount to such a circumstance. The level of compensation should be based on Article 7 of the European Regulation on Air Passenger Rights.

It appears that airlines refuse to follow the *Sturgeon* judgment and to compensate delayed passengers accordingly. The various reasons put forward by the airlines are, however, clearly unfounded. Contrary to what the airlines' argue, the *Sturgeon* judgment is in line with content and scope of the *IATA* judgment and it fully respects the Montreal Convention. The question can be asked whether the airlines' reasoning is intended to be a basis for a substantive legal debate or a means to delay the payment of compensation of delayed passengers.

If a court is to decide a case regarding compensation for a delayed passenger on the basis of the Regulation, it is very likely that it will dismiss the airlines' arguments and decide the case in line with the *Sturgeon* judgment.

Sturgeon should also be followed by the national authorities whose task it is to enforce the Regulation.

The Sturgeon *judgment is entirely in line with the* IATA *judgment (section 2)*
Contrary to what the airlines argue, the *Sturgeon* judgment is entirely in line with the distinction the Court of Justice made in its *IATA* judgment between identical and individual damage. According to this judgment compensation for *individual* damage is governed by the Montreal Convention; this concerns the actual damage an individual suffers, redress for which requires a case-by-case assessment of the extent of the damage caused; consequently, it can only be the subject of compensation granted on an individual basis. On the other hand, *identical* damage is governed by the Regulation. This is damage that is almost identical for every passenger, redress for which may take the form of standardised types of compensation. *Sturgeon* only concerns this latter category: the identical damage passengers suffer when their

flight is delayed for three hours or more. The judgment provides these passengers with a right to standardised compensation. Therefore, the decision is in line with the distinction made in the *IATA* judgment and it fully respects the Montreal Convention.

Sturgeon *is not based on the Regulation's preamble but on the European principle of equal treatment (section 3)*

The airlines are incorrect in arguing that the European Court primarily based its judgment in *Sturgeon* upon a construction by reference to Recital 15 in the preamble of the Regulation. Rather, the basis for the Court's decision was its finding that the damage sustained by air passengers in cases of cancellation or long delay is comparable and that these passengers are treated differently by the Regulation whereas there is no objective ground to justify that difference. The Court therefore concluded that the Regulation was not in line with the European principle of equal treatment.

The Montreal Convention is fully respected in Sturgeon *(section 4)*

The airlines' argument that the European Court's judgment in *Sturgeon* is inconsistent with the Montreal Convention is unfounded. More particularly, *Sturgeon* does not imply the introduction of *exemplary or punitive damages*. These are types of damages that have nothing to do with the compensation airlines must pay delayed passengers by means of a standardised amount of money.

Sturgeon *is binding on all national courts (section 5)*

If the European Court of Justice answers a preliminary question, its answer is not only binding on the court that has asked the question but on all national courts. The Court's decision works as a precedent and this means that all national courts have to follow the interpretation of the Regulation given by the Court of Justice in *Sturgeon*.

1 Introduction

On 19th January 2010, Mr Hendrik J. Noorderhaven, CEO of EUclaim, asked my legal advice regarding the following matter.

On 19th November 2009, the European Court of Justice held in its *Sturgeon* judgment (henceforth also *Sturgeon*)[1] that the European Regulation on Air Passenger Rights (henceforth also Regulation)[2] does not treat airline passengers equally. The Court found that the damage sustained by passengers in case of cancellation or long delay is similar, namely loss of time. Hence, passengers find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of the Regulation. A different treatment by the Regulation of these categories of passengers for which there is no objective ground of justification implies a breach of the principle of equal treatment. The Court therefore held that air passengers with a delay of three hours or more have a right to compensation, unless the airline can prove that the delay was caused by extraordinary circumstances. A technical defect in an aircraft usually does not amount to such a circumstance.

After this judgment, EUclaim asked the airlines to arrange payments for claims from delayed passengers in line with the *Sturgeon* judgment. The airlines, however, in particular KLM, TUI and Transavia, refused to agree to pay compensation, putting forward various arguments. These arguments can be summarised as follows:

- According to the airlines, *Sturgeon* conflicts with the distinction made in the *IATA* judgment[3] between identical and individual damage (section 2);
- According to the airlines, *Sturgeon* is primarily based on a recital in the preamble of the Regulation and therefore conflicts with the *IATA* judgment (section 3);
- According to the airlines, *Sturgeon* conflicts with the Montreal Convention[4] because the compensation to be paid by the airlines amounts to 'punitive' or 'exemplary damages' (section 4);

1 Joint Cases C-402/07, *Sturgeon v. Condor* and C-432/07 *Böck v. Air France* [2009], not yet published.
2 Regulation (EC) 261/2004 of the European Parliament and of the Council van 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 L 46/1 of 17.2.2004.
3 Case C-344/04, *IATA and ELFAA v. Department for Transport* [2006] ECR I-403.

- According to airlines, *Sturgeon* only binds the national court that asked the preliminary question and not other national courts (section 5).

None of the airlines expressed objections against the Court of Justice's finding in *Sturgeon* that the Regulation is not in line with the principle of equal treatment regarding passengers with delayed flights and passengers with cancelled flights.

In this advice the airlines' arguments will be analysed and it will be concluded whether these are tenable in light of European and international law.

2 *Sturgeon* entirely in line with the *IATA*

2.1 Airlines' position

According to the airlines, the *Sturgeon* judgment conflicts with the Court's *IATA* judgment. In this latter decision the Court distinguished between:

a. *Immediate needs, identical for all passengers, which are addressed via the Regulation:*
   This damage is almost identical for every passenger and redress may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls: i.e. in accordance with Article 6 of the Regulation;[5] and

b. *Individual damage, for which passengers can claim restitutionary financial compensation pursuant to the Montreal Convention.*
   This is individual damage which 'can consequently only be the subject of compensation granted on an individual basis', and in respect of which passengers are not prevented from being able to bring in additional actions to redress that damage under the conditions laid down by the Montreal Convention.

According to the airlines this distinction made in *IATA* is ignored in *Sturgeon*.

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4 See www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999.
5 The last nine words are added by the airlines; they are not in the quoted part of the decision.

2.2 Analysis of airlines' position

The airlines' argument is unfounded because *Sturgeon* does respect the distinction made in *IATA*. *Sturgeon* did not deal with passengers' *individual* damage (category b, above, exclusively governed by the Montreal Convention) but with damage that is *identical* for all passengers and for which the Regulation provides immediate and standardised compensation (category a, above).[6] In *Sturgeon* the Court decided that passengers with a delay of three hours or more are entitled to immediate and standardised compensation in line with Article 7 of the Regulation. This means that the *Sturgeon* judgment is entirely consistent with the Montreal Convention and the considerations in the *IATA* judgment.

If the airlines mean to argue that the Court in *IATA* limited the right to compensation in case of delay to certain forms, also this argument is incorrect as the Court in *IATA* said:

> 'Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision of, *for example, of refreshments, meals and accommodation and of the opportunity to make phone calls.*[7] (my italics, CvD)

The italicized words beginning with 'for example' are not intended to be a limitative list. In accordance with *IATA* it is therefore conceivable that standardised compensation takes a different form than the mentioned examples including financial compensation as decided in *Sturgeon*. Reference can also be made to the considerations in *IATA* where the Court says that it does not follow from any provision of the Montreal Convention

> '... that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the

6 *Sturgeon*, par. 50-54.
7 *IATA*, par. 43

damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts. The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed.'[8]

3 *Sturgeon* not based on preamble but on equality principle

3.1 Airlines' position

The airlines argue that the reasoning of the Fourth Chamber in *Sturgeon* in respect of the issue of compensation for delay, was based primarily upon a construction by reference to Recital 15 in the preamble of the Regulation, such that

> '… as the notion of long delay is mentioned in the context of extraordinary circumstances, it must be held that the legislature also linked that notion to the right to compensation.'[9]

However, according to the airlines, in *IATA* the Grand Chamber had found:

- There was ambiguity due to the inconsistency between Recitals 14 and 15 and Articles 5 and 6 of the Regulation in relation to the application of the extraordinary circumstances exception. However, this ambiguity 'did not extend so far as to render incoherent the system set up by the two Articles which were themselves entirely unambiguous';[10]
- The Court could not rely on the preamble to derogate from the actual content of Articles 5 and 6: 'while the preamble to a Community measure may explain the latter's content … it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question'.[11]

8 *IATA*, par. 45-46.
9 *Sturgeon*, par. 43.
10 *IATA*, par. 75.
11 *IATA*, par. 76.

According to the airlines, no reference is made in *Sturgeon* to those passages from the Grand Chamber's judgment, despite their obvious and direct bearing on the issue which the Fourth Chamber was considering.

3.2 Analysis of airlines' position

First of all, it needs to be emphasised that the airlines' suggestion that the Fourth Chamber is subordinate to the Grand Chamber is wrong. All judgments of the European Court of Justice have the same binding power. It is not possible to lodge an appeal before the Grand Chamber against a decision of the Fourth Chamber. If there would be an inconsistency between the judgments of the Court, the only option for a national court is to ask preliminary questions. However, there is no such inconsistency between the judgments of the Fourth Chamber in *Sturgeon* and the Grand Chamber in *IATA*.

As far as the airlines' position is clear at all, it provides an example of selective quoting from *Sturgeon* and *IATA*. In *Sturgeon* the Court did not primarily base the right to compensation for delayed passengers upon a construction by reference to Recital 15 in the preamble of the Regulation. The Court's reference to Recital 15 is part of its considerations to establish the aim of the Regulation.[12] As the Court has made clear in its case law, it is necessary, in interpreting a provision of Community law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part,[13] whilst account must be taken of the reasons which led to its adoption.[14] It is in this framework that the Court refers, amongst other references, to Recital 15 in the Preamble.

Subsequently, the Court deals with the question whether the Regulation is in line with the European principle of equal treatment. The Court answers this question in the negative and decides on this ground that passengers of delayed flights are entitled to standardised compensation. The Court explicitly refers to, *inter alia*, the *IATA* judgment[15] and concludes:

12 *Sturgeon*, par. 41-42.
13 See in particular Case C-156/98, *Germany v. Commission* [2000] ECR I-6857, par. 50, and Case C-306/05, *SGAE* [2006] ECR I-11519, par. 34.
14 Case C-298/00P, *Italy v. Commission* [2004] ECR I-4087, par. 97, and the case law cited therein.
15 *Sturgeon*, par. 48 with reference to Case C-210/03, *Swedish Match* [2004] ECR I-11893, par. 70, and *IATA*, par. 95.

> ‘Given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed. That is *a fortiori* the case in view of the aim sought by Regulation No 261/2004, which is to increase protection for all air passengers. In those circumstances, the Court finds that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is to say when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier.’[16]

Hence, also in this respect *Sturgeon* is entirely in line with *IATA*.[17]

4 *Sturgeon* fully respects Montreal Convention

4.1 Airlines’ position

According to the airlines the Court of Justice in *IATA* made it clear that redress is available under the Montreal Convention (rather than under the Regulation) for individual damage suffered as a result of delays. Then the airlines quote Article 29 of said Convention:

> ‘In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.’

Subsequently, the airlines argue:

16 *Sturgeon*, par. 60-61.
17 The airlines’ references to the Opinion of Advocate-General Geelhoed in *IATA* are not relevant. First, in *IATA* the Advocate-General was not concerned with the questions dealt with in *Sturgeon*. Second, the Advocate-General’s Opinion is a non binding advice to the Court.

> ‘The plain language of Article 29 suggests that application of Article 7 of the Regulation to delays would result in a violation of Article 29. The compensation regime of Article 7 is non-compensatory, since it is based on fixed amounts not related to actual damage suffered. Pursuant to Article 12 of the Regulation, total compensation can be higher but not lower than the fixed amounts foreseen in Article 7. The legislative history of the Regulation furthermore shows that the compensation regime of Article 7 was intended to dissuade airlines from taking certain commercial decisions that were viewed as disadvantageous to passengers. Consequently, it appears that the minimum amounts prescribed by Article 7 are, and are intended to be, ‘punitive’ or ‘exemplary’ and are therefore unenforceable pursuant to Article 29 of the Convention.

4.2 Analysis of airlines’ position

The airlines are correct in assuming that the compensation regime of Article 7 is non-compensatory as this Article provides for standardised amounts of compensation. This was already confirmed in *IATA* where the Court made a distinction between individual and identical damage (see section 2). The first category is exclusively governed by the Montreal Convention whereas the second category (compensation of identical damage by means of standardised amounts) is not affected by the Convention. Here, the European legislature is free to lay down conditions under which damage linked to the inconvenience of delays should be redressed.[18]

The airlines’ main argument seems to be that the *Sturgeon* judgment conflicts with the last sentence of Article 29 of the Convention. Apparently, they try to argue that the standardised amounts of compensation in the Regulation are in fact *punitive or exemplary damages*.

Also this argument is evidently incorrect. *Exemplary or punitive damages* are American-Anglo legal concepts. They provide for an exceptional type of damages in order to punish or make an example of the defendant.[19] One may think of a

18 *IATA*, par. 43-45.
19 In the English landmark case of *Rookes v. Barnard* [1964] AC 1129 Lord Devlin mentioned two categories in which ‘exemplary or punitive damages’ could play a role: (a) ‘oppressive, arbitrary or unconstitutional action by the servants of the government’, en (b) ‘conduct calculated to make a profit in excess of any compensation payable’.

newspaper printing a libellous story in order to boost its circulation, expecting the extra profits to outweigh the damages it probably has to pay.

For two reasons *exemplary or punitive damages* are not at stake in Article 7 and in the *Sturgeon* judgment. First, *exemplary or punitive damages* are assessed on the basis of the facts of the individual case, whereas Article 7 concerns standardised amounts of compensation regardless of the circumstances of the individual case. Second, compensation on the basis of Article 7 is due unless the delay is caused by extraordinary circumstances.[20] This means that the airline's obligation to pay compensation under this provision is independent of the question whether it can be particularly blamed for its conduct. The airline that intentionally causes a delay has to pay passengers the same amount as when the delay was caused by the airline's mere negligence.

5 *Sturgeon* binding on all national courts

5.1 Airline's position

One of the airlines argues that the *Sturgeon* judgment does not apply as it only answers questions asked by a German and an Austrian court. The Dutch courts are therefore not bound by it.

5.2 Analysis of the airline's position

It is not entirely clear whether this argument is intended to be taken seriously. The aim of the preliminary rulings procedure is to further the unity of interpretation of European rules.[21] If a question of interpretation of a European rule is raised before a national court, that court is entitled to request the Court of Justice to give a ruling thereon. By giving this ruling the Court provides an authoritative interpretation of the rule at stake.

In the 1960s the Court of Justice held that a national court is not bound to ask preliminary questions if the Court had already answered that question in a previous

20 Case C-549/07, *Wallentin-Hermann v. Alitalia* [2008], not yet published, par. 32.
21 Since the Treaty of Lisbon entered into force the applicable provision is Article 267 EU Treaty. The relevant part runs as follows: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

procedure.[22] This implies that the Court's judgment in a preliminary rulings procedure serves as a precedent for the national courts. Although the answer to the preliminary question is directed to the court that asked the question other national courts have to follow that answer if they are confronted with the same question.[23]

Sturgeon concerned the interpretation of the European Regulation on Air Passenger Rights. By answering the preliminary questions of the German and Austrian courts the Court of Justice provided an authoritative interpretation of the Regulation's provisions. This interpretation is not only binding on the German and Austrian courts that asked the questions but for all courts or tribunals of an EU Member State where the same question arises.

22 Case 28-30/62, *Da Costa en Schaake NV, Jacob Meijer NV en Hoechst Holland NV v. Nederlandse Belastingadministratie* [1963] ECR 31. See also Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415.
23 Case 66/80, *International Chemical Corporation/Amministrazione delle Finanze dello Stato* [1981] ECR 1191.