Aerospace

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FLIGHT DELAYS – TIME TO PAY?

On 15 May 2012, the Advocate General of the European Court of Justice (ECJ) handed down a much anticipated Opinion in the challenge to the 2009 *Sturgeon* decision. In a blow to airlines, Advocate General Bot concludes that where passengers suffer, on account of a delayed flight, a loss of time equal to or in excess of three hours, ie. when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier, they are entitled to compensation in line with levels provided under Regulation EC No 261/2004 in the event of flight cancellation.

Sturgeon 2009

In the 2009 *Sturgeon* judgment, the ECJ controversially found in favour of passengers under Regulation 261 on the issue of entitlement to compensation following long flight delay, notwithstanding the absence of any express provision to that effect in the substantive text of the Regulation. The rationale of the court was that the Regulation has to be interpreted consistently with the principle of equal treatment, in that its view was that passengers whose flights are delayed and those whose flights are cancelled are similarly inconvenienced and should accordingly be treated the same. Hence, it is not appropriate to award compensation for the inconvenience to one category of passenger but not the other. The Court also placed emphasis on giving effect to the stated objective of the Regulation, namely to provide a high level of passenger protection in the event of denied boarding, cancellation and delays.

Much criticism and commentary has resulted from the *Sturgeon* decision. The legal analysis and conclusions reached by the ECJ were, to put it mildly, surprising. The judgment has been widely questioned in many cases brought in the national courts of a number of EU Member States.

Referral to the ECJ

In the wake of the *Sturgeon* decision, judicial

review proceedings were brought in the UK by TUI, easyJet, British Airways and IATA against the UK Civil Aviation Authority, with the aim of having the validity of the judgment referred back to the ECJ for reconsideration. Separately, in Germany, the Amtsgericht Köln in a flight delay case (*Nelson v Lufthansa*), entertained doubts with regard to the compatibility of the Regulation provisions, as interpreted by the ECJ in *Sturgeon*, with the Montreal Convention 1999. These national courts duly referred questions to the ECJ concerning the interpretation and validity of the *Sturgeon* decision. Oral argument in the joined cases was heard from eight interested parties (TUI, easyJet, British Airways, IATA, Lufthansa, Germany, Poland, United Kingdom, EU Parliament, EU Council and EU Commission) on 20 March 2012. All but two of those parties (the EU Commission and Poland) urged the ECJ to overturn the earlier *Sturgeon* decision.

The Advocate General's Opinion

On 15 May 2012, the Advocate General issued his Opinion on the case. The Opinion is not legally binding, but is intended to guide the Court in formulating its judgment. In the majority of cases, an Advocate General's Opinion is adopted, in whole or in part, by the Court. In what is a relatively brief Opinion that, for airlines, is disappointingly void of fresh analysis, Advocate General Bot has opined as follows:

- The ECJ should hold that passengers (falling under the scope of the Regulation) who are delayed such that they reach their final destination three hours or more after their originally scheduled arrival time are entitled to the fixed levels of compensation provided for in the Regulation. He agreed with the reasoning in *Sturgeon* that passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of the Regulation. It would therefore be contrary to the principle of equal treatment if those passengers were treated differently, even though they are in comparable situations.

- An entitlement to compensation for delays pursuant to Regulation 261 does not conflict with the delay provisions of the Montreal Convention 1999. The Advocate General relied on previous ECJ case law (*Case C-344/04 IATA and ELFAA*) in which the Court held that the passenger care and assistance measures provided for by Article 6 of Regulation 261, in the event of a long delay to a flight, constitute standardised and immediate compensatory measures, rather than concerning individual damage to be assessed and given redress on an individual basis. It is the latter which is regulated by the Montreal Convention. In an intellectual sleight of hand, the Advocate General now relies on that reasoning in order to conclude that the entitlement to flat rate compensation in Regulation 261 is also a "standardised and immediate" measure paid not on the basis of individual damage but based on the length of the flight in question. Accordingly, that too is compatible with the Montreal Convention, whose delay provisions redress a different type of damage. The Advocate General simply chooses to side-step the fact that there was no inkling whatsoever in the judgment in the *IATA/ELFAA* case that the delay provisions of the Regulation could extend to payment of compensation and that the judgment instead was concerned with its passenger care and assistance provisions and whether there should be any defence to those.

- EU law is compatible also with the principle of legal certainty, which requires that passengers and air carriers should know exactly the extent of their respective rights and obligations. Advocate General Bot has rejected submissions by airlines that the Sturgeon decision conflicts with the clear and unambiguous wording of Regulation 261, with the European Union legislature's intention and with the judgment in *IATA/ELFAA*. In an eye-catching analysis, he:

  - relies on conclusions in the *IATA/ELFAA* judgment that, even though the recitals to the Regulation create an apparent ambiguity as to the scope of the care and assistance remedies for flight delays, that ambiguity could not override the clear substantive provisions of the Regulation, which were "entirely unambiguous"

as to whether those remedies were subject to a defence of extraordinary circumstances; but

- in the context of delay compensation, relies on one of the very same recitals considered and dismissed in the *IATA/ELFAA* case, for the purpose of interpreting the equally unambiguous substantive provisions of the Regulation dealing with delay and compensation. His reasoning appears to be that it is necessary to do so in order to construe the Regulation in a manner which ensures its effectiveness and validity. The fact that the relevant substantive provisions contain no ambiguity in not containing any entitlement to compensation for flight delays appears, on this reasoning, to be no barrier to using the recitals to read into the Regulation something which is manifestly not there.

- EU law is compatible with the principle of proportionality. Compensating passengers whose flights have been delayed does not result in an arbitrary and unduly severe financial burden on air carriers, particularly since the frequency of delays of more than three hours, which confer entitlement to compensation, appear to be limited. He was persuaded by figures brought to the attention of the European Commission by the European Organisation for the Safety of Air Navigation (Eurocontrol) that in fact fewer than 1.2% of flights potentially fall under the scope of the Regulation's provisions on delayed flights and fewer than 0.5% are delayed by three hours or more. The proportion of flights for which delay confers entitlement to compensation, provided for in Article 7 of the Regulation, is therefore less than 0.15%. Moreover, airlines are not obliged to pay compensation if they can prove that the cancellation or long delay is caused by extraordinary circumstances beyond the carrier's control.

  The Advocate General affirms the availability of the defence of extraordinary circumstances, but what the ECJ gives with one hand, it takes with the other: the defence has the same restrictions as those applying to cancellations following the judgment in *Wallentin-Hermann v Alitalia*, namely, that technical problems which give rise to delay will rarely give the carrier a defence.

- As to any temporal effect of the Court's decision, as a rule, the Court's judgments apply to legal relationships which arose and were established before the judgment ruling on a request for interpretation of the particular legislation. In effect, the ECJ is saying in such cases that this has always been the correct interpretation of legislation from the time it first came into force. The ECJ already had the opportunity, in its judgment in its November 2009 *Sturgeon* decision, to rule on the question of compensation for passengers whose flights have been delayed and it did not in that judgment limit the temporal effects of that finding. Accordingly, there is no need to limit the temporal effects of the judgment that is now to be given in the present cases. The practical effect of this finding, if confirmed by the Court, is that the entitlement to compensation for flight delay under Regulation 261 is back-dated to when the Regulation first came into effect in February 2005.

What next?

If the Advocate General's opinion is followed, the ECJ's decision will increase carriers' financial exposure by obliging airlines falling under the scope of the Regulation to pay up to €600 per passenger in the event of a delayed arrival of three hours or more. One suspects that the statistics on flight delays provided by Eurocontrol mask the potential impact on carriers in financial terms.

As noted, the opinion of the Advocate General is non-binding advice to the ECJ. However, in the vast majority of cases the court follows the Opinion to some degree. Whilst the analysis and conclusions are disappointing and clearly open to question, the Opinion nevertheless gives a steer to the Court which may well be minded to make the same findings. The final judgment may be handed down before the Court recess (the Court vacation begins on 16 July). If not, airlines must await the new term in September for final confirmation as to the position.

So what next for carriers? Pending the ECJ judgment, it should be business as usual. If, however, the ECJ does adopt the Advocate

General's opinion, a swathe of delay claims that currently stand stayed by the English courts pending the ECJ decision are likely to revive and will need to be reviewed and carriers will generally need to revisit their strategies for addressing Regulation 261 claims.

Meanwhile, the European Commission is undertaking a consultation that aims to address perceived shortcomings of Regulation 261 (and of Regulation 889/2002 with regard to mishandled luggage), with a view to possible revision of both regulations. Whether and if so to what extent the voice of airlines, as well as that of consumers, will be given due audience in any resulting revision remains to be seen.

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