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Air Passenger Rights after *Sturgeon*

Cees van DAM*

In Sturgeon,[1] *the European Court of Justice*[2] *considered that EC Regulation 261/2004 on Air Passenger Rights*[3] *breaches the principle of equal treatment. It 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.*

After a brief look into how airlines generally perform with regards to their obligations under Regulation 261/2004 (section 1), I will summarize the Sturgeon *decision as it was handed down by the European Court (section 2), set out the airlines' response to* Sturgeon, *which amounts to a boycott of the European Court's decision (section 3), analyse the questions referred to the European Court by the High Court in London in which the airlines challenge the validity of* Sturgeon *(section 4), and briefly comment on questions referred by the German Federal Court on the application of* Sturgeon *(section 5). My conclusion (section 6) will be that the European Court cannot but confirm* Sturgeon, *because the decision is compatible with both the Montreal Convention and the Grand Chamber decision in International Air Transport Association (IATA). This conclusion is in line with the opinion I published in January 2010.*[4]

This article may be misunderstood as presenting a consumer view on Air Passenger Rights. However, it only aims to predict, from an independent perspective, what the European Court will decide in the pending cases with respect to Sturgeon.

1. HOW AIRLINES WORK

In November 2010, German consumer organizations conducted a survey on passengers' experiences with their rights against airlines under Regulation 261/2004.[5] The results did not come as a surprise. They confirmed the lack of compliance with the Regulation by many if not most airlines. The most striking conclusions were:

- a large majority of airlines ignores the obligation to provide care and compensation;
- only 25% of the airlines offers compensation, mostly only after a passenger's request;

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[1] After the entering into force of the Lisbon Treaty, known as the Court of Justice of the European Union (CJEU). In this paper, the old terminology of 'European Court' will prevail.

[2] Joint Cases C-402/07 *Sturgeon v. Condor* and C-432/07 *Böck v. Air France* [2009] ECR I-10923.

[3] Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 Feb. 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) 295/91, OJ L 46/1 of 17 Feb. 2004.

[4] <www.ceesvandam.info> under 'Passenger Rights', and 25 Jan. 2010.

[5] Verbraucherzentrale, *Fluggastrechte – Anspruch und Wirklichkeit. Ergebnisse einer Online-Umfrage der Verbraucherzentralen 2010* (Potsdam, 2010), <www.vbz.de>.

Dam, Cees van. 'Air Passenger Rights after *Sturgeon*'. *Air and Space Law* 36, no. 4/5 (2011): 259–274.

- more than 50% of the passengers was not informed of their rights;
- most airlines respond very slowly to requests;
- 22% of passengers did not receive any answer from the airline;
- only 3% of the cases ran smoothly for passengers.

The outcome of this survey suggests that many airlines boycott European legislation or at least do not take it seriously. This does not only apply for the *Sturgeon*-related issues but also for the many other obligations the airlines have under the Regulation. Considering the consistency of passengers' experiences, not only in Germany, it is likely that this is not a matter of poor management but that it is part of airlines' policies that are directed from the airlines' board rooms. The study also reveals how large parts of the airline industry still consider passengers as bums on seats rather than customers who need to be taken seriously. These and other surveys have made the European Commission even more aware that adopting a Regulation on Air Passenger Rights is one thing, but enforcing the Regulation is quite another.[6]

2. What *Sturgeon* Means

The background of *Sturgeon* was the airlines' tendency to not cancel long delayed flights but let passengers sit out the delay (in the *Sturgeon* cases twenty-two and twenty-five hours) in order to avoid having to pay them compensation under Articles 5 and 7 of the Regulation.[7] Prior to *Sturgeon*, the discussion therefore focused on the difference between cancellation and delay. It was argued that at some point a long delay could turn into a cancellation. However, the problem was how to assess the turning point. Was a new flight number required? Was it necessary that passengers had their luggage returned or received new boarding passes?[8] The question as to the difference between cancellation and long delay was put before the European Court by the German *Bundesgerichtshof* (BGH) and the Vienna *Handelsgericht*.

The European Court answered that a delay, irrespective of its duration, cannot be regarded as a cancellation where there is a departure in accordance with the original planning. A flight can only be classified as 'cancelled' if the airline arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made. Hence, the Court maintained a strict distinction between cancellation and delay.[9]

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[6] See Communication from the Commission to the European Parliament and the Council on the application of Regulation 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, Brussels 11 Apr. 2011, COM(2011) 174 final.

[7] My personal best (so far) is sixteen and half hours with British Airways in August 2008 from Munich to London. This experience triggered my interest in the oddities of Regulation 261/2004.

[8] See Opinion AG Sharpston before *Sturgeon*, para. 68, and the legal literature she refers to. See also Eliza Varney & Mike Varney, 'Grounded? Air Passenger Rights in the European Union', in *The Yearbook of Consumer Law 2008*, ed. Christian Twigg-Flesner a.o. (Aldershot: Ashgate, 2008), 175 ff.

[9] *Sturgeon*, paras 29–39. Obviously, this leaves a number of questions unanswered. See, for example, Kinga Arnold & Pablo Mendes de Leon, 'Regulation (EC) 261/2004 in the "Light of the Recent Decisions of the European Court of Justice: Time for a Change?!"', *Air and Space Law* (2010): 96 ff.

Subsequently, the Court considered that it does not expressly follow from the wording of the Regulation that delayed passengers have a right to compensation. However, when interpreting a provision of community law, the Court does not only consider its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (paragraph 41),[10] and that account must be taken of the reasons which led to its adoption.[11] On the basis of recital 15 of the Regulation's preamble (paragraph 43), the Regulation's objective (a high level of protection for air passengers, paragraph 44),[12] and the need to interpret the Regulation's provisions broadly (paragraph 45), the Court concluded that 'it cannot automatically be presumed that passengers whose flights are delayed do not have a right to compensation and cannot, for the purposes of recognition of such a right, be treated as passengers whose flights are cancelled' (paragraph 46).

After this *hors d'oeuvre*, the Court served its *pièce de résistance* from the *cuisine luxembourgeoise* by considering general principles of interpretation: a Community act must be interpreted in such a way as not to affect its validity.[13] If a provision is open to several interpretations, preference must be given to the interpretation ensuring the provision's effectiveness (paragraph 47).[14] And provisions must be interpreted in accordance with primary law as a whole, including the principle of equal treatment. The latter principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (paragraph 48).[15]

The Court then went on to compare the situation of delayed passengers with those of passengers of cancelled flights. It considered that both categories of passengers suffer the same damage, namely loss of time, as both need more time to reach their destination than was scheduled by the airline. Consequently, passengers of cancelled flights and passengers of delayed flights suffer similar damage and thus find themselves in comparable situations for the purposes of the application of the right to compensation in Article 7 of the Regulation (paragraphs 50–54).[16] However, passengers of delayed flights do not have a right to compensation and are therefore treated less favourably even though they suffer a similar loss of time. The Court observed that there appears to be no objective ground capable of justifying such a difference in treatment (paragraphs 58–59).

With reference to Article 5(1)(c)(iii) (paragraph 57), the Court held that passengers of delayed flights may rely on the right to compensation laid down in Article 7 'where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is to

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[10] Case C-156/98, *Germany v. Commission* [2000], ECR I-6857, para. 50, and Case C-306/05, *SGAE* [2006], ECR I-11519, para. 34.

[11] Case C-298/00 P, *Italy v. Commission* [2004], ECR I-4087, para. 97 and the case law referred therein.

[12] See also, for this principle applied in other contexts, Case C-203/99, *Veedfald* [2001], ECR I-3569, para. 15; Case C-481/99, *Heininger v. Bayerische Hypo- und Vereinsbank* [2002] ECR I-9945, para. 31.

[13] Case C-403/99 *Italy v. Commission* [2001] ECR I-6883, para. 37.

[14] Case C-187/87 *Land de Sarre and Others* [1988] ECR 5013, para. 19, and Case C-434/97 *Commission v. France* [2000] ECR I-1129, para. 21.

[15] Case C-210/03 *Swedish Match* [2004] ECR I-11893, para. 70, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para. 95.

[16] See also *IATA*, para. 43.

say when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier' (paragraph 61).[17]

The practical result of this decision is that passengers on flights that are delayed at arrival for three hours or more and with a distance of up to 1,500 km are entitled to EUR 250. Passengers on other flights within the European Economic Area (EEA) and on flights to or from the EEA of between 1,500 and 3,500 km are entitled to EUR 400 and passengers on all other flights to EUR 600.[18]

The Court added that, just like in case of cancellation (Article 5(3)), the airline is exempt from paying compensation if it can prove 'that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier' (paragraph 69). However, most technical problems do not amount to such circumstances.[19]

3. The *Sturgeon* Boycott

Sturgeon was one in a range of European Court decisions in which the airlines had to bite the dust. In 2006, airlines argued that the Regulation was invalid for various reasons, but the Court did not agree.[20] In 2008, an airline argued that it did not have to pay compensation in case of a technical problem, but the Court only accepted this to a very small extent.[21] And in 2009, the Court held that passengers can usually lodge a claim against the airline in their country of residence.[22] However, these were only scratches as compared to the black eye caused by *Sturgeon*.

Unsurprisingly, many airlines have been boycotting *Sturgeon* and refuse to pay passengers compensation in case of a long delay. The legal grounds they put forward are not convincing (see section 4), but the airlines are probably not so much aiming at winning this legal battle as at winning time.

In most cases, the airlines' efforts to convince national courts to refer questions about *Sturgeon* to the European Court failed. However, in August 2010, British airlines managed to convince the High Court in London in an administrative procedure against the Civil Aviation Authority (the UK enforcement body) to ask the European Court preliminary questions. The High Court was surprisingly easy to convince. It did not conduct its own assessment of the airlines' submissions but mainly copy-pasted their questions. It is needless

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[17] *Sturgeon* is not the first example of the Court amending secondary community law on the basis of fundamental principles of law: Takis Tridimas, *The General Principles of EU Law* (2006), 29. See also, for example, Case C-26/62, *Van Gend & Loos* [1963] ECR 1 and Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

[18] In case of a delay in the last category of three hours or more, but less than four hours, the compensation is EUR 300: *Sturgeon*, para. 63.

[19] *Sturgeon*, para. 69; see, for cancellation, Case C-549/07 *Wallentin-Hermann v. Alitalia* [2008] ECR I-11061. See, for an overview, Alexander Milner, Regulation EC 261/2004 and 'Extraordinary Circumstances', *Air and Space Law* (2009): 215–220.

[20] *IATA*.

[21] *Wallentin*.

[22] Case C-204/08, *Rehder* [2009] ECR I-6073: the Court held that passengers can choose between the court of the country of departure and the court of the country of arrival.

to say that if this reference policy would become common practice at first instance courts, it is going to get pretty busy in Luxembourg. Subsequently, it took the High Court more than four months to put the questions in the post to Luxembourg. Some might say this delay was intended, but it was probably just sloppiness, which is of course regrettable enough. In the end, the questions arrived at the Court just before Christmas.

The High Court's questions look a bit like a shower of shot, and thematically they are not very clearly structured. Therefore, I have reorganized the questions and will deal with them in the following section. This will include a related question about *Sturgeon* that has been referred by a German first instance court.[23] This is remarkable, because the German Federal Court was the first national court to accept *Sturgeon*.[24]

4. The Validity of *Sturgeon*

4.1. Grand chamber versus fourth chamber?

The first question referred by the High Court asks whether the Articles 5–7 of the Regulation are 'to be interpreted as requiring the compensation provided for in Article 7 to be paid to passengers whose flights are subject to delay within the meaning of Article 6, and if so in what circumstances?'

This is a fairly straightforward question but it asks a question the European Court clearly answered in *Sturgeon*. It is particularly for this reason that there are restrictions for national courts to ask further questions about the European Court's decisions. It will be argued that the High Court's questions do not respect these restrictions (section 4.9).

The background of this question is probably the airlines' hope that this case will be decided by the Grand Chamber and that it will overrule the Fourth Chamber that decided *Sturgeon*. This is, however, not conceivable. Apart from the fact that *Sturgeon* is in line with the Grand Chamber's decision in *IATA* (see below), the airlines' suggestion that the Fourth Chamber is subordinate to the Grand Chamber is wrong. All judgments of the European Court have the same binding power. It is not possible to lodge an appeal before the Grand Chamber against a decision of another Chamber. If the European Court would indeed deviate from *Sturgeon*, it will run the risk of creating an internal appeal for preliminary questions that are not answered by the Grand Chamber.

The latter part of the question 'and if so, in what circumstances?' is probably intended to ask the Court to retreat from *Sturgeon* in that compensation is due after three hours delay at arrival. Although the way the Court calculated the three hours delay is not beyond criticism, this is not enough to expect the Court to replace it by a different calculation at the next available opportunity.

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[23] Case C-581/10, *Nelson v. Lufthansa*.

[24] Exactly three weeks after *Sturgeon*: BGH 10 Dec. 2009, Xa ZR 61/09. In October 2010, a Dutch first instance court expressed its intention to ask preliminary questions about *Sturgeon* (Rechtbank Breda 20 Oct. 2010, LJN: BO1083, *X v. KLM*). However, it remained silent after I published an opinion in which I pointed out that the questions were superfluous. See <www.ceesvandam.info> Nederlands > Passagiersrechten > 25 Oct. 2010.The case is still pending.

4.2. The 15th Recital and the Principle of Legal Certainty

The airlines also argue that the Court in *Sturgeon* was wrong to give weight to the 15th recital to the Regulation; a reasoning they argue was explicitly rejected in *IATA*. In *IATA*, the airlines argued that recitals 14 and 15 of the preamble are inconsistent with Articles 5 and 6 of the Regulation. The Court held, first, that while a preamble may explain the Regulation's content, it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question.[25] 'Second, the wording of those recitals indeed gives the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the Community legislature and the actual content of Articles 5 and 6 of Regulation No. 261/2004 which do not make this defence to liability so general in character. However, such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous'.[26] With reference to the latter sentence the airlines argue that Articles 5 and 6 are entirely unambiguous and that the Court therefore could not deviate from these provisions without breaching the principle of legal certainty.[27]

In a similar vein, the airlines argue that the Grand Chamber in *IATA* emphasized the importance of the principle of legal certainty (paragraph 68): 'The principle of legal certainty is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly'. According to the airlines, the interpretation given by the Fourth Chamber in *Sturgeon* lacks the quality of legal certainty that is an elementary requirement of the rule of law as it is inconsistent with (i) the unambiguous language of the Regulation and (ii) the Grand Chamber's ruling in *IATA*.[28] The third question referred by the Amtsgericht Köln relates to the same issue.[29]

The airlines' arguments are not convincing. First, the Court in *Sturgeon* referred to recital 15 in a different context as in *IATA*. *IATA* was about the principle of legal certainty for the airlines, *Sturgeon* about the principle of equal treatment of passengers. In *IATA*, the Court held that the ambiguity between recitals 14 and 15, on one hand, and the content of Articles 5 and 6, on the other, is not such that it amounts to an infringement of the principle of legal certainty. The latter articles are 'entirely unambiguous' in that they clearly indicate when extraordinary circumstances need to be taken into account.[30] This left

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[25] *Alliance for Natural Health*, para. 91; Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, para. 54, and Case C-136/04 *DeutschesMilch Kontor* [2005] ECR I-10095, para. 32.

[26] *IATA*, para. 76.

[27] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 9-10.

[28] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 10.

[29] Case C-581/10 (*Nelson a.o. v. Lufthansa*): 'How may the interpretative criterion underlying the Court of Justice's judgment in *Sturgeon and Others*, which allows the right to compensation under Article 7 of Regulation (EC) No 261/2004 to be extended to cover cases of delay, be reconciled with the interpretative criterion which the Court of Justice applied to that regulation in its judgment in Case C-344/04 *IATA and ELFAA* [2006] ECR I-403?'.

[30] *IATA*, para. 76.

enough space for the Court in *Sturgeon* to refer to recital 15 with respect to the right to compensation in case of long delay. It should be emphasized, however, that the Court in *Sturgeon* did not base its decision on recital 15. Rather, the Court's reference was part of a string of considerations to establish the Regulation's scope.[31] This happened in the context of the Court's interpretation of the Regulation. For this interpretation, it is necessary 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,[32] while account must be taken of the reasons which led to its adoption.[33]

The airlines may be right to point out that, also in *Sturgeon*, the principle of legal certainty was at stake. However, even though the Court did not explicitly refer to this principle, it will probably have concluded that, in the context of the questions referred by the national courts, it had to give way to the principle of equal treatment. Legal principles do not have an absolute value and often conflict with each other. It is one of the Court's tasks to reconcile them or to give way to one to the detriment of the other.

4.3. Legislator's Intention?

The airlines also submit that it is clear from the legislative history that there was no intention on the part of the Community legislature to require air carriers to pay compensation in the event of delay. The principle of compensation for delay was expressly considered by the Community legislature but was rejected.[34]

The airlines argue their case by referring to a Communication, in which the European Commission considered that air carriers are often not responsible for delays.[35] Leaving aside the Advocate-General Sharpston's criticism on the lack of logic in the Commission's remarks,[36] the problem with the airline's argument is that it identifies the Commission with the Community legislature.[37] From a constitutional perspective, this is rather doubtful, particularly where it is not the Commission but the Council and Parliament that adopt a Regulation. Moreover, it is standing case law that a Commission's Communication does not have any normative effect.[38]

In the European legislative process (including the reconciliation procedure), many considerations may have played a role, quite a few of them conflicting, and in the end, a number of them will have been sacrificed on the altar of political compromises. 'Laws, like

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[31] *Sturgeon*, paras 41–45.

[32] See in particular Case C-156/98, *Germany v. Commission* [2000] ECR I-6857, para. 50, and Case C-306/05, *SGAE* [2006] ECR I-11519, para. 34.

[33] Case C-298/00P, *Italy v. Commission* [2004] ECR I-4087, para. 97, and the case law cited therein.

[34] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 9.

[35] Communication of the Commission of 21 Jun. 2000 (COM (2000) 365) at paras 44–45.

[36] Opinion AG Sharpston, paras 57–61.

[37] See also for example Arnold & Mendes de Leon, 101, referring to a memo of the European Commission, considering: 'that in present circumstances operators should not be obliged to compensate delayed passengers': COM(2001) 784 final, para. 23.

[38] Case 133/79, *Sucrimex v. Commission* [1980] ECR 1299, para. 16; Case 217/81, *Interagra v. Commission* [1982] ECR 2233, para. 8; Case 151/88, *Italy v. Commission* [1989] ECR 1255, para. 22.

sausages, cease to inspire respect in proportion as we know how they are made'.[39] For this reason, the European Court is rightly reluctant to put much emphasis on the legislative history of European legislation.

4.4. Regulation Not in Breach of Principle of Equal Treatment?

The airlines argue that delay and cancellation are not similar and that the principle of equal treatment is therefore not engaged. In their view, air carriers are often not responsible for delays, unlike for denied boarding and cancellations. The responsibility for delays often lies with third parties such as airport operators. Moreover, airlines do not generally have contracts with such third parties, which would enable them to recover any compensation paid to passengers. Finally, the penalty of compensation would not be effective to dissuade air carriers from avoiding delays, and the consequences of cancellation may be very different for the passenger from the consequences of delay.[40]

Particularly, this latter argument casts doubt on whether the airlines have made a serious effort to read *Sturgeon*. With respect to the principle of equal treatment, the airlines focus on the difference between delay and cancellation from the airlines' perspective. However, the Court in *Sturgeon* found that the Regulation breached the principle of equal treatment from the passenger's point of view. Furthermore, the argument that airlines are often not responsible for delays needs further evidence, which the airlines do not provide. By the same token, it can be argued that airlines are often responsible for delays because of their own organizational errors and poor planning.

Moreover, if the cause of the delay is outside the airline's control and the responsibility lies with airports, air traffic managers, or other service providers, this may amount to an extraordinary circumstance, exempting the airline from paying compensation. *Sturgeon* explicitly provides for such a defence. If circumstances causing the delay are not considered to be extraordinary, this will not affect the airline's right to take recourse against those responsible for the delay (Article 13). In practice, this right of recourse may be limited on contractual grounds, such as with respect to ground handling service providers or airport operators,[41] but it is hard to see why the (contractual) relations of airlines with their business partners should affect the rights of passengers.

4.5 Principle of Proportionality: Arbitrary and Unduly Severe Burdens

The airlines further submit that *Sturgeon* results in the imposition of an arbitrary and unduly severe financial burden on air carriers. They say that they are already sufficiently incentivized to avoid and minimize delays and that there are operational reasons why airlines would not be able to respond to the increased costs resulting from an obligation to pay

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[39] American poet John Godfrey Saxe, later also attributed to German statesman Otto von Bismarck.

[40] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 11.

[41] Arnold & Mendes de Leon, 103.

compensation by taking further avoidance measures. A requirement to pay compensation for delays would also have a disproportionate impact on passengers and would be liable to give rise to an increase in fares and a reduction in marginal services and services to outlying destinations. Also, airlines would have a clear incentive to cancel more flights, which would be adverse to passengers' best interests.[42]

This latter argument is not free from hypocrisy: before *Sturgeon*, airlines preferred not to cancel delayed flights, and this was usually adverse to passengers' best interests.

The assertion that *Sturgeon* leads to an unduly severe burden on air carriers is unsubstantiated. Airlines have complained that *Sturgeon* would cost them EUR 3 to EUR 5 billion.[43] However, the margin of EUR 2 billion raises the question whether this can be considered to be a serious estimation. It is, of course, possible for the airlines to produce more precise statistical and financial evidence to the European Court, and indeed more transparency by the airlines would be warmly welcomed. It is, however, just like in *IATA*,[44] not very likely that the airlines will provide data. And even if they would, their evidence will not show a disproportionate burden for the airlines. Estimates by the UK government of the costs of the Regulation pre-*Sturgeon* amounted to GBP 1 per one way ticket, provided these costs were entirely passed on to the passenger.[45] *Sturgeon* will only partially increase this amount and therefore does not impose an arbitrary and unduly severe financial burden on air carriers.[46]

4.6 Compatibility with Montreal: Identical and Individual Damage

The most fundamental point the airlines put forward seems to be that *Sturgeon* is inconsistent with the Montreal Convention. The Convention provides that air carriers shall be liable for the damage caused by delay (Article 19) but that any action for damages 'can only be brought subject to the conditions and such limits of liability as are set out in this Convention' (Article 29).[47] With its second question, the Amtsgericht Köln refers the same issue to the European Court.[48]

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[42] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 9–10.

[43] Letter European Low Fares Airlines Association to European Commissioner Siim Kallas, 8 Jan. 2010.

[44] *IATA*, para. 89: 'it must be stated that figures on the frequency of those delays and cancellations have not been given in the proceedings before the Court. Accordingly, the theoretical costs which those measures involve for airlines, as put forward by the parties concerned, do not in any event enable it to be regarded as established that those effects would be out of proportion to the interest in the measures.'

[45] Department for Transport, *Final RIA on the Enforcement of Council Regulation 261/2004 in the UK* (London, 2005), 14.

[46] Data provided to the European Commission by Eurocontrol show that from 2006 to 2009 less than 0.5% of the flights departing from EU airports experienced long delays at departure of over three hours. The percentage of flights for which *Sturgeon* compensation is due is even lower because: (1) not the delay at departure is decisive but the delay at arrival and (2) airlines are exempted from paying compensation if the delay is caused by extraordinary circumstances. See Commission Staff Working Paper accompanying document to the Communication from the Commission on the operation and the results of Regulation (EC) 261/2004, Brussels 11 Apr. 2011, COM(2011) 174 final.

[47] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 10.

[48] Case C-581/10, *Nelson a.o. v. Lufthansa*: 'What is the relationship between, on the one hand, the right to compensation based on Art. 7 of Regulation (EC) No. 261/2004 which a passenger has, according to the judgment of the

In *IATA*, the Court held that the Regulation is consistent with the Montreal Convention by drawing a distinction between individual damage and identical damage. It held that the Montreal Convention governs the first category, and the Regulation the second. The Court also held that it does not follow from the Articles 19, 22, and 29:

> 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 standardized and immediate manner, the 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.[49]

Hence, Montreal only concerns individual damage and therefore leaves space to redress for identical damage. *Sturgeon* dealt with damage that is *identical* for all passengers and for which the decision provides immediate and standardized compensation.[50] This identical damage is the loss of time.[51] The loss of time is identical to all passengers as they all suffer the same delay. Loss of time may have different *consequences* for each passenger. These consequences constitute individual damage, the compensation of which is governed by Montreal.

Sturgeon compensation is an immediate measure in that it has to be paid 'on the spot', that is, at the airport of arrival, in line with Article 7(3).[52] Dempsey and Johansson argue that the compensation is not standardized but particularized, depending upon the distance flown and the time of delay.[53] However, this argument seems to confuse standardization with uniformization. *Sturgeon* compensation is not uniform; it is (in line with the compensation for denied boarding and cancellation under the Regulation) standardized for a few categories of flight distances. It is not particularized according to the passengers' individual circumstances. *Sturgeon* is therefore consistent with the Montreal Convention and the Court's considerations in *IATA*.

It goes without saying that a more subtle system of standardized compensation is conceivable. In the forthcoming review of the Regulation the European Commission may consider proposing an amount of compensation for each hour delay and with no discount for long delays. This would even more clearly show that the *Sturgeon* compensation for loss of time is compensatory and therefore in line with Montreal.

Court of Justice of 19 Nov. 2009 in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, if he reaches his final destination three hours or more after the scheduled arrival time and, on the other hand, the right to compensation in respect of delay provided for in Art. 19 of the Montreal Convention, regard being had to the exclusion under the second sentence of Art. 29 of the Montreal Convention?'

[49] *IATA*, paras 45–46.

[50] *Sturgeon*, paras 50–54.

[51] English: 'damage consisting in a loss of time'; French: '*au préjudice qui consiste en une perte de temps*'; German: '*Schaden der in einem Zeitverlust der betroffenen Fluggäste besteht*'.

[52] Unlike Arnold & Mendes de Leon, 101.

[53] Paul Stephen Dempsey & Svante O. Johansson, '*Montreal v. Brussels*: The Conflict of Laws on the Issue of Delay in International Air Carriage', *Air and Space Law* (2010): 219.

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

> excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardized and immediate assistance or care for everybody concerned, through the provision, *for example, of refreshments, meals and accommodation and of the opportunity to make phone calls*. (emphasis added)[54]

The emphasized words indicate that the Court did not intend its list to be of a limitative character. Therefore, in line with *IATA*, standardized compensation can take a different form than the mentioned examples and can also include the financial compensation under Article 7 of the Regulation. This was confirmed in *Wallentin* where the Court held that Article 5 of the Regulation (which includes the right to compensation) 'provides for standardized and immediate compensatory measures. Those measures, which are unconnected with those whose institution is governed by the Montreal Convention, thus intervene at an earlier stage than the convention'.[55]

Hence, *Sturgeon* compensation is indeed distinct from the individual compensation under Article 19 Montreal Convention and is therefore in line with *IATA*. One may like the IATA decision or not,[56] it was a decision of the Grand Chamber and also for this reason it is clear that the Court will not withdraw from this position but confirm *Sturgeon*.

4.7 Compatibility with Montreal: Non-compensatory Damages

Finally, the airlines argue that application of Article 7 of the Regulation to delays results in a violation of Article 29. This provision requires that damages in respect of delay must be awarded solely on a compensatory basis whereas, according to the airlines, *Sturgeon* provides for the payment of compensation at fixed rates, determined primarily by distance and category of destination. The compensation regime of Article 7 is therefore non-compensatory, since it is not related to actual damage suffered. According to Article 29, damages can only be compensatory: 'punitive, exemplary or any other non-compensatory damages shall not be recoverable'. The airlines assert that the amounts prescribed by *Sturgeon* are, and are intended to be, 'punitive' or 'exemplary' and are therefore unenforceable pursuant to Article 29 of the Convention.[57] The first question of the Amtsgericht Köln touches on the same issue.[58]

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[54] *IATA*, para. 43.

[55] *Wallentin*, para. 32; see also *Rehder*, para. 27.

[56] See for example Dempsey & Johansson, 207–224; Jorn Wegter, 'The ECJ decision Of 10 Jan. 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention', *Air and Space Law* (2006): 133–148.

[57] Queen's Bench Division (Administrative Court), *TUI Travel a.o. v. Civil Aviation Authority*, (CO/6569/2010), Schedule, 10.

[58] Case C-581/10, *Nelson a.o. v. Lufthansa*: 'Does the right to compensation provided for in Art. 7 of Regulation (EC) No. 261/2004 1 constitute a claim for non-compensatory damages within the meaning of the second sentence of Art. 29 of the Montreal Convention of 28 May 1999 for the unification of certain rules for international carriage by air ("the Montreal Convention")?' See also Dempsey & Johansson, 219–220.

Hence, the question is whether *Sturgeon* compensation indeed amounts to punitive, exemplary, or non-compensatory damages. The answer can be twofold. The strongest distinction between Montreal and the Regulation would be to hold that *Sturgeon* compensation for identical damage is independent of the Montreal Convention. It is therefore not at all affected by Montreal and can even be non-compensatory. One could draw this conclusion from *IATA*, where the Court held that standardized and immediate compensatory measures are not among those whose institution is regulated by the Convention.

It is, however, probably not necessary to take this step. Throughout its case law, the Court has emphasized that compensation for delay is compensatory. More precisely, the Court held in *Sturgeon* that Article 7 provides for compensation for 'loss of time'. Loss of time is identical yet real damage for all the passengers as that all suffer the same delay. Loss of time may have different consequences for each passenger. These *consequences* constitute individual damage, which is governed by Montreal.

Sturgeon compensation is therefore clearly compensatory and neither punitive nor exemplary or non-compensatory. The Court in *Sturgeon* carefully follows this track by considering that the Regulation 'has, in those measures, the objective of repairing, *inter alia*, *damage consisting*, for the passengers concerned, *in a loss of time which*, given that it is irreversible, *can be redressed only by compensation*'[59] (emphasis added). It can be assumed that the Court intentionally uses this terminology in order to distinguish *Sturgeon* from Montreal. The conclusion can only be that *Sturgeon* compensation is compensatory and therefore compatible with the Montreal Convention.

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.[60] Therefore, for two additional reasons exemplary or punitive damages are not at stake in Article 7 and *Sturgeon*. First, exemplary or punitive damages are assessed on the basis of the facts of each individual case, whereas Article 7 concerns standardized amounts of compensation for loss of time (regardless of the circumstances of the individual case because the losses are identical for each passenger). Second, exemplary or punitive damages are awarded where the defendant's conduct is particularly blameworthy, such as in case of calculating conduct to make a profit exceeding the compensation payable to the claimant. However, the payment of *Sturgeon* compensation is independent of the airlines' intentions. It is only due when the airline cannot prove that the circumstances were beyond its control.[61] If they were within its control, it is immaterial whether the airline acted negligently or intentionally.

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[59] *Sturgeon*, para. 52.

[60] 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' and (b) 'conduct calculated to make a profit in excess of any compensation payable'.

[61] Case C-549/07, *Wallentin*, para. 32.

4.8 Temporal Effects

Question four referred by the High Court asks that if *Sturgeon* is confirmed, 'what if any limits are to be placed upon the temporal effects of the Court's ruling'. In other words, the airlines would like the effect of *Sturgeon* to be limited for the past.

The problem with this question is that the Court in *Sturgeon interpreted* the Regulation. Therefore, this interpretation cannot but apply as from the date of the Regulation's entry into force on 17 February 2005, unless the Court provided for any temporal effects of its ruling, which it did not. This implies that passengers of delayed flights prior to *Sturgeon* are entitled to compensation. The only restriction for passengers lays in the rules on the limitation of claims under national law. Article 35 Montreal Convention[62] does not apply to a claim under the Regulation, because the latter is a claim for identical damage, not for individual damage.[63]

Is it really to be expected that the European Court will place time limits on the *Sturgeon* ruling where it did not do so in the case itself? The airlines seem to ask this question for the sake of asking. The problems a time limit on *Sturgeon* would cause are well illustrated by the following question referred by the High Court, the only one suggested by the defendant in the case, the Civil Aviation Authority.[64] If the Court would place limits on the temporal effect of *Sturgeon*, 'what if any effect is to be given to the decision of *Sturgeon* between 19 November 2009 and the date of the Court's ruling In this case? In that time, passengers whose flights have been subject to delay have asserted claims for compensation under Article 7 in reliance on the judgment in *Sturgeon*'. In other words: if the Court would place a time limit on *Sturgeon*, it would create two categories of delayed passengers: pre-TUI passengers and post-TUI passengers. It is not really something one would expect the Court to do.

4.9 Wünsche

The most fundamental problem with the High Court's questions is whether they should have been asked at all. In virtually all national court cases after *Sturgeon*, the airlines have been pressing the same button, namely that the court should refer questions about *Sturgeon* to Luxembourg. The airlines were, however, only successful when they found a willing ear in the High Court in London.

The national courts generally refused to refer questions to Luxembourg on the basis of the *Wünsche* decision of the European Court. In this decision, the Court limited the possibilities for national courts to ask questions about the Court's decisions, holding that:

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[62] The right to damages shall be extinguished if an action is not brought within a period of two years.

[63] See, for example, BGH 10 Dec. 2009, Xa ZR 61/09. See also Ludger Giesberts & Guido Kleve, 'Compensation for Passengers in the Event of Flight Delays', *Air and Space Law* (2010): 294 ff.

[64] Quite remarkably, the CAA is entirely funded by the airlines. See <www.caa.co.uk/default.aspx?catid=286>: 'The UK Government requires that the CAA's costs are met entirely from its charges on those whom it regulates. Unlike many countries, including the other EASA Member States, there is no direct Government funding of the CAA's work.' So far for the CAA's independence.

> when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. However, it is not permissible to use the right to refer further questions to the Court as a means of contesting the validity of the judgment delivered previously as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article 177 of the Treaty.[65]

The airlines' arguments regarding *Sturgeon* are partly of a legal and partly of a factual character. As has been set out above, the airlines' legal arguments do not bring up considerations that might lead the Court to give a different answer to the questions in *Sturgeon*. All the airlines' questions were answered in the Court's case law. I leave aside that it is generally hard to convince the Court that it has overlooked legal points. It would be like the Court saying: 'Apologies to everyone but we have missed a couple of legal points when we decided *Sturgeon* and we sincerely thank the airlines for bringing this to light'. The reality is more as the German BGH succinctly considered regarding the compatibility of *Sturgeon* with the Montreal Convention: 'that [the European Court] would have overlooked Article 29 Montreal Convention cannot be accepted'.[66]

It is, however, very well possible that the Court has overlooked matters of fact or rather that the Court was not presented facts that might have led it to give a different answer. *Wünsche* does not exclude airlines bringing such facts to the attention of the Court, particularly in the case of *Sturgeon*, where the procedure did not give the airlines the opportunity to do so. However, as has been mentioned above, the airlines have not adduced evidence to substantiate this point of fact. More generally, it is unlikely that the airlines will do so in the European court. And even if they do, it is likely that the evidence will not be sufficient to convince the Court to change its point of view and amend *Sturgeon* (section 4.5).

5 The Follow Up of *Sturgeon*

In January 2011, the German Federal Court (BGH) referred a question to Luxembourg about the application of *Sturgeon*.[67] The claimant and his wife had booked a return flight from Bremen via Paris and São Paulo to Asunción in Paraguay. The flight from Bremen to Paris was due to depart on 16 May 2006 at 6.30 a.m.; the connecting flight from Paris to São Paulo was at 10.15 a.m. The scheduled arrival time at Asunción was 11.30 p.m. The claimants received boarding passes for the complete trip. The departure at Bremen was delayed until shortly before 9.00 a.m., and the couple arrived in Paris when their connecting flight to São Paulo had already departed. They were rebooked on another

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[65] Case 69/85, *Wünsche Handelsgesellschaft mbH v. Federal Republic of Germany*, [1986] ECR 947, para. 15.

[66] BGH 18 Feb. 2010, Xa ZR 95/06, para. 20: 'dass er Art. 29 MÜ übersehen hätte, kann nicht angenommen werden'.

[67] See Case 11/11, *Air France v. Folkerts*. Only three weeks after *Sturgeon*, the BGH already expressed its support for *Sturgeon*: BGH 10 Dec. 2009, Xa ZR 61/09. It confirmed this in BGH 18 Feb. 2010, Xa ZR 95/06.

flight, but they also missed their connecting flight to Asunción. In the end, they arrived there on 17 May 2006 at 10.30 a.m.

According to the BGH, the couple's entitlement to compensation depended on whether *Sturgeon* also applies when there is not yet a delay in the sense of Article 6 of the Regulation. This provision holds that, in case of delay, the airline is obliged to offer the passenger assistance after a certain lapse of time, depending on the length of the flight. In case of a flight of over 3,500 km, assistance must be provided when the flight is delayed for four hours or more. In the case at hand, however, the couple departed from Bremen about two and a half hour after the scheduled departure time. The question was therefore: does *Sturgeon* compensation only require the delay of three hours or more *at arrival*, or does it also require a delay *at departure* according to the ladder in Article 6?

The BGH considered that the former view was supported by the emphasis the European Court in *Sturgeon* attached to the principle of equal treatment. The Court considered that the Regulation aims to immediately compensate in a standardized way the passengers' loss of time and that both passengers of cancelled and of delayed flights suffer the same loss of time.[68]

On the other hand, so the BGH, the European Court also pointed out that compensation for cancellation and delay can take different forms. In this line of reasoning, the principle of equal treatment was not the basis for the Court's decision but only an additional argument. The right to compensation followed from the link between recital 15 and the concept of a long delay (paragraph 43). Hence, it could be argued that claims that are not fulfilling the requirements of Articles 4–6 are excluded.

It is not unlikely that the former view will prevail in the European Court. An important reason for this is that the Court in *Sturgeon* compared the passengers of delayed and cancelled flights by reference to Article 5(1)(c)(iii) and concluded that passengers of cancelled flights acquire a right to compensation when they suffer a loss of time equal to or in excess of three hours in relation to the duration originally planned by the air carrier.[69] If Article 6 would be additionally applicable, the idea of the same loss of time would be disturbed and the principle of equal treatment would again be infringed.

The BGH also referred a second question to the European Court in case it would accept that the time limits of Article 6 are applicable, in addition to the requirement of three hours delay at arrival. In such a case, the question arises whether the relevant distance is the length of the first leg of the flight only or the length of the flight to the final destination.[70] This is a question of a more general nature, as it may also arise in other situations of a missed connecting flight. Considering that the Court in *Sturgeon* repeatedly speaks about 'final destination', I expect that the Court will not be prepared in calculating a delay on the basis of each leg of a trip.[71]

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[68] *Sturgeon*, paras 51–53.

[69] *Sturgeon*, para. 57.

[70] Article 2(h) Regulation defines final destination as: 'the destination on the ticket presented at the check-in counter or, in case of directly connecting flights, the destination of the last flight'.

[71] See for a different opinion Giesberts & Kleve, 300 ff.

6 Conclusions

Also after the European Court will have confirmed *Sturgeon*, questions will remain about its application. This is one of the inevitabilities of the law. This, however, does not alter the fact that, in many Member States, the application of *Sturgeon* has become an established practice of the national courts.[72] The European Commission has consistently confirmed its support for *Sturgeon*, not least in its role as co-coordinator of the National Enforcement Bodies.[73] With reference to *Sturgeon*, the European Commission wrote in its April 2011 Communication: 'Since the ECJ rulings are directly applicable and legally binding from the date that the relevant Regulation came into force, all the carriers are legally obliged to respect them'. For these reasons, it is hard to see how the Court can retreat from *Sturgeon* without causing something like a legal and practical mess.

Perhaps the only positive aspect of the High Court's reference is that it provides an opportunity for the European Court to make clear that the airlines do not have a choice but to comply with *Sturgeon* and to pay passengers compensation in case of long delay rather than pulling their legs.

The only address for the airlines' grievances will be the Brussels legislator. However, in order to be successful there, it is advisable that the airlines show compliance with the Regulation and the Court's rulings. For many airlines, this may require something like a change of culture, but it seems to be a minimum to convince the frequent flyers at the Commission, the Council and Parliament of their good will.

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[72] See for example: *Germany*: BGH 18 Feb. 2010, Xa ZR 95/06; BGH 10 Dec. 2009, Xa ZR 61/09. According to Press Communication 40/10, 19 Feb. 2010, the BGH followed *Sturgeon* in five decisions. *Austria*: Handelsgericht Wien 15 Apr. 2010 (60 R 114/06d). *The Netherlands*: Hof Amsterdam 16 Feb. 2010, LJN: BM5267; Rb. Haarlem 24 Feb. 2010, LJN: BL6559; Rb. Den Haag 14 Jul. 2010, LJN: BP8057; Rb. Den Haag 14 Jul. 2010, rolnr. 773096\RL EXPL 08-17394; Rb. Haarlem 15 Jul. 2010, LJN BN2126; Rb. Den Haag 12 Aug. 2010, LJN: BP8520; Rb. Haarlem 9 Sep. 2010, rolnr. 455303 / CV EXPL 10–2101; Rb. Den Haag 22 Sep. 2010, LJN: BP8069; Rb. Den Haag 22 Sep. 2010, LJN: BP8499; Rb. Den Haag 5 Oct. 2010, LJN: BP8072; Rb. Den Haag 19 Oct. 2010, rolnr. 774750 \ RL EXPL 08-18051; Rb. Den Haag 7 Feb. 2011, LJN: BP8066; Rb. Den Haag 9 Feb. 2011, LJN: BP8510; Rb. Haarlem 10 Mar. 2011, LJN: BP8512.

[73] Communication from the Commission, Brussels 11 Apr. 2011, COM(2011) 174 final, 4.