On 15 May 2012 Advocate General Bot of the European Court of Justice (ECJ) delivered his opinion in the joined cases of Nelson v Deutsche Lufthansa AG and on the application of TUI Travel plc, British Airways plc, easyJet Airline Co. Ltd and International Air Transport Association.

The opinion wholly affirmed the controversial decision of the Fourth Chamber of the ECJ in the joined cases of Sturgeon v Condor Flugdienst and Böck v Air France (Sturgeon), which provided for fixed levels of compensation for passengers subject to delays of three hours or more pursuant to Regulation (EC) 261/2004 (Reg 261/04).

BACKGROUND

The much anticipated opinion centres around the interpretation of Articles 5 (cancellation), 6 (delay) and 7 (compensation) of Reg 261/04. In both cases, the referring courts asked the ECJ to review the interpretation it gave to those provisions in Sturgeon, which provided passengers with a right to compensation when their flight was delayed by three hours or more on arrival at the destination.

The Advocate General dealt with the overlapping questions posed by the two referring courts in the following terms:

- Was the interpretation of Articles 5, 6 and 7 in Sturgeon correct? If not, do these provisions contravene the principle of equal treatment?
- If the ECJ confirms the interpretation in Sturgeon, are Articles 5, 6 and 7 compatible with the Montreal Convention 1999 (MC99) and the principles of proportionality and legal certainty?
- If Reg 261/04 entitles passengers to compensation for delay, will this be limited in time, for example will passengers who have not yet brought a claim on the date of the judgment be entitled to compensation for delay?
- If Sturgeon is not affirmed by the ECJ what effect will the decision have, if any?

OPINION OF THE ADVOCATE GENERAL

Sturgeon and compensation for delay

The Advocate General began by noting that the ECJ "had already had an opportunity to consider" in Sturgeon the
question of whether Articles 5, 6 and 7 of Reg 261/04 required carriers to pay compensation to delayed passengers. He observed: "However, the disputes in the main proceedings show that air carriers refuse to apply that judgment and to compensate passengers finding themselves in such situations."

The Advocate General acknowledged the carriers' contention that the interpretation in Sturgeon is contrary to the decision in the IATA case. In that case, it was held, inter alia, that there was no ambiguity in relation to Articles 5 and 6, despite the fact that Recital 15 gave another impression.

The Advocate General considered that the UK Government was wrong to infer from the IATA case that the Recital could not modify the meaning of the Articles to give passengers a right to compensation in the event of delay. Consequently, he said, reliance upon IATA in the Sturgeon decision was valid.

The Advocate General concluded that there was no conflict in the approach taken by the ECJ in IATA and in Sturgeon.

**Equal treatment**

In relation to the qualifying delay period set by the ECJ in Sturgeon, the Advocate General did not see why he should re-consider this "since nothing new which might call into question the interpretation that the Court gave of those provisions in Sturgeon and Others has been presented".

The Advocate General recalled the ECJ's findings in Sturgeon that the purpose of Reg 261/04 was to ensure a high level of protection for passengers, regardless of whether they are denied boarding, their flight is cancelled or delayed. This includes repairing damage consisting of "a loss of time which, given that it is irreversible, can be redressed only by compensation".

On that basis, the Advocate General found that it would be contrary to the principle of equal treatment if passengers in the comparable situations of cancellation (and subsequent re-routing) or long delay were to receive different treatment.

The contention that fixing a three hour duration is arbitrary was rejected by the Advocate General, who stated that requiring a fixed length of time for a long delay to qualify for compensation would "prevent national courts from making different assessments of what constitutes a long delay, which may give rise to legal uncertainty". No fixed duration might create inequalities in identical situations, according the Advocate General.

Based on the above, the Advocate General held that Articles 5, 6 and 7 should be interpreted in such a way that passengers may rely on the Article 7 right to compensation if they are delayed by three hours beyond their scheduled arrival time.

**Compatibility with MC99**

Both referring courts requested clarification as to the compatibility of this interpretation of Reg 261/04 with MC99's provisions entitling passengers to an exclusive cause of action and a sole remedy in respect of "damage occasioned by delay in the carriage of passengers by air...". The ECJ was also asked to review compatibility of the interpretation with Article 29 of MC99 which states that any award for damages excludes "punitive, exemplary or any non-compensatory damages".

The ECJ held in IATA that any delay in the carriage of passengers by air may, generally speaking, cause two types of damage, namely (1) damage which is the same for each passenger that must take the form of standardised immediate assistance or care, and (2) individual damage inherent in the reason for travelling which must be assessed on an individual basis. MC99 covers the second type of damage only.

The Advocate General referred to the above and concluded that "Like assistance and care, compensation under Article 7 of that Regulation constitutes a standardised and immediate measure intended to repair damage" for delayed passengers. As this type of damage is not covered by MC99, no incompatibility arose.

**Proportionality and legal certainty**

The argument that an obligation on carriers to pay compensation for delay would impose an unduly severe financial burden, disproportionate to the objective pursued by Reg 261/04, was rejected by the Advocate General since the frequency of qualifying delays "appears limited".

The Advocate General cited figures brought to the attention of the European Commission by EUROCONTROL. Specifically, less than 1.2% of flights potentially fall under the scope of Reg 261/04's delay provisions and the proportion of flights which would entitle passengers to compensation amount to only 0.15%.

Accordingly, the effect of the obligation to pay delay compensation was negligible, particularly in light of the ability to rely on the extraordinary circumstance defence within the meaning of Article 5(3). Furthermore, carriers could reduce the amount of compensation payable by 50% by transporting passengers to their destination within four hours from their scheduled arrival time, or seek redress from a third party responsible for a delay.
Consequently, the obligation on carriers to pay compensation for delay was not disproportionate in the Advocate General’s opinion. Furthermore, this interpretation was not incompatible with the principle of legal certainty given that there was no inconsistency in the ECJ’s interpretation in both the Sturgeon and IATA decisions.

**Temporal scope**

The temporal scope of the effect of a judgment was considered briefly in the opinion. In TUI, the applicants contended that there should be no right to compensation for delay prior to the date of the judgment, save where claims were already presented.

However, the Advocate General noted that the ECJ’s interpretation of Reg 261/04 is intended to clarify and define the meaning and scope as it ought to have been applied from the date of entry into force. Since the ECJ placed no limit on the temporal effect of its judgment in Sturgeon, the Advocate General argued that there should be no restriction placed on the effect of the judgment in the present case.

Therefore, Reg 261/04 must be applied to claims which may arise in respect of carriage which pre-dates the judgment, irrespective of whether such a claim has already been notified.

**Conclusion**

In the Advocate General’s opinion, since entry into force, Articles 5, 6 and 7 of Reg 261/04 must be interpreted in such a way to entitle passengers whose flights are delayed three hours or more from the time originally scheduled to arrive at their final destination to fixed compensation. Furthermore, this interpretation is consistent with MC99, the principles of proportionality and legal certainty.

**COMMENTARY**

The ECJ will render its final judgment in the next few months. While the Advocate General’s opinion is not binding on the ECJ, such opinions are usually followed in the final judgment.

Consequently, it is likely that airlines will be forced to accept claims for compensation for delay pursuant to Reg 261/04, potentially dating back to entry into force of the Reg 261/04 on 17 February 2005. Any claims that have been stayed pending the outcome of this case will need to be handled accordingly.

There is argument that the two year limitation period provided for by MC99 should apply to compensation claims pursuant to Reg 261/04, on the basis that the two types of damage arise out of a contract for carriage by air. This issue has been dealt with differently by lower courts in different Member States, and referred to the ECJ where a decision is awaited.

In light of this opinion, the only exemption to the duty to pay compensation, namely in the case of delays arising from extraordinary circumstances, will be all the more significant. However, following the notorious decision in Frederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA the defence can be relied upon in very limited cases in respect of technical faults, and can be difficult and costly to prove.

While the Advocate General’s opinion is often followed by the ECJ, this is not guaranteed and we await the final decision of the ECJ in order to provide clarity on this issue.

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**KEY CONTACTS**

For further information please contact:

**Kathryn Ward**
Partner
T +44 (0)20 7796 6788
kathryn.ward@dlapiper.com

**Lauren Payne**
Trainee Solicitor
T +44 (0)20 7153 7154
lauren.payne@dlapiper.com

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1 **C-581/10**
2 **C-629/10**
3 **C-402/07 and C432/07 dated 19 November 2009**
4 The Amtsgericht Köln (Germany) in Nelson and the High Court of Justice of Justice of England and Wales, Queens Bench Division (Administrative Court) in TUI
5 **C-344/04 IATA and ELFAA (IATA)**
6 MC99 Article 29
7 MC99 Article 19
8 The German courts have ruled that, due to the two types of damage defined by the Court in the IATA case, the Convention’s limitation period would not apply to Reg 261/04 claims. However, in the County Court decision on 24 May 2011 in Schreiber v TUI UK Limited the Judge noted that the Court’s decision in IATA had not precluded the application of the limitation period in MC99 to claims pursuant to Reg 261/04
9 **C-139/11 Cuadrench Moré**
10 **C-549/07**