Stakeholders in the travel industry are all only too well aware of the implications of the European Court of Justice ('ECJ') ruling of 19 November 2009 in Sturgeon v Condor Flugdienst GmbH and Böck and Others v Air France SA.1 The Fourth Chamber of the ECJ ruled that Regulation (EC) 261/2004 ('the Regulation') should be read to provide compensation to passengers who suffer delay in excess of three hours in cases that are not caused by 'extraordinary circumstances'.2 Those familiar with the Regulation will, in our view, be hard pressed to reach such a conclusion taking the natural and ordinary meaning of the language used. Those who have knowledge of the legislative process that gave birth to the Regulation will be left in no doubt that the honourable judges of the Fourth Chamber did, with respect, get it wrong. The controversial aspect of the ruling is primarily the requirement to provide delayed passengers with compensation that Parliament did not provide for. Indeed, it was expressly discussed in the travaux preparatoires behind the Regulation that delayed passengers should not be provided with compensation.3 It is an example of extreme and costly judicial interpretation and it raises important concerns for all aspects of the travel industry.

Airlines were finding it increasingly difficult to comply with the Regulation, even before the Sturgeon decision – and the Eyjafjallajökull Volcano and its extraordinary effects on airspace is just a further example of how burdensome the Regulation can be.4 The adverse impact of the Regulation on airlines, coupled with the Sturgeon decision has motivated a concerted effort by lobbyists and carriers to have the Regulation amended and the Sturgeon ruling re-visited by the Grand Chamber of the ECJ.5 In that regard a Judicial Review Application was lodged in the Administrative Court by three carriers and IATA on 11 June 2010 and the issue was discussed at an EU Transport Ministers meeting on 24 June 2010 with the subject led by the Cameron/Clegg coalition Government. However, the lack of progress through political channels

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1 Joined cases: C-402/07 and C-432/07.
2 The defence of ‘extraordinary circumstances’ (Article 5(3) of the Regulation) was clarified in the sense that ‘technical faults’ that are an inevitable aspect of aircraft operations can give rise to a defence if unavoidable. See also Friederike Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA C-549/07.
3 Opinion of the Economic and Social Committee adopted 29 March 2001, inter alia.
4 Airlines should avoid compensation claims based on Article 5(3), the extraordinary circumstances defence when flights were cancelled when airspace was closed; however airlines are required to reimburse passengers with their full ticket price or re-route and meet care and assistance costs (hotels/meals).
5 The Grand Chamber of the ECJ is the full court of thirteen judges.
has been frustrating and it is unlikely that any amendment will occur in the short to medium term.

Witnessed in the Courts across Europe, there have been several developments, although not directly in relation to the Sturgeon doctrine itself, but on general principles of the Regulation.

The Ruesselsheim District Court, on 19 February 2010, applied the preliminary ruling of the ECJ in the Sturgeon decision. The Court refused Condor a subsequent reference back to the ECJ.

The Federal Court of Justice in Germany also determined in December 2009 that, at least so far as German claims are concerned, claims under the Regulation must be brought within 3 years. The Sturgeon decision stands as an interpretation of the Regulation and hence has retroactive effect. The Regulation itself stipulates no limitation period for claims.

On 11 February 2010, a Court in Pontevedra, Spain, referred two important questions to the ECJ for ruling:

- Is the term ‘cancellation’ to be interpreted as meaning only the failure of the flight to depart as planned or would it include a case of a flight forced to return to the place of departure for technical reasons?
- Should the term ‘further compensation’ in Article 12 of the Regulation include non-material damage or must it be restricted to substantial expenses?

Both questions bring into sharp focus the inter-relationship of the Regulation and the Montreal Convention 1999 (which is widely interpreted as an exclusive remedy and which prevents recovery of non-compensatory damages). If Sturgeon is correct, the Regulation is inconsistent with the Montreal Convention and invalid and the distinction in the type of damages in the IATA/ELFAA case is redundant.

The eruption of the Eyjafjallajökull volcano in April 2010 had catastrophic effects on all aspects of air travel throughout Europe for an extended period. The financial impact of the closure of parts of European airspace on the global economy has been estimated at $130m USD per day, with European airlines bearing 70% of that figure. A significant proportion of the loss to airlines flowed from compliance with the Regulation which does not define the period for which care and assistance obligations run. The sudden demand for hotel rooms of course meant that prices were pushed to a premium. Arguments will no doubt be found as to what constitutes a reasonable period to have to meet these expenses and how successfully or otherwise passengers have mitigated their situation.

An equally burdensome provision in the Regulation is where passengers are to be offered re-routing at the earliest opportunity under ‘comparable transport conditions’ – the cost being borne by the airline. Indeed, the Regulation provides no definition of what is ‘comparable’ to the flight that the passenger was originally scheduled to fly on. A strict interpretation of Article 8 suggests that ‘comparable transport’ is likely to mean air travel only and of a type similar to the original booking. The Directorate General for Energy and Transport however issued

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6 C-344/04.
8 Ibid.
9 The DGET has since been renamed to the ‘Directorate General for Mobility and Transport’.
guidance on this point and has adopted a much wider stance as to what is considered ‘comparable’. The guideline (which has no legal force) suggests that a comparable form of transport may be land based forms of transport, for example by ‘train, taxi, or bus, if, the distance to be covered is appropriate for such transport modes’. The guidance therefore suggests that land based transport may be used to aid convenience for air-travel re-routing. Ultimately, each case will be judged on its merits taking all circumstances into account. When all flights across Europe were cancelled, is it valid to utilise any means of transport, at any price and seek to have the carrier pay for it? Carriers are likely to say no and maintain a robust defence to such claims, preferring to maintain that an offer to re-route (even if entailing a lengthy delay in repatriation) is all they are bound to offer (and meet the accommodation costs pending flight) and should a passenger decline this offer, they effectively terminate the carriage contract entitling them simply to a refund of the unused portions of their ticketing.

In determining whether the Regulation is fair and appropriate as a liability regime for aviation, it is worth considering how it compares to other transport consumer protection Regulations. Regulation (EC) 1371/2007 in relation to rail passenger rights and obligations operates in a fundamentally different way by providing compensation to passengers facing cancellation and delay linked to the ticket price rather than to the distance of the journey. In any event, there is a positive correlation in ticket price and journey distance, and it could be argued that if compensation for air transport were to use this model then the industry would find it much more palatable. In the context of coach transport, a compensation regime is currently at a parliamentary amendment stage.

The Regulation states that passengers should be afforded a ‘high level of protection’. The travel industry may consider this to be somewhat of an under-statement. It is clear that the Sturgeon ruling has caused many problems. Some may consider that the ruling gives airlines more incentive to maintain operational efficiency; however there are circumstances where a sudden technical fault in an aircraft or other extraordinary circumstances may simply be outside of the airline’s control and yet the courts seek to impose carriers with financial risk and responsibility. The Eyjafjallajökull volcanic eruption has highlighted the inadequacy of the Regulation, which requires revision. The million dollar question is whether there is the political will to address such a consumer driven issue. From the industry perspective, the failure to do so could be catastrophic.

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11 Ibid, answer to Question 22
12 This position differs from Regulation (EC) 261/2004 which links the level of compensation with the distance the scheduled flight is intended to cover.