

WORKSHOP SESSION

EJTN Training on the EU Preliminary Ruling Procedure – October 2017

Learning Objectives:

1. Evaluate the necessity of requesting the CJEU to deliver a preliminary ruling (including the analysis of the criteria of *acte clair* or *acte éclairé*);
2. Assess a step-by-step action plan regarding the request for a preliminary ruling, including models of orders/decrees for a preliminary ruling;
3. Understand the key aspects and procedure regarding the formulation of question(s) supporting a request for a primary ruling.

Methodological Approach:

1. Outline of a real case-study involving the possible request for a preliminary ruling: relevant facts, legal proceedings, etc.;
2. List of EU legislation and case-law relevant to the facts of the case;
3. Specific questions to be addressed by each group: participants are requested to write down their answers, listing the reasons and corresponding legal arguments supporting their conclusions;
4. Review of a suggested template for drafting of a request for a preliminary ruling on the interpretation of EU law.

Tasks:

1. Based on the set of facts provided, discuss in your group whether or not a clarification on the interpretation of EU law by the CJEU is required, justifying your conclusions.
2. Independently of your findings under task 1, formulate a hypothetical question to the CJEU.
3. Review the template provided for a full overview of the steps to be addressed when referring a question to the CJEU.

Workshop Moderators:

- Vera GALIS Judge at Court of Appeal Bucharest in Labor Law and Social Litigation;
- Rajko KNEZ, Judge at the Constitutional Court of the Republic of Slovenia, professor at the University of Maribor Faculty of Law;
- Wiebke DETTMERS, Judge/Scientific Assistant at the Federal Court of Justice, Germany.

Case-Study - Compensation for delayed flights¹?

The plaintiff booked a package holiday to Spain with a **tour operator**. This included, amongst other things, two flights for the outward journey: The first flight (Flight 1) from Hamburg was meant to land at 4:30pm in Las Palmas. The connecting flight (Flight 2) was scheduled to leave for Fuerteventura at 5:30pm.

Flight (1) was operated by the **defendant, airline X**. Flight (2) was operated by **another airline Y**.

Flight (1) landed with a delay of approximately 20 minutes. The plaintiff missed the connecting flight to Fuerteventura. The plaintiff arrived at the holiday destination roughly 14 hours late.

On 1st of February 2016, the plaintiff took **airline X, responsible for Flight (1)**, to court for the delay for compensation to the amount of €400 pursuant to the Air Passenger Act ([Regulation \(EC\) 261/2004](#) of the European Parliament and of the Council) regarding common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays of flights.

According to Art. 7(1)b : *...Where reference is made to this Article, passengers shall receive compensation amounting to [...] EUR 400 for all intra-Community flights of more than 1.500 kilometres, and for all other flights between 1.500 and 3.500 kilometres. ...*

The local court dismissed the claim, and an appeal was unsuccessful. The court of appeal did not agree that there had been a delay of three hours or more, as required by the provisions of Article 7(1)b of the Regulation. Flight (1) was only delayed by 20 minutes. The defendant, the airline responsible for Flight (1), was not responsible for the total delay, as it did not operate the connecting flight. It also had no influence on the selection of the flights. The flights were compiled by the tour operator with which the plaintiff booked the package holiday. The plaintiff's claim for damages must be addressed to the tour operator.

According to the ECJ, a compensation claim may only be made in the event of arriving at the final destination three or more hours late (ECJ, judgement of 19 November 2009 – [Joined cases C-402/07 and C-432/07](#)). For direct connecting flights, the final destination is the destination of the last flight. In its judgement of 26 February 2013 - [C-11/11](#), the ECJ dealt with the question of whether a claim for compensation required the same airline that caused the delay to have issued a ticket (or booking confirmation) for both flights.

An appeal on points of law was lodged against the solution of the appellate court. During these proceedings, the need to request for a preliminary ruling by the Court of Justice of European Union is debated.

Questions/Task:

- I. **Is a reference for a preliminary ruling to be provided by the competent court?**
- II. **If yes: How should the question to be submitted be formulated?**

¹ Taken from the Federal Court of Justice press release dated 19 July 2016 No. 127/2016, reference X ZR 138/15.

Summary of Case C-11/11

Source: InfoCuria – Case-law of the Court of Justice (available [here](#))

Judgment of the Court (Grand Chamber), 26 February 2013

Air France v Heinz-Gerke Folkerts and Luz-Tereza Folkerts

(Request for a preliminary ruling from the Bundesgerichtshof)

(Request for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Articles 6 and 7 — Connecting flight(s) — Delay in arrival at the final destination — Delay equal to or in excess of three hours — A passenger's right to compensation)

Facts:

Mrs Folkerts held a reservation to fly from Bremen to Asunción, via Paris and São Paulo. In accordance with the original planning, Mrs Folkerts' flight was scheduled to depart from Bremen on 16 May 2006 at 6.30 am and arrive in Asunción, her final destination, the same day at 11.30 pm.

The departure of the flight from Bremen to Paris, operated by the company Air France, was delayed and the aircraft took off only shortly before 9.00 am, that is a delay of approximately two and a half hours beyond the scheduled departure time. Mrs Folkerts, who already had her boarding cards for the entire journey on departure from Bremen, did not reach Paris until after Air France's aircraft scheduled for the connecting flight to São Paulo had already departed. Mrs Folkerts was re-booked by Air France on to a later flight to São Paulo. Because of her late arrival in São Paulo, Mrs Folkerts missed the connecting flight to Asunción originally scheduled. She therefore did not arrive in Asunción until 17 May 2006 at 10.30 am, that is 11 hours after the arrival time originally scheduled.

At first instance and then on appeal, Air France was ordered to pay Mrs Folkerts damages, including, in particular, a sum of EUR 600 under Article 7(1)(c) of Regulation No 261/2004.

Air France then brought an appeal on a point of law before the Bundesgerichtshof (German Federal Court of Justice). The Bundesgerichtshof considers that the outcome of that action depends on whether Mrs Folkerts is entitled to compensation from Air France pursuant to Article 7 of Regulation No 261/2004.

The Bundesgerichtshof takes the view that Mrs Folkerts is entitled to compensation in the amount of EUR 600 only if the case-law of the Court of Justice (Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923) – according to which passengers have the right to compensation under Article 7(1) of Regulation No 261/2004 also in the event of long delay – is also applicable to cases where, although there was not yet any delay beyond the scheduled departure within the terms of Article 6(1) of that regulation, the final destination was nonetheless reached three hours or more after the arrival time originally scheduled.

Therefore, in the Bundesgerichtshof's view, the question of whether the right to compensation advanced by Mrs Folkerts is well founded depends on whether Article 7(1) of Regulation No 261/2004 may be relied on even where there is no delay within the terms of Article 6(1) of that

regulation. The Bundesgerichtshof takes the view that it is not clear from the grounds of the judgment in *Sturgeon and Others* whether, for the purpose of entitlement to compensation under Article 7(1) of Regulation No 261/2004, the length of the delay in reaching the final destination alone is determinant or whether entitlement to compensation for such a delay additionally requires that the conditions set out in Article 6(1) of that regulation be met, that is to say, that the departure of the flight in question was already delayed beyond the limits set out in Article 6(1).

Questions addressed to the CJEU:

In those circumstances the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Does a passenger have a right to compensation under Article 7 of Regulation No 261/2004 in the case where departure of his flight was delayed for a period which is below the limits specified in Article 6(1) of that regulation, but arrival at the final destination was at least three hours later than the scheduled arrival time?
2. If the first question is answered in the negative: For the purpose of determining whether there was a delay, within the terms of Article 6(1) of Regulation No 261/2004, in the case of a flight consisting of several stages, should reference be made to the individual stages or to the distance to the final destination?

Operative part of CJEU judgment:

Article 7 of Regulation No 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, must be interpreted as meaning that compensation is payable, on the basis of that article, to a passenger on directly connecting flights who has been delayed at departure for a period below the limits specified in Article 6 of that regulation, but has arrived at the final destination at least three hours later than the scheduled arrival time, given that the compensation in question is not conditional upon there having been a delay at departure and, thus, upon the conditions set out in Article 6 having been met.

In the case of directly connecting flights, it is only the delay beyond the scheduled time of arrival at the final destination, understood as the destination of the last flight taken by the passenger concerned, which is relevant for the purposes of the fixed compensation under Article 7 of Regulation No 261/2004. The opposite approach would constitute an unjustified difference in treatment, inasmuch as it would effectively treat passengers of flights arriving at their final destination three hours or more after the scheduled arrival time differently depending on whether their flights were delayed beyond the scheduled departure time by more than the limits set out in Article 6 of Regulation No 261/2004, even though their inconvenience linked to an irreversible loss of time is identical.

(see paras 35, 39, 47, operative part)