

THE INTERPRETATIVE AUTONOMY OF THE EUROPEAN COURT OF JUSTICE
AND THE MARGIN OF INTERPRETATION OF NATIONAL COURTS: A
SYSTEMATIC READING OF THE CILFIT JUDGMENT

(Provisional title)

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§ I. PROBLEM STATEMENT

One of the main objectives of the European Court of Justice (ECJ) is to “ensure that in the interpretation and application of the Treaties the law is observed” (article 19 TUE). In this regard, the ECJ benefits from an important interpretative autonomy understood here as the competence to settle interpretative problems without being subordinated to another jurisdiction.

The jurisdictional structure of the EU is comprised of the ECJ and the national courts (NC), whose cooperative relationships are characterized by the absence of hierarchies among them (KOMAREK, 2005, p. 10) and are “based on an spirit of respect of the purpose of the system as a whole” (LENAERTS, 1983, p. 479). This conception underlies the mechanism of preliminary ruling provided for in Article 267 (1) of the TFEU, and this mechanism has also become a specific “judicial dialogue” between the ECJ and NCs.

Article 267 (3) establishes a duty on the National Courts of Last Instance (NCLI) to refer an interpretative question to the ECJ when it is raised in a pending case before them. This duty is established to ensure “the proper application and uniform interpretation” (C-283/81, *CILFIT*, para. 7; C-337/95, *Parfums Christian Dior*, para. 25) and its main objective is “to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States” (C-495/03, *Intermodal Transports*, para. 29).

In 1982, in its *CILFIT* judgment, the ECJ laid down three exceptions to this duty. By virtue of the third exception (the “acte clair” exception), a NCLI may refrain from submitting a question on the interpretation of EU law when the “correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question arises is to be resolved”. In addition, the NCLI “must be

convinced that the matter is equally obvious” to other NCs and to the ECJ. (C-283/81, *CILFIT*, para. 16).

Before arriving at that conclusion, the NCLI must take into account the main characteristics of EU law: 1) its multilingual character; 2) the existence of autonomous concepts in its legal terminology; and 3) the systematic and teleological directives of interpretation used by the ECJ. (C-283/81, *CILFIT*, para. 17-20).

It has been identified that the use of the third exception entails a potential risk of abuse of this doctrine by NCLI as well as the risk of divergences in national case law between Members States (C-283/81, *CILFIT*, para. 21) that could jeopardize the uniform interpretation of EU law.

European legal scholarship has proposed two different readings of the judgment. The first one states that the ECJ has formulated conditions that in practice are “unusually difficult to satisfy” (BROBERG, 2008, p. 1384), and by doing so the “strategy” of the ECJ was to reaffirm its interpretative role (RASMUSSEN, 1984, p. 243; BRORBERG and FENGER, 2011, p. 180; SARMIENTO, 2010, p. 188).

On the other hand, the second reading suggest that the CILFIT conditions must be “interpreted” not in a literal manner, but merely as “caveats” or recommendations when NCs interpret and apply EU law (EDWARD, 2010).

Despite their differences, both readings of the CILFIT judgment admit a certain margin of interpretation on NCs. Despite the “strict” character of the CILFIT conditions or their “practical difficulties”, it should be stressed that since its implementation in EU law, the “acte clair” doctrine has been utilised by the NCLI to interpret EU law, and as well as to a certain extent refraining from their duty of requesting a preliminary ruling by the ECJ.

Almost forty years have passed since the pronouncement of this “foundational judgment” of the ECJ without any *substantial* change to the “*acte clair*” doctrine conditions (see, for instance, C-416/17, *Commission v. France*); however, it should be noted that the ECJ has already dealt with several issues concerning its application (C-160/14, *Ferreira de Silva*; C-72/14 and C-197/14, *X and van Dijk*).

In this regard, EU legal scholarship and the Advocates General, once again accepting a certain margin of interpretation by NCs, have already proposed an adjustment

of the “acte clair” conditions and established the necessity of introducing new mechanisms in order to oversee the newly proposed criteria (BROBERG, 2008, p. 1394).

On the other hand, and going even further, authors such as Gareth Davies, adopting the concept of “interpretative pluralism”, criticize the ECJ’s “monopoly of interpretation” and defend the notion that NCs should also have the possibility to challenge the ECJ’s interpretations on EU law (DAVIES, 2018).

§ II. PROPOSAL AND ORIGINALITY

All this brings to question whether there is a way to counsel the interpretative autonomy of the ECJ on one hand, and on the other the margin of interpretation vested in the NCs and recognized by the CILFIT judgment, without altering the “acte clair” conditions (something that the ECJ apparently does not want to do in the short term).

The overall purpose of this research, in contrast with the existing EU legal doctrine on the subject, is to propose a more systematic reading of the “acte clair” doctrine as well as the existing mechanisms in order to ensure the uniformity and coherence of EU law.

More specifically, it will be suggested that the different European legal mechanisms (procedure of infringement, principle of state responsibility for non-compliance with EU law, and the preliminary ruling procedure itself) certainly re-affirm the interpretive autonomy of the European Court of Justice, its role as the ultimate interpreter of EU law, and its close scrutiny of the “acte clair” doctrine, whilst accepting a margin of interpretation bestowed upon the NCs that is in turn subject to certain limitations. Additionally, in case of dissension between the ECJ and a NC about the interpretation of EU law there is always the possibility of reopening the “judicial dialogue” using an instrument that is more efficient in terms of response time (i.e. Article 99 of the Rules of Procedure of the ECJ). This system, when considered as a whole, is indeed far from perfect, although it remains coherent and complete.

Finally, with regard to the risk of coherence and uniformity on the interpretation and application of EU law, this proposal suggests to view these problems as temporary inconsistencies which can be resolved by the ECJ in the future through use of one or all of the above-cited mechanisms.

§ III. METHODOLOGY

This research requires an in-depth examination of the existing ECJ case law on those infringement actions which concern the breach of EU law as a result of the decision of an NCLI (C-416/17, *Commission v. France*; C-154/08, *Commission v. Spain*); the principle of state responsibility for non-compliance with EU law by the judiciary (C- 224/01, *Köbler*); and the preservation of the NC's right (or obligation) to refer a preliminary question to the ECJ (C-188/10, *Melki and Abdeli*; C-283/81, *CILFIT*, para. 15). Particular attention will be paid to recent developments in case law concerning the “acte clair” doctrine, from the past ten years, that have brought the debate back on the track of EU legal scholarship.

The lion's share of this analysis is devoted to the judgments of the Court of Justice, however this does not preclude different references to the opinions of the advocates general about the subject. Finally, this “systematic” lecture proposal additionally requires a reference to some of the reasoned orders adopted by the ECJ in order to identify some of the particularities about the interpretation of EU law, as well as references to the existent case law of the European Court of Human Rights regarding the obligation of NCLI to request a preliminary ruling and the respect of Article 6 of the European Convention on Human Rights (*inter alia*, ECHR, n° 17120/09, *Dhabi v. Italy*).

§ IV. CALENDAR

Concerning the feasibility of completion of this research project, the following working plan is proposed:

18 February – date of the seminar:

- The research and the lecture on the materials will continue even if the proposal has not ultimately been accepted by the ECB. The advancements will be integrated into the PPT presentation intended to be used for the 2019 spring seminar. This aims to avoid any risk of not meeting the deadline of the first draft.

Date of the seminar – 3 June:

- The research will continue taking fully into account the remarks and comments of the participants to the seminar (the ECB).

3 June– 14 July:

- Drafting of the text in order to submit it before the first deadline

Date of the ECB's review – 29 November:

- Completion and correction of the first draft, taking into accounts the remarks and suggestions of the ECB.

After 1st December

- Submission of the article to the Journal
- Incorporate into the article any possible new comments from the Journal.

20 September 2020

- Final acceptance for publication of the article by the Journal.

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