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Recent Developments in the *Acte Clair* Case Law of the EU Court of Justice: Towards a more Flexible Approach

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Abstract

This article examines the *acte clair* doctrine in light of the recent rulings of the Court of Justice of the European Union in *Ferreira da Silva* and *X and van Dijk*. It first analyses the earlier case law on *acte clair*, disclosing inconsistencies in the application of its requirements. Then, it offers a critical review of *Ferreira da Silva* and *X and van Dijk*. It claims that the *Cilfit* criteria, although often quoted in judgments and doctrine, have been applied neither consistently nor truly rigidly by the Court. Instead, a more flexible approach to *acte clair* requirements is taking shape, while the Court is simultaneously reminding national courts that its discretion on preliminary reference issues is not unlimited. Finally, the article criticizes *Ferreira da Silva* and *X and van Dijk* for missing the opportunity to further clarify the normative content and the legal status of the *Cilfit* criteria.

Keywords: preliminary reference; preliminary ruling; *acte clair*; *Cilfit* criteria

I. Preliminary Reference and *Acte Clair*

The preliminary reference procedure is a fascinating feature of the EU (European Union) legal system, linking the national courts of the Member States with the Court of Justice of the European Union (hereinafter the CJEU, the Court of Justice, the Court). This instrument is aimed at enabling the courts of Member States to ensure a uniform interpretation and application of EU law within the European Union by seeking assistance from the Court of Justice.[1]

Although more than half a century has passed since the introduction of the preliminary reference procedure, questions over its proper application persist, particularly in relation to the extent of the obligation of a national court to refer to the CJEU. Such questions trigger the uncomfortable task of balancing the co-operative nature of proceedings and the national court's duty to ask the CJEU for an authoritative interpretation of EU law. The preliminary reference procedure thus touches upon the fundamental issues of mutual trust and respect between the national courts and the CJEU. Obviously, these issues become particularly delicate when supreme and constitutional courts of the Member States are involved.[2]

Article 267 of the TFEU (Treaty on the Functioning of the European Union)[3] establishing the preliminary reference procedure differentiates between the *right* and the *duty* of national courts to seek a preliminary ruling. Under the discretionary reference stipulated in Article 267(2) TFEU, a national 'court or tribunal' *may* ask the CJEU to give a

[1] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. OJ C 338, 6 November 2012, p. 1.
[2] See in that regard Broberg (2008, pp. 1384–7).
[3] Consolidated version of the Treaty on the Functioning of the European Union. OJ, C 326, 26 October 2012, pp. 0001–0390.

preliminary ruling if it considers that a decision on the question is 'necessary' to enable it to give a judgment in a particular case. The obligatory reference (*duty* to refer) is established in two cases: with respect to national courts adjudicating at last instance (Article 267(3) TFEU)[4] and with respect of all courts faced with a question of the validity of EU law. Regarding the latter case, the *Foto-Frost* case[5] established that a national court or tribunal has no jurisdiction to declare measures taken by the EU institutions invalid – this can be done only by the Court of Justice. National courts may equally not rely on *acte éclairé* or *acte clair* and rule that an EU provision is invalid, even if a similar provision in a comparable legal act has already been declared invalid by the CJEU.[6]

The obligation of national courts of last instance to refer for a preliminary ruling when a question of the interpretation of EU law arises is subject to certain exceptions.[7] In accordance with the jurisprudence of the Court,[8] a national court is relieved from the duty to refer (1) when EU law questions are not relevant to the decision in the main proceedings, (2) in a situation before a national court is 'materially identical with a question which has already been subject of a preliminary ruling in a similar case' ('*acte éclairé*')[9] or (3) when the proper interpretation of EU law is 'so obvious as to leave no scope for any reasonable doubt' ('*acte clair*').[10] Whereas the first two exceptions seem to cause relatively little trouble,[11] the boundaries of *acte clair* doctrine are somewhat blurred and deserve further analysis.

The *acte clair* doctrine, having its roots in the *Cilfit* judgment[12] delivered in 1982, has reached a mature age and has been applied many times – but never in a fully coherent and clear manner. As the recent *Ferreira da Silva*[13] and *X and van Dijk*[14] cases have reminded us, the answer to the question of when a national court has a duty to refer to the CJEU and when it can refrain from doing so by invoking *acte clair* rules still causes doubts in national courts and academics. The rules of the application of *acte clair* are not

[4] In accordance with Article 267(3) TFEU, a national court is under an obligation to refer where a question is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy in domestic law, and the answer is necessary for the court to reach a decision.
[5] Case 314/85 *Foto-Frost*, EU:C:1987:452.
[6] Case C-461/03 *Gaston Schul*, EU:C:2005:742.
[7] The first case, in which the CJEU discussed whether the obligation to refer for a preliminary ruling was absolute, was *Da Costa* (Joined cases 28/62 to 30/62 *Da Costa*, EU:C:1963:6). The questions referred were identical to those raised in the Court's earlier case, and the Court used the opportunity to rule on the *erga omnes* authority of its judgments, allowing them to form precedents. It stated that 'the authority of an interpretation under article [267] already given by the Court may deprive the obligation [to refer for a preliminary ruling] of its purpose and thus empty it of its substance'. Even if this exception from the duty to refer in *Da Costa* was limited to materially identical questions already answered by the CJEU (a narrow interpretation of *acte éclairé*), *Da Costa* indicated that Article 267 should not be interpreted literally and that there are certain limits to the obligation to refer.
[8] For the national law perspective, see Brealey and Hoskins (1994, pp. 134–40) and Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (2004). The initial view of UK judges is represented by decisions in cases *HP Bulmer Ltd. v. J Bollinger SA* [1974] 2 CMLR 91; *Commissioners of Customs and Excise v. Samex Aps* [1983] 1 All ER 1042; *Lord Bethell v. SABENA* [1983] 3 CMLR 1; *Chequepoint Sarl v. McClelland* [1997] QB 51. See also Broberg and Fenger (2014, p. 238).
[9] Joined cases 28/62 to 30/62 *Da Costa* [1963] ECR 31. This rule was later extended to include situations 'where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'. See case 283/81 *Cilfit and Others*, EU:C:1982:335, para. 14.
[10] Case 283/81 *Cilfit and Others*, EU:C:1982:335.
[11] For a more detailed analysis, see Broberg and Fenger (2014, pp. 230–4).
[12] Case 283/81 *Cilfit and Others*, EU:C:1982:335.
[13] Case C-160/14 *Ferreira da Silva*, EU:C:2015:565.
[14] Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:564.

clearly defined and continue to evolve. This article attempts to shed some light on the recent CJEU case law concerning this matter and to evaluate it in the context of a wider evolution of *Cilfit* criteria. It seeks to show that *Cilfit* criteria are not applied *stricto sensu*, and a more flexible approach to *acte clair* can be observed in the recent period.

II. *Cilfit* and its Unreachable Requirements

The Court of Justice tried to explain what an *acte clair* situation should mean in more detail in the context of EU law by formulating certain general criteria in the *Cilfit* case. The preliminary reference in *Cilfit* was submitted by the Italian Court of Cassation (*Corte Suprema Di Cassazione*), which thought that the proper interpretation of EU rules before it was so obvious that there was no genuine need to request an interpretation of the CJEU. Thus, it asked under what conditions a national court of last instance may refrain from requesting a preliminary ruling of the CJEU.

In this leading case, the CJEU held that the correct application of EU law may be so obvious to a national court that it leaves *no scope for any reasonable doubt* regarding the manner in which the question raised is to be resolved. Before it comes to such a conclusion, stated the CJEU, the national court or tribunal must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice (para. 16). The CJEU further added that the existence of such a possibility of non-referral must be assessed on the basis of characteristic features of EU law, the particular difficulties to which its interpretation gives rise (para. 17) and the risks of divergences in judicial decisions within the EU (para. 21). The Court also stressed that the interpretation of a particular EU provision entails considering its different language versions (para. 18) and peculiarities of EU law terminology (para. 19), placing such a provision in its context and interpreting it in light of EU law as a whole while also taking into account its objectives and the state of evolution (para. 20).[15] Only if those conditions are satisfied, stated the Court, may the national court refrain from submitting the question to the CJEU and take upon itself the responsibility for resolving it.

Such clarifications did not appear helpful in practice. Some suggested interpreting *Cilfit* so narrowly and strictly as to require the vast majority of cases before national courts of last instance that involved the interpretation of EU law to be referred to the CJEU.[16] Others favoured a larger margin of discretion for national courts when deciding on *acte clair*.[17] One thing remained certain: even if, at first sight, a proper interpretation of an EU law provision appeared obvious, keeping *Cilfit* criteria in mind and following them literally could make such a provision much less straightforward. From the warning tone used in *Cilfit*, one might even get the impression that the CJEU wanted to discourage national courts from venturing into *acte clair* deliberations and instead have their questions sent directly to Luxembourg.

[15] For a detailed analysis of these criteria and their interpretation by the courts of the Member States, see Broberg and Fenger (2014, pp. 230–54).
[16] This was more common in earlier legal doctrine, for example, Rasmussen (1984, pp. 242–59).
[17] For example, Tridimas (2003, pp. 9–50) and Broberg (2008, pp. 1383–97).

It comes without surprise that the *acte clair* doctrine formulated in *Cilfit* was often criticized by academics[18] and by the advocates general of the CJEU.[19] Such criticism is well founded. In most cases, it is impossible for a national court to fulfil all the *Cilfit* conditions read *stricto sensu* due to their broad and insufficiently defined terms. In other words, as Advocate General Wahl recently put it, if one were to adhere to a rigid reading of the case law, coming across a 'true' *acte clair* situation would, at best, seem just as likely as encountering a unicorn.[20] A national judge must not only consult the CJEU's jurisprudence and the vast doctrine and case law of 28 EU Member States but also to engage in linguistic comparisons (there are now 24 official languages in the EU) of EU texts and national laws. What was hardly imaginable back in 1982 when *Cilfit* was adopted (when the European Economic Communities consisted of ten Member States with seven official languages) is in 2016 simply out of the question. Consequently, one might assume that the highest courts of the Member States have already breached Article 267(3) many times by incorrectly applying the *acte clair* doctrine formulated in *Cilfit*.[21]

The Court of Justice itself does not seem to have applied the *Cilfit* precedent consistently and has systematically left aside some of the *Cilfit* criteria. In most cases related to *acte clair*, the CJEU limited itself to reminding the national courts of the basic *Cilfit* rule requiring the application of EU law to be 'so obvious as to leave no scope for any reasonable doubt on the manner in which the question raised is to be resolved'.[22] In some recent cases, the CJEU referred to the generally framed *Cilfit* principle that in the application of *acte clair* doctrine, it is necessary to assess 'the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the EU' but do so without disclosing its normative content.[23] In only one case so far, the Court required a national court to be 'convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice', but again, it did not explain how such a test should be carried out.[24] In contrast, the Court has never referred to the more specific *Cilfit* requirements, such as the linguistic comparisons of EU provisions or the assessment of a particular EU terminology or of the EU legal system as a whole.[25] The recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings[26] are equally silent on these *acte clair* requirements.

[18] See, for example, Broberg (2008, pp. 1383–97), Rasmussen (1984, pp. 242–59) and Craig (1995, p. 26).
[19] See, for example, Opinion of Advocate General Jacobs in Case C-338/95 *Wiener SI*, EU:C:1997:352 and Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-461/03 *Gaston Schul*, EU:C:2005:415.
[20] Opinion of Advocate General Wahl in Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-461/03 *Gaston Schul Douane-expediteur*, EU:C:2005:415, where he concluded that there is absolutely no possibility of adopting the *Cilfit* approach.
[21] Some statistics and national courts' tendencies to refer for a preliminary ruling are presented in Fenger and Broberg (2011, pp. 180–212). They disclosed that, for example, French Conseil d'État is less likely to submit a reference for a preliminary ruling than constitutional courts of Austria or Italy. See also Annual Report of the CJEU (2013).
[22] Case C-340/99 *TNT Traco*, EU:C:2001:281, para. 35 and Case C-224/01 *Köbler*, EU:C:2003:513, para. 118; Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others*, EU:C:2011:667, para. 31; Joined cases C-428/06 to C-434/06 *UGT-Rioja*, EU:C:2008:488, para. 42.
[23] Case C-495/03 *Intermodal Transports*, EU:C:2005:552, para. 45; Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:564, para. 55; Case C-160/14 *Ferreira da Silva*, EU:C:2015:565, para. 39.
[24] Case C-495/03 *Intermodal Transports*, EU:C:2005:552, para. 39.
[25] However, in some cases not related to *acte clair*, the CJEU, referring to the *Cilfit* judgment, held that the interpretation of EU provisions involves the comparison of its different language versions (for example, Case C-207/14 *Hotel Sava Rogaška*, EU:C:2015:414, para. 26; Case C-236/97 *Skatteministeriet*, EU:C:1998:617, para. 25) and the assessment of EU law as a whole (for example, Case C-583/11P *Inuit*, EU:C:2013:625, para. 50).
[26] OJ C 338, 6 November 2012, pp. 1–6.

Having all this in mind, it is possible to conclude that even if the *Cilfit* case remains a precedent quoted in all subsequent cases related to *acte clair*, the rules formulated in this case should not be considered a closed list of strict requirements to be complied with in full. Rather, they are to be seen and used as guidance for national courts when taking decisions in individual cases characterized by specific circumstances.[27] Academics and national judiciaries largely endorse such a common-sense approach. In the same vein, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union noted a few years ago that it should be in the interest of the parties, the national courts and the CJEU to avoid burdening the preliminary reference procedure with questions that are of minor importance for the unity, coherence and development of EU law.[28]

III. *Acte clair* in the Recent CJEU Judgments

Two recent judgments adopted in September 2015 seem to further expand the scope of *acte clair*, evidencing a softening approach towards *Cilfit* criteria. Notably, the CJEU appears to be opting for more flexibility in the application of *acte clair* – something that was needed, taking into account the developments in the EU discussed above, particularly the growing number of EU Member States and, accordingly, of EU national courts, the experience of national courts in applying EU law gained over the years, and the evolving co-operative relations between the CJEU and national courts.

The Case of X and van Dijk

In the recent case of *X and van Dijk*,[29] the Court of Justice applied the *Cilfit* criteria somewhat leniently, extending the national last instance court's margin of discretion when deciding on the need for a preliminary reference. The disputes in the domestic proceedings concerned the refusal of Dutch authorities to recognize certain social security certificates provided in another Member State. In addition to issues related to social security laws, the joined cases raised important questions on the preliminary ruling procedure in general and on the concept of *acte clair* in particular.

The initial request for a preliminary ruling was submitted by a Dutch non-final instance court, which asked the CJEU for its interpretation of EU law in the area of social security laws. The Dutch Supreme Court (*Hoge Raad*), having a similar case before it on exactly the same legal issue, decided to stay the proceedings and to refer to the CJEU. It essentially wanted to clarify whether the fact that a question was referred for a preliminary ruling by a lower national court precluded the highest national court from taking the view that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt on how that question must be answered. In other words, *Hoge Raad* asked whether the *Cilfit* criteria requiring the matter to be equally obvious to the courts of the other Member States should be applied in relation to lower instance courts within the same Member State.

[27] In a similar vein, see Opinion of Advocate General Wahl in Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319, para. 67.
[28] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (2008).
[29] Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:564.

Advocate General Wahl, in his opinion in this case,[30] suggested interpreting *Cilfit* criteria in a more flexible way. He claimed that the rule that 'the matter is equally obvious to the courts of the other Member States and to the Court of Justice' should not be understood in absolute terms. He saw *Cilfit* criteria as a 'tool kit' for determining whether there might be reasonable doubt and not as strict requirements.

The Court of Justice followed a similar flexible approach and reconfirmed its stance that it is for the national courts against whose decisions there is no judicial remedy under national law to take upon themselves the responsibility for determining whether the case before them involves an *acte clair*. The Court also noted that a decision on preliminary reference should be taken 'in the light of particular circumstances of the case'. The fact that a lower court has made a reference to the CJEU on the same legal issue as that raised before the last instance court 'must be considered' by the latter, but it does not preclude the court of last instance 'from concluding, from its examination of the case and in keeping with the criteria laid down in the judgment in *Cilfit*, that the case before it involves an *acte clair*' (para. 60). Lastly, the CJEU invoked an argument that Article 267 does not prevent the decisions of non-final instance courts that have referred a matter to the CJEU from being challenged by higher courts, and the latter could then assume their responsibility for ensuring compliance with EU law. The CJEU concluded that a court of last instance is not required to make a reference to the CJEU on the sole ground that a lower national court has done so, nor is it required to wait until the CJEU gives an answer to a question posed by a lower court.[31]

This ruling must have come as a surprise to some advocates general and members of academia who not long ago argued that the *Cilfit* rule that the matter should be 'equally obvious … to the courts of the other Member States' would be rebutted if the last instance court's interpretation of EU law differed from the one adopted by a lower court.[32] *Fenger and Broberg* even implied that the fulfilment of this particular criterion requires that *all* other courts be of the same opinion as the last instance court in question.[33] What we see in *X and van Dijk* is a negation of the aforementioned perception that there should never be any diverging case law – conflicting opinions of lower courts, at least within the same Member State, do not *per se* exclude the possibility of *acte clair*.

X and van Dijk invokes an earlier case and seems to further develop its line of reasoning. Back in 2005, in *Intermodal Transports*,[34] the Court was faced with a question of whether a national court against whose decisions there is no judicial remedy under national law may still rely on *acte clair* if it is aware of a divergent application of a particular EU rule by customs authorities of another Member State. The CJEU ruled that this fact alone cannot 'automatically result in an obligation for that court to refer to the CJEU'. The CJEU first referred to the general *Cilfit* principle to consider the specific characteristics of EU law. Afterwards, unlike in *X and van Dijk*, it relied on a problematic *Cilfit* requirement whereby a national court 'must in particular be convinced that the matter is

[30] Opinion of Advocate General Wahl in Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319.
[31] Advocate General Wahl, contrary to the CJEU, opined that on certain occasions, it might be wiser for a last instance court to wait for a preliminary ruling from the CJEU before completing its case. See Opinion of Advocate General Wahl in Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319, para. 73.
[32] See Opinion of Advocate General Stix-Hackl in Case C-495/03 *Intermodal Transports BV*, para. 113 and Fenger and Broberg (2011, p. 190).
[33] Ibid.
[34] Case C-495/03 *Intermodal Transports*, EU:C:2005:552.

equally obvious to the courts of the other Member States and to the Court of Justice'. However, the Court then admitted that such a national court could not be required to ensure that, in addition, the matter is equally obvious to bodies of a non-judicial nature, such as administrative authorities (para. 39). The CJEU concluded that a divergent view of administrative bodies of another Member State on a particular EU matter does not rule out the possibility for a national court to invoke *acte clair*. The Court noted, however, that having information about such a divergent view 'most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the EU rule' (para. 34).

It can be claimed that both *X and van Dijk* and *Intermodal* complement the *Cilfit* case law by widening the margin of the discretion of national courts when they apply the *acte clair* doctrine and by tempering the rigid wording of the original *Cilfit* ruling. Whereas in *Intermodal*, the CJEU held that a divergent opinion of administrative authorities does not prevent courts of last instance from relying on the *acte clair* doctrine, in *X and van Dijk*, the Court came to the same conclusion with respect to lower courts of the same Member State expressing doubts over the interpretation of an EU law provision. In both cases, the Court required national courts to consider the broadly framed *Cilfit* criteria[35] and the circumstances of the case at issue before deciding on the need to make a reference for a preliminary ruling. It also stressed the national court's discretion and 'sole responsibility' when applying the *acte clair* doctrine.

However, both judgments contain certain inconsistencies and questionable conclusions. They also represent a missed opportunity to clarify the content and the legal status of *Cilfit* criteria in view of the evolution of the EU and its legal system.

In particular, *X and van Dijk* failed to fully clarify the scope of the *Cilfit* requirement that the matter be 'equally obvious … to the courts of the other Member States'. The CJEU could have gone beyond the preliminary reference question and shed some light on whether a divergent interpretation of EU law by non-final instance courts of the *other* Member States would prevent the application of *acte clair* doctrine. Moreover, it is unclear *how widespread* such a divergent court practice of the other Member States should be, for example, whether one or a few conflicting decisions would suffice or these divergences should be of a more systemic nature. *Ferreira da Silva*, discussed below, is not very helpful in this context because that case was characterized by 'a great deal of uncertainty' on the part of the national courts of multiple Member States.

Furthermore, there are almost no arguments provided in *X and van Dijk* regarding why courts of last instance should not wait for a preliminary ruling requested by a court of lower instance in a case involving the same legal issue. A duty to wait for the completion of a procedure before the CJEU appears to be justified under the principle of sincere cooperation, particularly in more complex cases.[36] Indeed, not waiting for a preliminary ruling in such cases could impede the fulfilment of the CJEU's obligation to ensure the

[35] Notably, the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the EU. See Case C-495/03 *Intermodal Transports*, EU:C:2005:552, para. 33 and Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319, para. 55.

[36] Such cases could *inter alia* involve situations in which the CJEU is requested to interpret a certain EU law provision or a broader regulation for the first time, in which several lower instance courts have already disagreed over the interpretation of a given provision, or in which the last instance court itself intends to change its interpretation of an EU law provision at issue.

uniform interpretation and application of EU law, as it might well happen that the CJEU adopts a different EU law interpretation than the national last instance court.

In this context, one may remember a much stricter approach to the interpretation of EU law that the CJEU applies in cases challenging the validity of EU law. For example, in *Gaston Schul*, the Court held that 'even in cases which at first sight are similar, careful examination may show that a provision whose validity is in question is not comparable to a provision which has already been declared invalid because, for instance, it has a different legal or factual context'.[37] Similarly, the CJEU, having larger technical resources and expertise in EU and comparative national law, may sometimes come to a different conclusion in cases involving interpretations of EU law.

Consequently, failure to wait for a preliminary reference could cause legal uncertainty and additional costs for the parties, the EU and the Member State concerned; it could trigger the opening of national procedures not only for the adjustment of the last instance court's ruling in that particular case but also for the failure to refer to the CJEU.[38]

The conclusions in *Intermodal Transports* may be equally questioned. On the one hand, it is possible to understand the Court's concerns about the interference in administrative practices that are not the subject of a particular dispute (para. 40). On the other hand, preliminary reference procedures initiated in cases that disclose serious divergences in the application of EU law by administrative authorities of the Member States could be an effective tool for exposing and addressing such administrative practices at the EU level with the aim of ensuring a more uniform application and interpretation of EU law. It cannot be expected from national courts to properly investigate and assess the extent of such divergences and their effect on the uniform application of EU law, along with the judicial practice of the other Member States in related areas. Hence, the Court could have been slightly more nuanced in *Intermodal Transports.*

Ferreira da Silva

Ferreira da Silva[39] was the first case in over half a century of preliminary ruling practice in which the CJEU admitted that in the situation at hand, a national Supreme Court had breached its duty to make a preliminary reference under Article 267(3) TFEU. Even though the question of state liability for breaches of EU law committed by national judicial authorities of last instance was raised in earlier cases,[40] *Ferreira da Silva* was definitely a landmark ruling in this regard.

The case concerned an action against collective redundancy brought by Mr. Ferreira da Silva e Brito and 96 other employees before Portuguese courts. The main legal dispute revolved around the interpretation of the concept of 'transfer of business'. When the court of first instance and the appellate court came to different interpretations of this concept, the dispute reached the court of last instance, the Supreme Court of Justice (*Supremo Tribunal de Justiça*). A number of employees, parties to the case, asked this court to make a reference to the CJEU for clarification of the concept of 'transfer of business' in the

[37] See Case C-461/03 *Gaston Schul*, EU:C:2005:742, para. 20.
[38] In a similar vein, see Fenger and Broberg (2011, p. 205).
[39] Case C-160/14 *Ferreira da Silva*, EU:C:2015:565.
[40] Case C-224/01 *Köbler*, EU:C:2003:513; Case C-173/03 *Traghetti del Mediterraneo*, EU:C:2006:391. In *Köbler*, the Court ruled on the possibility of a Member State liability in a case where a national court of last instance, using the *acte clair* doctrine, manifestly breaches EU law.

context of that particular case. However, the *Supremo Tribunal de Justiça* was of a different opinion – it invoked the *acte clair* doctrine considering that there was no material doubt regarding the interpretation of the EU law at issue. The employees initiated another action seeking a declaration of non-contractual civil liability against the Portuguese State for the breach of Article 267(3) TFEU. This time, the court of first instance made a reference to the CJEU asking, *inter alia*, whether the *Supremo Tribunal de Justiça* was obliged to refer a question to the CJEU concerning the interpretation of the concept of 'transfer of business'.

The Court of Justice made it clear that there was no *acte clair* in this situation. It first noted that in itself, the fact that other national courts have given contradictory decisions is not a conclusive factor capable of triggering the obligation to refer for a preliminary ruling (para. 41). The Court then affirmed its position expressed in *X and van Dijk*, that is, that a court adjudicating at last instance may take the view that although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt (para. 42). However, the Court found that the question of how the concept of a 'transfer of a business' should be interpreted has given rise to a great deal of uncertainty on the part of many national courts and tribunals. This uncertainty shows not only that there are difficulties in interpretation but also that there is a risk of divergences in judicial decisions within the EU (para. 43). The CJEU thus declared that to avert the risk of an incorrect interpretation of EU law, the *Supremo Tribunal de Justiça* was required to seek a preliminary ruling on how the concept of 'transfer of business' should be interpreted within the meaning of EU directives.[41]

It might be wondered, at least at first sight, why the Court came to different conclusions in *X and van Dijk* and in *Ferreira da Silva* – two seemingly similar cases concluded on the same day by largely the same composition of CJEU judges.[42] In the former case, the CJEU seems to have followed a more lenient approach than in the latter. Thus, what made the Court ultimately distinguish between the two cases?

In both cases, there was a divergence of views between the lower instance and the courts of last instance over the interpretation of an EU law matter. In the two cases, the Court used a similar line of reasoning. It made references to the principle of co-operation between the CJEU and the national courts, to the general *Cilfit* principles and to the 'sole responsibility' of national courts to decide on *acte clair*. In *Ferreira da Silva*, the Court even used the same argument as in *X and van Dijk* that contradictory positions of lower courts alone cannot trigger a duty to refer, confirming its flexible approach to *Cilfit* case law. However, the Court later revealed *Ferreira Da Silva*'s distinctive character. The situation in this case was particular because the concept of 'transfer of business' has given rise to 'a great deal of uncertainty' on the part of many national courts (para. 43), unlike in *X and van Dijk*, where there was no information of such uncertainty across the EU.[43] Moreover, unlike in *X and van Dijk*, where the question on the limits of *acte clair* was

[41] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States related to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. OJ 2001 L 82, p. 16.

[42] Both rulings were rendered by the Second Chamber of the CJEU. Only one judge differed in the two cases, whereas the judge rapporteur was the same.

[43] It would be interesting to see whether the judgment in *X and van Dijk* would have been different had the EU law question referred to the CJEU been more controversial from the EU law point of view.

framed generally, the question in *Ferreira da Silva* was specifically tied to the particular situation at hand. Hence, in the latter case, the Court concluded that in these particular circumstances marked by conflicting case law at the national level and frequent difficulties of interpretation in various Member States of what 'transfer of business' is, courts of last instance are obliged to refer to the CJEU in order to avoid the risk of an incorrect interpretation of EU law (para. 45).

Thus, the two cases were characterized by different circumstances and a different scope of preliminary reference questions, which helps explain why the Court came to divergent conclusions. Both cases further developed the CJEU jurisprudence on *acte clair* and clarify its scope. At the same time, the Court is continuing its search for a delicate balance between keeping the co-operative nature of the preliminary ruling procedure[44] and reminding the national courts of last instance of their duty in certain circumstances to refer a case to the CJEU. The stakes are high, as Advocate General Bot rightly put it in his opinion in *Ferreira da Silva*[45] – non-compliance on the part of national courts of last instance with their obligation to make a reference ultimately has the effect of depriving the CJEU of its fundamental task under Article 19(1) TEU (Treaty on European Union), that is, to ensure 'that in the interpretation and application of the Treaties the law is observed'.

Putting the Two Judgments into a Wider Context of the Acte Clair *Doctrine*

In *X and van Dijk*, the CJEU seems to be mainly paying tribute to the discretionary right of courts of last instance to decide on *acte clair* and to their hierarchical authority over the decisions of their lower courts. Indeed, in this case, the Court wanted to prevent the situation in which a last instance court would be restricted in its action, or even forced to refer the matter to the CJEU, only because of the different understanding of an EU law issue by a lower court. This would be hard to combine with the spirit of co-operation between the Court of Justice and national (supreme) courts, and it would also raise concerns of interference with the principle of hierarchy of national courts, the main idea of which is the rights of the higher court to overrule lower courts. However, *X and van Dijk* still does not contain a proper explanation as to why courts of last instance were allowed to render their judgments without waiting for related preliminary rulings initiated by lower courts and why the Court did not foresee any exceptions to such a generous principle.[46]

With *Ferreira da Silva*, in contrast, the CJEU seems to be reminding courts of last instance that their discretion on *acte clair* decisions has certain limits – notably, when an EU law matter at issue is causing great uncertainty across the EU, they must refer it to the CJEU. At the same time, this judgment attempts to soften the *Cilfit*'s *acte clair* requirement that 'the national court or tribunal must be convinced that the matter is equally obvious to the courts of other Member States'. Linking an obligation to refer

[44] As Vassilios Skouris, former President of the Court of Justice, has argued, the judicial architecture of the EU and the Member States' judiciaries must be viewed as parallel systems, coexisting within the same supranational structure. See Skouris (2005).

[45] Opinion of Advocate General Bot in Case C-160/14 *Ferreira da Silva*, EU:C:2015:390.

[46] The possible reasons behind such a decision could have been the CJEU's willingness to foster procedural efficiency (economy) in national court proceedings and to reaffirm the status of highest courts of the Member States. See also Opinion of Advocate General Wahl in Joined cases C-72/14 and C-197/14 *X and van Dijk*, EU:C:2015:319, paras. 50 and 73.

and possible liability for the breach of Article 267(3) TFEU to 'a great deal of uncertainty' suggests a rather flexible CJEU approach towards the rigidness of *Cilfit* criteria.

However, the nature and boundaries of these discretionary limits are still not entirely clear. For example, the CJEU has so far not provided any guidance for situations when a national court of last instance intends to adopt an interpretation of EU rule that conflicts with its previous rulings. In doctrine, we can find a position that it would normally be difficult for a national court to claim *acte clair* if it has followed a different abstract interpretation in its earlier rulings (unless in between there was a relevant CJEU ruling that required changing the direction of interpretation).[47] The CJEU judgments analysed above neither confirm nor deny this conclusion. However, in light of *X and van Dijk*, it seems that the Court shows some flexibility on these matters as it confirms the possibility for national judges of the *same* Member State to have different opinions. In the spirit of the old saying that only the dead and the fools do not change their opinion, it may well happen that the Court could allow some dynamic interpretation of EU law by national courts of last instance.

Similarly, it remains unclear whether *acte clair* doctrine could be invoked when there is a divergent interpretation of EU law amongst judges sitting on the same panel. It seems that in certain cases, particularly when there were additional indications of divergent views in legal doctrine or in national jurisprudence, there would be good grounds to refer. However, if divergent opinions did not go beyond the usual deliberations within a panel, the Court would likely take a more flexible view, along the arguments suggested above.

Moreover, it remains unclear to what extent *acte clair* could be invoked in cases that are somewhere in between the situations of *X and van Dijk* and *Ferreira da Silva.* In *X and van Dijk*, the only divergent opinion was that of an administrative authority in one of the Member States, and there was little practice related to that specific certificate in question. In *Ferreira da Silva*, by contrast, there was a significant volume of CJEU case law, national decisions and academic writings bringing forward different issues and presenting different opinions around the topic of 'transfer of business'. Obviously, there is wide amplitude between the two situations and an even wider one if one takes into account all possible scenarios that life can offer. It is true that these recent cases have brought more flexibility in the application of *acte clair* and have somewhat smoothened the edges of the original doctrine, but did they bring substantially more clarity in practical terms? It does not appear so; rather, they opened doors to new questions and doubts.

In view of these unanswered questions, *X and van Dijk* and *Ferreira da Silva* can be regarded as a missed opportunity for the CJEU to clarify its ultimate stance on the obligation of national courts of last instance to seek a preliminary ruling. For the sake of higher legal certainty and a more consistent application of the preliminary ruling procedure, which itself is aimed at ensuring a uniform interpretation and application of EU law across the EU, the CJEU could have spelled out in clearer terms its position on *Cilfit* criteria, particularly their normative content and legal value when applied to particular circumstances of individual cases. 'Blank' references to the duty to apply *Cilfit* criteria, as found in most CJEU judgments, do not provide sufficient guidance for national courts regarding the limits of their discretion.

[47] Fenger and Broberg (2011, p. 190).

A persistent lack of clarity over the scope and content of *Cilfit* criteria is preventing national courts of last instance from applying these criteria clearly and consistently. This situation not only poses problems from the EU law point of view but may well trigger Member States' liability before the European Court of Human Rights. According to the settled case law of this court, failure of national courts of last instance to provide reasons for the refusal to refer to the CJEU may result in the breach of Article 6 of the ECHR (European Convention on Human Rights and Fundamental Freedoms).[48] Although until now, the European Court of Human Rights has not demanded thorough justifications in cases of non-referral to the CJEU,[49] we cannot be certain that such a lenient approach will continue to be applied.

IV. Concluding Remarks

The *Cilfit* criteria, originally formulated in 1982, are too rigid to be fulfilled in practice, particularly in the EU of 28 Member States and 24 official languages. Even the Court of Justice does not apply these criteria consistently and to their full extent. In most cases related to *acte clair*, the CJEU limits itself to reminding the national courts of general *Cilfit* principles, without disclosing their normative content.

Rulings in *X and van Dijk* and *Ferreira da Silva* fully confirm and further develop such a flexible approach to *Cilfit* criteria. They widen the discretion of national courts of last instance to rely on *acte clair* by establishing that a different interpretation of EU law by a lower instance court does not in itself prevent a last instance court of the same Member State from invoking *acte clair*.

At the same time, *Ferreira da Silva* reminds national courts of last instance that their discretion regarding the preliminary reference procedure has certain limits. Notably, conflicting national case law and frequent difficulties of interpretation of a given EU law provision in various Member States would trigger a duty to refer to the CJEU.

Both cases have provided a relatively rare opportunity to clarify the normative content and the legal status of *Cilfit* criteria, but the Court of Justice has unfortunately missed it. For the sake of higher legal certainty and a more consistent application of the preliminary ruling procedure, the Court could have better explained the way in which national courts could ascertain that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Moreover, the Court could have clarified the level of uncertainty that is allowed within a national last instance court itself. Lastly, the Court could have alleviated doubts surrounding the legal status and applicability of the rigid *Cilfit*

[48] In the recent judgment *Dhahbi v. Italy* (dec.), no. 17120/09, 8 April 2014, the European Court of Human Rights reconfirmed its stance that refusal by a national court of last instance to make a preliminary reference to the CJEU amounts to a breach of Article 6 ECHR if the national court does not provide reasons justifying its decision to refrain from a preliminary reference. Notably, the Court reminded that Article 6 of the Convention requires that national courts, whose decisions are not open to appeal under domestic law, give reasons, based on the applicable law and the exceptions laid down in CJEU case law, for their refusal to refer a preliminary question on the interpretation of EU law. The European Court of Human Rights reiterated this position in its recent judgment in *Schipani v. Italy* (dec.), no. 38369/09, 21 July 2015. See also *Vergauwen and Others v. Belgium* (dec.), no. 4832/04, 10 April 2012, paras. 89–90.

[49] Taking into account its relevant case law, the European Court of Human Rights appears to be setting only minimal requirements for the duty to state reasons for non-referral to the CJEU. Indeed, the Strasbourg court seems to be accepting a mere reference to one of the exceptions to the duty to refer established by the CJEU as a sufficient ground for non-referral. See *Dhahbi v. Italy* (dec.), no. 17120/09, 8 April 2014; *Matheis v. Germany* (dec.), no. 73711/01, 1 February 2005; *André Desmots v. France* (dec.), no. 41358/98, 23 October 2001; *Bakker v. Austria* (dec.), no. 43454/98, 13 June 2002; *Dotta v. Italy* (dec.), no. 38399/97, § 13, 7 January 1999.

requirements, on which the Court itself has never relied, such as linguistic comparisons of EU legal provisions.

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