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Citation: Storey, Tony (2008) The impact of EU expansion on the Preliminary Rulings Procedure. In: After the First 50 years: The Future of European Law and Policy, 3 - 4 July 2008, Institute of European Law, Birmingham Law School, UK.

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## THE IMPACT OF EU EXPANSION ON THE PRELIMINARY RULINGS PROCEDURE

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Paper presented to “After the First 50 years: The Future of European Law and Policy” conference, Institute of European Law, Birmingham Law School, University of Birmingham, 3<sup>rd</sup> July 2008

### Introduction

In *CILFIT* (case 283/81),<sup>1</sup> the European Court of Justice (ECJ) endorsed the use of the *acte clair* doctrine – the notion that national courts of “last resort” may decide to refrain from seeking a preliminary ruling under Article 234 (3) EC. The Court also stipulated a list of factors – the *CILFIT* criteria – that should be satisfied before the doctrine may be properly invoked. One criterion is that the national court “*must be convinced* that the matter is equally obvious to the courts of the other Member States” (emphasis added). In 1982, there were nine “other” Member States; in 2008, there are 26. Another criterion requires courts to bear in mind that Community legislation is “drafted in several languages”. There were seven official languages in 1982; there are now 22 (23 if Irish is included). The *CILFIT* criteria were difficult to satisfy in 1982; they have become increasingly more difficult as EU membership has expanded; they are, it is submitted, practically impossible to satisfy in any meaningful sense in 2008. The *CILFIT* criteria should therefore be re-written.

As EU membership has expanded (and looks set for further expansion in the not too distant future), various reform proposals concerning the preliminary rulings procedure have been formulated, the central idea being to change the “judicial architecture” to allow the ECJ to cope with its ever increasing workload. The most notable of these is (by default, given that it is the only one that has actually been implemented): the insertion of the present Article 225 (3) EC by the Treaty of Amsterdam, conferring limited jurisdiction for dealing with preliminary rulings on the Court of First Instance (CFI). More specifically, the CFI is authorised to deal with preliminary rulings in as yet unspecified ‘specific areas’. The time has come to bring Article 225 (3) EC into effect, with the free movement of goods being selected as the first ‘specific area’.

### 1. The Purpose of Article 234 EC

At the outset, it is critically important to remember why Article 234 EC even exists. The most obvious answer is that its purpose is the need to secure the uniformity of the EU’s legal order throughout the Member States. In *Rheinmühlen Düsseldorf*<sup>2</sup> (case 166/73), the ECJ declared that:<sup>3</sup>

“Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community. Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving community law its full effect within the framework of the judicial systems of the Member States.”

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<sup>1</sup> *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] E.C.R. 3415

<sup>2</sup> [1974] ECR 33. Article 177 EEC was renumbered Article 234 EC by the Treaty of Amsterdam, effective May 1999

<sup>3</sup> At paragraph 2

This fundamental point must be borne in mind when considering any proposals to reform the preliminary rulings procedure.

## 2. The Problem: Excessive Delay

The principal problem with the Article 234 EC procedure in 2008 is the inherent delay: the heavy workload of the ECJ means a reference to the Court takes, on average, 19.3 months (2007 statistics).<sup>4</sup> That is actually a fairly significant reduction compared to five years ago. In 2003, the average waiting time for preliminary rulings reached an all-time high of 25.5 months. After years of steadily increasing waiting times up to that point, the average has come down in each subsequent year (23.5 months in 2004; 20.4 months in 2005 and 19.8 months in 2006). However, this should not be taken as proof that reform options are unnecessary. For one thing, the pace of improvement is slowing. Between 2004 and 2005, the waiting time decreased by 3.1 months, but between 2005 and 2006 the drop was only 0.6 months and from 2006 to 2007 the drop was merely 0.5 months (i.e., a fortnight).

Moreover, 2007 was the first year since 2001 that the number of cases in the Court's docket has shown a net increase (265 new cases were received whilst only 235 were disposed of, leading to a net increase of 30 cases). In every year from 2002 to 2006 inclusive, the Court managed to achieve a net reduction in cases, with the biggest drop in 2005 (221 new cases against 254 disposed of, a net reduction of 33 cases).

One explanation for these trends may be that, in 2004, the Court welcomed ten new judges from the accession states of that year. This represented a 67% increase in judicial personnel at the Court's disposal. Against that, the number of preliminary rulings arriving from those accession states has – so far – been minimal. In the years 2005 – 2007 inclusive, the ten 2004 accession states between them contributed a mere 31 cases,<sup>5</sup> out of a grand total of 737 received in those four years.<sup>6</sup> By way of contrast, Belgian courts requested 60 preliminary rulings over the same time span.

However, it would be naive to rely upon this trickle of cases from the 2004 accession states to continue. It is a recognised phenomenon that courts in some accession states take time to “find their feet”.<sup>7</sup> UK courts requested one ruling per year from 1974 to 1976 inclusive, then five in 1978; Austrian courts requested two rulings in 1995<sup>8</sup> followed by six in 1996, and then 35 in 1997. Admittedly, some states maintain a level participation rate in terms of rulings requested. Swedish courts requested six rulings in 2007, exactly the same number as in 1995.<sup>9</sup> Similarly, Hungarian courts requested two rulings in 2007, the same as in 2004. Nevertheless, there are signs that Polish courts, after a slow start, may be developing a liking for preliminary rulings. Polish courts requested one ruling in 2005, two in 2006 and seven last year.

The likelihood is that the number of rulings coming in from courts in pre-2004 accession States will remain fairly constant, but that requests from the 2004 and 2007 accession

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<sup>4</sup> Statistics on the workload of the ECJ are available at [http://curia.europa.eu/en/instit/presentationfr/index\\_cje.htm](http://curia.europa.eu/en/instit/presentationfr/index_cje.htm)

<sup>5</sup> Ten from Poland; nine from Hungary; six from the Czech Republic; two from Estonia; two from Lithuania and two from Slovakia. Cyprus, Latvia, Malta and Slovenia had yet to request a single ruling between them by the end of 2007

<sup>6</sup> Some 4% of the total.

<sup>7</sup> According to Walter van Gerven, “*The Role and Structure of the European Judiciary now and in the Future*” (1996) 21 E.L. Rev. 211, at p. 211, “New accessions lead, with a likely delay of 4 to 5 years, to a proportionally increased number of cases, an increase which is not necessarily compensated for by the increase in the Court's personnel” (emphasis added)

<sup>8</sup> The year of Austrian accession

<sup>9</sup> The year of Swedish accession

countries will rise over the next few years.<sup>10</sup> It should be noted that the 265 new preliminary rulings cases received in 2007 represents an all-time high.<sup>11</sup>

Even with the recent reduction in the waiting time, it is clearly unacceptable, for several reasons, to have a delay approaching 20 months. First, the case at national level is suspended while the ECJ is preparing its ruling – meaning that the legal dispute which led to the case goes unresolved during that time. Second, national courts may be put off from asking questions because of the delay, meaning that (potentially) a number of very important questions which would otherwise be answered by the ECJ have to be answered by the national courts. This in turn risks fostering a lack of uniformity in EU law as well as potentially inhibiting the development of the ECJ's jurisprudence. It should not be forgotten that the ECJ's role in the preliminary rulings procedure is essentially reactive: the Court depends on the national courts feeding it with questions. Although it has shown some flexibility in rewording questions asked of it, it nevertheless cannot answer questions which it has not been asked at all. Third, with the pressure of work there is a risk that the Court may be rushed.<sup>12</sup>

### 3. The factors which have contributed to the problem

Angus Johnston states:<sup>13</sup> “Clearly, there is a serious workload problem for the Courts, due to a number of factors... it is particularly serious in the context of references for a preliminary ruling”. What are these factors? The following does not purport to be a definitive list, but indicates some of the reasons behind the Court's increasing workload. First, the increasing number of Member States, meaning more referrals, and the increasing number of languages, which adds to the translational problems, exacerbating the problem caused initially by more referrals. To summarise the growth of the EU to date:

- Originally, six states with a mere four languages (Dutch, French, German, Italian);
- From 1973, nine states with six languages (Danish and English);
- From 1981, ten States with seven languages (Greek);
- From 1986, 12 States with nine languages (Portuguese and Spanish);
- From 1995, 15 states with 11 languages (Finnish and Swedish);
- From 2004, 25 States with 20 languages (Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak, Slovene); and
- From 2007, 27 States with 22 languages (Bulgarian and Romanian).

In addition, primary legislation is produced in Irish. Only four of the present 27 Member States have no official language – Austria, Belgium, Cyprus, and Luxembourg.

Second, the increasing scope and volume of EC legislation. To give just one example, the Treaty of Amsterdam inserted Article 13 into the EC Treaty, effective May 1999. The Council used this power to pass two important directives: Directive 2000/43 on racial or ethnic origin discrimination, and Directive 2000/78 on age, disability, religion and belief and sexual orientation discrimination (the framework directive). These directives have already generated preliminary rulings to clarify the meaning of ambiguous words such as 'disability',<sup>14</sup> 'dismissals',<sup>15</sup> and 'pay'<sup>16</sup> and phrases such as 'facts from which it may be

<sup>10</sup> Bulgarian and Romanian courts requested one ruling each in 2007: *Apis-Hristovich EOOD v Lakorda AD* (case C-545/07) and *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Gheorghe Jipa* (case C-33/07), respectively. That figure is almost certain to rise over the next few years

<sup>11</sup> The previous record being 264 in 1998

<sup>12</sup> Anthony Arnall, “*Refurbishing the Judicial Architecture of the European Community*” (1994) 43 I.C.L.Q. 296, at p.298, observed that “it can no longer be said that the Court's judgments are invariably a product of mature reflection”

<sup>13</sup> “*Judicial Reform and the Treaty of Nice*” (2001) 38 C.M.L. Rev. 499, at p.501

<sup>14</sup> *Sonia Chacón Navas v Eurest Colectividades SA* (case C-13/05) [2006] E.C.R. I-6467

<sup>15</sup> *Felix Palacios de la Villa v Cortefiel Servicios SA* (case C-411/05), judgment 16th October 2007

presumed that there has been direct or indirect discrimination',<sup>17</sup> 'less favourable treatment',<sup>18</sup> and 'objectively and reasonably justified by a legitimate aim'.<sup>19</sup> Other references in the future are inevitable to establish the meaning of phrases such as: 'racial or ethnic origin'; 'religion or belief'; 'sexual orientation', 'public or private organisations, the ethos of which is based on religion or belief', 'to act in good faith and with loyalty'; 'unwanted conduct', 'violating the dignity of a person', and 'creating an intimidating, hostile, degrading, humiliating or offensive environment'.

Third, the contribution made by the ECJ. It is fair to say that the Court itself has contributed to its own problems. Initially, the ECJ encouraged references, through an "open door" policy. This can be demonstrated by reference to the very generous attitude towards the ECJ as to what constitutes 'any court or tribunal' in Article 234 (2) EC. The Court *could* have interpreted this literally, but that would have restricted thousands of judicial bodies not named "court" or "tribunal" from seeking rulings, which would have interposed an obstacle between the ECJ and the national legal systems, threatening not only the co-operation between them but also potentially frustrating the development of the ECJ's jurisprudence. Instead, the Court interpreted the phrase 'any court or tribunal' purposively, looking for bodies exercising judicial functions irrespective of their formal designation. Probably the best known example is *Broekmeulen* (case 246/80),<sup>20</sup> where the Court accepted a reference from the Appeals Committee of the Royal Netherlands Society for the Protection of Medicine.

Eventually, the Court identified various criteria for establishing whether or not a body was a 'court or tribunal'. In *Dorsch Consult* (case C-54/96),<sup>21</sup> the Court stated that "In order to determine whether a body making a reference is a 'court or tribunal'... the Court takes into account a number of factors, such as:

- whether the body is established by law,
- whether it is permanent,
- whether its jurisdiction is compulsory,
- whether its procedure is *inter partes*,
- whether it applies rules of law, and
- whether it is independent."

These criteria were applied in such a way that the court was able to accept references from, *inter alia*, the Immigration Adjudicator (UK),<sup>22</sup> the Federal Procurement Office (Austria),<sup>23</sup> the Rural Businesses Appeals Board (Finland),<sup>24</sup> the Universities' Appeals Board (Sweden),<sup>25</sup>

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<sup>16</sup> *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (case C-267/06), judgment 1<sup>st</sup> April 2008

<sup>17</sup> *Centre for Equal Opportunities & Opposition to Racism v Firma Feryn* (case C-54/07) (pending)

<sup>18</sup> *Felix Palacios de la Villa v Cortefiel Servicios SA* (case C-411/05), judgment 16th October 2007

<sup>19</sup> *Werner Mangold v Rüdiger Helm* (case C-144/04) [2005] E.C.R. I-9981

<sup>20</sup> *C. Broekmeulen v Huisarts Registratie Commissie* [1981] E.C.R. 2311

<sup>21</sup> *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (case C-54/96) [1997] E.C.R. I-4961

<sup>22</sup> *Nour El-Yassini v Secretary of State for the Home Department* (case C-416/96) [1999] E.C.R. I-1209; *Arben Kaba v Secretary of State for the Home Department* (case C-356/98) [2000] E.C.R. I-2623

<sup>23</sup> *Mannesmann Anlagenbau Austria AG & Others v Strohal Rotationsdruck GesmbH* (case C-44/96) [1998] E.C.R. I-73; *Walter Tögel v Niederösterreichische Gebietskrankenkasse* (case C-76/97) [1998] E.C.R. I-5357; *EvoBus Austria GmbH v Niederösterreichische Verkehrsorganisations GmbH (Növog)* (case C-111/97) [1998] E.C.R. I-5411; *Alcatel Austria & Others v Bundesministerium für Wissenschaft und Verkehr* (case C-81/98) [1999] E.C.R. I-7671; *Traunfellner GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* (case C-421/01) [2003] E.C.R. I-11941

<sup>24</sup> *Raija-Liisa Jokela & Laura Pitkäranta* (cases C-9/97 & C-118/97) [1998] E.C.R. I-6267

<sup>25</sup> *Katarina Abrahamsson & Leif Anderson v Elisabet Fogelqvist* (case C-407/98) [2000] E.C.R. I-5539

the Social Insurance Appeals Board (Luxembourg),<sup>26</sup> the Competition Council (Finland),<sup>27</sup> the Special Commissioners of Income Tax (UK),<sup>28</sup> the Person Appointed by the Lord Chancellor under s.76 of the *Trade Marks Act 1994* (UK),<sup>29</sup> the Alien Appeals Board (Sweden),<sup>30</sup> the Supreme Patent and Trade Mark adjudication body (Austria),<sup>31</sup> and the Federal Communications Board (Austria).<sup>32</sup>

More recently, however, there seems to be evidence of a shift in policy, with the ECJ tightening up its criteria; in particular, the Court has been paying very close attention to whether an alleged 'court or tribunal' satisfies the criterion of independence.<sup>33</sup> Examples where a reference request was turned down on this ground include *Pierre Corbiau* (case C-24/92),<sup>34</sup> *Walter Schmid* (case C-516/99)<sup>35</sup> and *Syfait & Others v GlaxoSmithKline plc* (case C-53/03).<sup>36</sup> Cases where the reference request was admitted, but only after the referring body's independence was closely examined, include *Köllensperger & Atswanger* (case C-103/97)<sup>37</sup> and *Gabalfrisa* (cases C-110 – 147/98).<sup>38</sup>

Admittedly, there are early cases where the Court declined to respond to ruling requests, with perhaps the best known case being *Nordsee* (case 102/81),<sup>39</sup> where an independent arbitrator was turned down.<sup>40</sup> Similarly, a reference will be rejected if it is made by a body performing purely administrative functions, as in *Victoria Film* (case C-134/97).<sup>41</sup> This is the case even if the body is actually designated under national law as a "court", as in *Job Centre* (case C-111/94).<sup>42</sup> Nevertheless, it is contended that these are relatively isolated examples, and that the Court's policy on the *Dorsch Consult* criteria has hardened.

#### 4. The need for reform

According to Hjalte Rasmussen:<sup>43</sup> "It is... a generally shared view today that the case for a comprehensive and profound judicial reform has become compelling... the core need of

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<sup>26</sup> *Ghislain Leclere & Alina Deaconescu v Caisse nationale des prestations familiales* (case C-43/99) [2001] E.C.R. I-4265

<sup>27</sup> *Korhonen & Others* (case C-18/01) [2003] E.C.R. I-5321

<sup>28</sup> *Cadbury Schweppes plc v Commissioners of the Inland Revenue* (case C-196/04) [2006] E.C.R. I-7995

<sup>29</sup> *Elizabeth Florence Emanuel v Continental Shelf 128 Ltd* (case C-259/04) [2006] E.C.R. I-3089

<sup>30</sup> *Yunying Jia v Migrationsverket* (case C-1/05) [2007] E.C.R. I-1

<sup>31</sup> *Armin Häupl v Lidl Stiftung & Co. KG* (case C-246/05) [2007] E.C.R. I-4673

<sup>32</sup> *Österreichischer Rundfunk* (case C-195/06) judgment 18<sup>th</sup> October 2007

<sup>33</sup> See Catherine Barnard & Eleanor Sharpston, "The Changing Face of Article 177 References" (1997) 34 C.M.L. Rev. 1113, at pp. 1134 – 1135.

<sup>34</sup> *Pierre Corbiau v Administration des Contributions* (case C-24/92) [1993] E.C.R. I-1277

<sup>35</sup> [2002] E.C.R. I-4573 (Fifth Appeal Chamber of the regional finance authority for Vienna, Niederösterreich and Burgenland)

<sup>36</sup> [2005] E.C.R. I-4609 (Greek Competition Commission). The case is discussed by Georgios Anagnostaras, "Preliminary problems and Jurisdiction Uncertainties: the Admissibility of Questions referred by Bodies Performing Quasi-judicial Functions" (2005) 30 E.L. Rev. 878

<sup>37</sup> [1999] E.C.R. I-551 (Procurement Office of the Land of Tyrol, Austria)

<sup>38</sup> *Gabalfrisa SL & Others v Agencia Estatal de Administración Tributaria (AEAT)* [2000] E.C.R. I-1577 (Regional Economic & Administrative Court, Catalonia)

<sup>39</sup> *Nordsee, Deutsche Hochseefischerei GmbH v Bundesrepublik Deutschland & Land Rheinland-Pfalz* [1973] 1511

<sup>40</sup> See also *Guy Denuit & Betty Cordenier v Transorient – Mosaique Voyages et Culture SA* (case C-125/04) [2005] E.C.R. I-923, where a ruling requested by a body called "Arbitration Panel of the Travel Dispute Committee" in Belgium was refused

<sup>41</sup> [1998] E.C.R. I-7023

<sup>42</sup> [1995] E.C.R. I-3361; see also *Doris Salzmann* (case C-178/99) [2001] E.C.R. I-4421; *Lutz GmbH & Others* (case C-182/00) [2002] E.C.R. I-547; *Standesamt Stadt Niebüll* (case C-96/04) [2006] E.C.R. I-3561

<sup>43</sup> "Remedying the Crumbling EC Judicial System" (2000) 37 C.M.L. Rev. 1071, at p.1072

reform grows out of the ever growing lengths of time spent by the Court of Justice in processing preliminary rulings". He further contends that: "If profound reform of Article 234 is required because it offers the only viable remedy against the described malaise, then so be it".<sup>44</sup>

The question is, what form should this "profound reform" take?<sup>45</sup> Reforms could be made either to the "supply" side – improving the ability of the European judicature to handle referrals, or to the "demand" side – restricting the flow of cases into the Court.<sup>46</sup> The conferral of jurisdiction on the Court of First Instance (CFI) to handle some preliminary rulings under the Treaty of Nice is an example of a "supply" side reform. Other proposals which have been made on the "supply" side include introducing a form of case filtering or docket control; and a proposal to "decentralise" the preliminary rulings procedure to regionalised or national courts.

On the demand side, proposals have been made to restrict to national courts of "last resort" only the right to seek references; to abolish the right of first-instance national courts to seek references; re-wording of Article 234 EC to remind national courts that they are "Community" / "Union" courts and that, as such, it is their primary responsibility apply EU law and to further implore them not to seek rulings unless certain criteria are met, such as whether "reasonable doubt" exists; and scrapping mandatory referrals. Re-writing the *CILFIT* criteria under which national courts of "last resort" can decide not to seek references is another example of a demand side reform.

In this context, two reform documents are of particular importance: *The Future of the Judicial System of the European Union (Proposals and Reflections)* paper, which was produced jointly by the ECJ and the CFI in May 1999;<sup>47</sup> and *The Report by the Working Party on the Future of the European Communities' Court System*, published in January 2000. This is a report by a body set up by the European Commission, under the chairmanship of Ole Due (a former judge and president of the ECJ).<sup>48</sup>

#### 4.1 "Supply" Side reforms

##### ***Reform under the Treaty of Nice: Allowing the CFI to deal with references in "specific areas"***

As is well known, Article 225 (3) EC (post - Treaty of Nice 2001) provides that:

The CFI shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the CFI considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the ECJ for a ruling.

Decisions given by the CFI on questions referred for a preliminary ruling may exceptionally be subject to review by the ECJ, under the conditions and within the limits laid down by the

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<sup>44</sup> *Op. cit.*, at p.1077

<sup>45</sup> See generally Alan Dashwood & Angus Johnston (eds), "Synthesising the Debate" in *The Future of the Judicial System of the European Union* (Hart Publishing, 2001); Liz Heffernan, *The Community Courts post-Nice: a European Certiorari Revisited* (2003) 52 I.C.L.Q. 907

<sup>46</sup> See Takis Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure* (2003) 40 C.M.L. Rev. 9, at pp.16 – 21 for a discussion of "supply and demand" in the context of the preliminary rulings procedure

<sup>47</sup> Hereinafter "Proposals and Reflections". Available at the following link: [curia.europa.eu/en/instit/txtdocfr/autrestxts/ave.pdf](http://curia.europa.eu/en/instit/txtdocfr/autrestxts/ave.pdf)

<sup>48</sup> Hereinafter "Due". Available at the following link: [http://ec.europa.eu/dgs/legal\\_service/pdf/due\\_en.pdf](http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf)

Statute, where there is a serious risk of the unity or consistency of Community law being affected.

More than five years after the Treaty of Nice received its belated ratification, there are still no signs that this procedure is to be brought into operation. However, it is here submitted that it should be. Admittedly, there are bound to be teething problems, such as defining what is meant by 'a decision of principle' or exactly how 'exceptional' a question must be before the third subparagraph applies... but these will be resolved in time, if necessary by the ECJ itself. In much the same way that Article 234 EC has itself been the subject of a number of preliminary rulings, Article 225 (3) EC is part of the EC Treaty and hence susceptible to interpretation by the Court of Justice.

A number of commentators have advocated that the CFI should be given its opportunity under Article 225 (3) EC. Bo Vesterdorf, for example, writes that:<sup>49</sup>

"It is... very important that the Treaty of Nice now allows for a transfer of preliminary reference jurisdiction to the CFI... It will, in my personal opinion, at a point in time in the not too distant future become necessary to make use of this possibility. In fact, I am personally of the view that the sooner this possibility is exercised the better."

Takis Tridimas concurs, arguing that the reforms enacted by the Treaty of Nice "appear to establish an acceptable balance between competing demands... [they appear] preferable over alternative reforms".<sup>50</sup> This is not to suggest that the Nice reforms enjoyed unanimous support, however. Back in 1994, Anthony Arnall argued that preliminary rulings "should remain the exclusive preserve of the Court [of Justice]",<sup>51</sup> largely because of the problem of identifying which cases should be transferred.<sup>52</sup>

Indeed, fourteen years, later the big question remains: which 'specific areas' ought to be transferred? Angus Johnston has suggested that "the obvious candidate" is EC-level intellectual property rights.<sup>53</sup> Peter Dyrberg examines the possible future inter-relationship between the ECJ and CFI in some depth, and also offers a number of alternatives, including the aforementioned intellectual property rights, as well as, *inter alia*, competition law, the common agricultural policy, and social policy, without coming down in favour of any one in particular.<sup>54</sup> Interestingly, in a footnote he suggests two areas as "suitable candidates for a transfer", *viz* VAT cases and cases concerning the free movement of goods, on the basis that they are both "well developed areas of law with modest potential for [a] transcendent question to arise".<sup>55</sup> It is submitted that the free movement of goods would be perfect for a transfer to the CFI. The case law is certainly "well developed", which is, of course, not the same thing as saying that it has no capacity for development,<sup>56</sup> and would appear to fit in well alongside the CFI's current portfolio of work.

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<sup>49</sup> Bo Vesterdorf, "The Community Court System Ten Years from now and Beyond: Challenges and Possibilities" (2003) 28 E.L. Rev. 303, at p.314

<sup>50</sup> "Knocking on Heaven's Door...", *supra*, at p.21

<sup>51</sup> Anthony Arnall, "Refurbishing...", *supra*, at p.309

<sup>52</sup> *Op. cit.*, at p.308. Arnall thought it "impractical" to transfer classes of cases because of the risk that the same case might raise different issues.

<sup>53</sup> Angus Johnston, "Judicial Reform and the Treaty of Nice" (2001) 38 C.M.L. Rev. 499, at p.508

<sup>54</sup> Peter Dyrberg, "What Should the Court of Justice be doing?" (2001) 26 E.L. Rev. 291, at p. 297

<sup>55</sup> *Loc cit.*

<sup>56</sup> Consider, for example, the recent cases of *Dynamic Medien Vertriebs GmbH v Avides Media AG* (case C-244/06), judgment 14<sup>th</sup> February 2008 and *Commission v Portugal* (case C-265/06), judgment 10<sup>th</sup> April 2008. In the former case, the ECJ introduced the "protection of the child" as a possible justification for restricting the free movement of goods, whilst in the latter the Court introduced the "fight against crime" as another possibility.



### **Other supply side reforms**

A brief overview will now be given of some of the other “supply side” reforms.

#### **“Case Filtering” / Docket Control**

In *Proposals and Reflections* it was suggested (somewhat hesitantly, it must be said) that the ECJ be allowed to select cases according to their “novelty, complexity or importance”.<sup>57</sup> This was rejected by *Due*,<sup>58</sup> and academic commentators seem ambivalent at best.<sup>59</sup> The arguments in favour are that it might prompt national courts to be more selective and would allow the ECJ to concentrate on those cases which are “fundamental” to the development of EU law. The arguments against are that it threatens uniformity, and could distort the judicial dialogue between the ECJ and national courts. The latter may not risk seeking a reference being rebuffed and therefore not send it.

According to some commentators, however, the ECJ *already* employs an informal system of case filtering / docket control. Barnard and Sharpston noted a “change of approach” circa 1990, with the Court imposing more stringent conditions on the admissibility of requests for preliminary rulings.<sup>60</sup> Similarly, David O’Keeffe commented that “the case law on admissibility... could be seen as a form of docket control”,<sup>61</sup> although he cautioned becoming too accepting of this “informal type of docket control” as to do so “could damage the horizontal nature of the co-operation between the national courts and the Court of Justice, replacing it with an hierarchical structure”.<sup>62</sup> The position of the ECJ on the matter is summarised in *Leur-Bloem* (case C-28/95)<sup>63</sup> and *Butterfly Music* (case C-60/98),<sup>64</sup> where the Court acknowledged that it may refuse a request where it appears that the preliminary rulings procedure “has been misused and a ruling from the Court elicited by means of a contrived dispute”, where “it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main proceedings or their purpose”, or where the Court “does not have before it the factual or legal material necessary to give a useful answer to the questions submitted”. Tridimas, meanwhile, refers to the possibility for the ECJ to respond to a preliminary ruling request with an order, rather than a full judgment, as having “considerable potential to operate as a quasi-filtering mechanism”.<sup>65</sup>

#### **Decentralisation: create a series of regional courts specialising in EC law to handle preliminary rulings**

This was first proposed by Jean Paul Jacqué & Joseph Weiler:<sup>66</sup>

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<sup>57</sup> *Proposals and Reflections*, *supra*, at p.23

<sup>58</sup> *Due*, *supra*, at p.21

<sup>59</sup> See Rasmussen, “*Remedying...*”, *supra*, at p.1098; Tridimas, “*Knocking...*”, *supra*, at pp.17 – 18; Vesterdorf, “*The Community court...*”, *supra*, at p.318. Anthony Arnall, “*Judicial Architecture or Judicial Folly? The Challenge Facing the European Union*” (1999) 24 E.L. Rev. 516, at p.519, was more emphatic, describing a filtering system as “unattractive”, on the basis that it “risks serious damage to the spirit of co-operation on which the procedure depends”.

<sup>60</sup> Barnard & Sharpston, “*The Changing Face...*”, *supra*, at pp.1127 – 1141.

<sup>61</sup> David O’Keeffe, “*Is the Spirit of Article 177 under attack? Preliminary References and Admissibility*” (1998) 23 EL Rev 509, at p.528

<sup>62</sup> *Op. cit.*, at p.530

<sup>63</sup> *A. Leur-Bloem v Inspecteur der Belastingdienst / Ondernemingen Amsterdam 2* [1997] E.C.R. I-4161

<sup>64</sup> *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)* [1999] E.C.R. I-3939

<sup>65</sup> Tridimas, “*Knocking...*”, *supra*, at p.18

<sup>66</sup> “*On the Road to European Union – A New Judicial Architecture*” (1990) 27 C.M.L. Rev. 185, at p.192

“At the apex of the system will remain the [ECJ], renamed perhaps as the European High Court of Justice... We propose the creation of four new Community Regional Courts which will have jurisdiction to receive preliminary references from, and issue preliminary rulings to, national courts within each region.”

The authors proposed four regions, although that was linked to the fact that, in 1990, there were 12 Member States. With a 27 Member State Union in 2008, we might like to think about increasing the number of regions. To offset immediate arguments pertaining to the risk of inconsistency, they added that the Regional Courts would “clearly” be bound by decisions and rulings of the EHCJ and that in “most cases, one Regional Court will follow the jurisprudence of the others. If contradictory decisions or rulings are given, the appeal procedure should remedy this”. Furthermore:<sup>67</sup>

“The advantages we see are also quite transparent. If adopted, this system would ensure a dramatic decrease in the workload of the [ECJ], reserving its role as the ultimate guardian of the rule of law in the Community... Clearly this system would also bring about a substantial improvement in the time lag for preliminary rulings.”

The proposal has support from Rasmussen, who described it as “an attractive solution”,<sup>68</sup> but not Arnull, who considered it “even less appealing” than a filtering system, on the basis that it “would present an almost insurmountable obstacle to the uniform application of the law”, to say nothing about the expense involved.<sup>69</sup> Similarly, *Proposals & Reflections* showed (qualified) support for the idea,<sup>70</sup> but it was rejected by *Due*.<sup>71</sup>

#### 4.2 “Demand” Side reforms

##### ***Restrict to national courts of last resort only the right to seek references***

This is a suggestion which has recently been very strongly supported by Jan Komarek.<sup>72</sup> He argued that the Court “must speak clearly and persuasively. This cannot be done if it pulverises its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers”.<sup>73</sup> The arguments in favour are that it would dramatically reduce the ECJ’s workload, perhaps by as much as 75%. It has also been argued that it is inappropriate for lower courts and tribunals in the national legal orders to be able to effectively by-pass the courts above it in the national hierarchy and approach the ECJ directly.<sup>74</sup> The arguments against are that it threatens uniformity of EC law, threatens the dialogue that presently exists between ECJ and national courts, and could transfer problems to national systems, as parties would seek to keep appealing until they reached the national court of last resort.<sup>75</sup> Rasmussen has given his support to this proposal, describing it “eminently sensible”.<sup>76</sup> However, the majority of commentators are opposed, including O’Keeffe<sup>77</sup> and Arnull,<sup>78</sup> as

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<sup>67</sup> Jacque & Weiler, “*On the Road...*”, *supra*, at pp.196 – 197

<sup>68</sup> Rasmussen, “*Remedying...*”, *supra*, at p. 1111

<sup>69</sup> Anthony Arnull, “*Judicial Architecture...*” *supra*, at p. 519

<sup>70</sup> *Proposals and Reflections*, *supra*, at pp.26-27

<sup>71</sup> *Due*, *supra*, at pp.20-21

<sup>72</sup> Jan Komarek, “*In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*” (2007) E.L. Rev. 467

<sup>73</sup> *Op. cit.* at p.490

<sup>74</sup> *Op. cit.* at pp.486 – 487

<sup>75</sup> *Proposals and Reflections*, *supra*, at pp.22 – 23

<sup>76</sup> Rasmussen, “*Remedying...*”, *supra*, at p. 1104

<sup>77</sup> O’Keeffe, “*Is the spirit...*”, *supra*, at p. 529, who argued it would be “completely disproportionate to the extent of the problem” and also “contrary to the Court’s expressed appreciation of the possibility of references”

well as *Proposals and Reflections*<sup>79</sup> and *Due*.<sup>80</sup> It should also be pointed out that many important decisions have been made by the ECJ on a reference from fairly humble courts and tribunals. To take just one example, the landmark ruling in *Baumbast & R v Secretary of State for the Home Department* (case C-413/99),<sup>81</sup> in which, *inter alia*, direct effect was conferred on Article 18 EC, was requested by the Immigration Appeal Tribunal. Finally, a modified version of this proposal – to abolish the right of first-instance national courts to seek references – was rejected by *Due* for the same reasons as above.<sup>82</sup>

### **Abolish mandatory referrals**

It has been argued that the obligation on national courts of “last resort” to seek rulings could be abolished, effectively deleting Article 234 (3) EC. This has support amongst commentators, including Arnall, who pointed out that it “would send a powerful signal to the national courts that they were expected to play a greater role in the application of Community law in the Member States”,<sup>83</sup> and (with some hesitancy) Vesterdorf.<sup>84</sup> He argued that whilst “such an option certainly is thinkable, it is not without risks”, specifically, the risk of a body of case law building up in one or more Member States which is inconsistent with that of the ECJ and/or courts in other Member States, thereby threatening the uniformity of EU law and the smooth functioning of the internal market. To protect against this risk, he suggested that the Commission be given power to monitor the activity of national courts and, where it felt that a judgment “seriously threatens the unity or consistency” of EU law, “appeal” the case to the ECJ for a definitive ruling.<sup>85</sup>

### **Abolish Preliminary Rulings**

Perhaps the ultimate solution to the preliminary rulings workload problem on the demand side was proposed by Philip Allott.<sup>86</sup> His nuclear option is to abolish preliminary rulings, replacing them with a new system:<sup>87</sup>

“Preliminary rulings would be replaced by a system (*Community review / révision communautaire*) under which it would be for national courts, which are also Union courts, to apply Community law fully and finally, as a normal source of law alongside other sources of law, subject to a power in the Commission, a Member State, or an interested party to seek a review by the Court of Justice of the application of Community law in particular legal proceedings, with the Court exercising a power, analogous to the US Supreme Court's *certiorari* procedure, to select only significant cases.”

### **Water down the CILFIT criteria**

Lastly, consideration is given to the notion that the *CILFIT* criteria could be amended in some way, to relax their stringency. Under Article 234 (3) EC, Member States' courts of “last resort” have an obligation to seek a preliminary ruling if one is ‘necessary’ to enable them to give judgment. In *Intermodal Transports* (case C-495/03),<sup>88</sup> the Court stated that “supreme courts are bound by that obligation to refer as is any other national court or tribunal against

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<sup>78</sup> Arnall, “Judicial Architecture...”, *supra*, at p. 519, who argued that the conferral of such jurisdiction under Article 68 EC (the special preliminary ruling procedure for questions of interpretation involving Title IV) was “a step in the wrong direction”

<sup>79</sup> *Proposals and Reflections*, *supra*, at pp.22 – 23

<sup>80</sup> *Due*, *supra*, at pp. 12 – 13

<sup>81</sup> [2002] ECR I-7091

<sup>82</sup> *Due*, *supra*, at p.13

<sup>83</sup> Arnall, “Judicial Architecture...”, *supra*, at p.521

<sup>84</sup> Vesterdorf, “*The Community Court system...*”, *supra*, at pp.317 – 318.

<sup>85</sup> *Loc. cit.*

<sup>86</sup> “*Preliminary rulings - another infant disease*” (2000) 25 E.L. Rev 538

<sup>87</sup> *Op. cit.* at page 545

<sup>88</sup> [2005] E.C.R. I-8151

whose decisions there is no judicial remedy”.<sup>89</sup> The purpose of Article 234 (3) EC was explained in *Fazenda Pública* (case C-393/98) as follows:<sup>90</sup>

“[T]hat obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice... [It] is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State.”

However, according to the ECJ in *CILFIT* (case 283/81):<sup>91</sup>

“[T]he 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 raised is to be resolved.”

A decision not to request a preliminary ruling because the provision is “so obvious as to leave no scope for reasonable doubt” is widely referred to as *acte clair*. It is perceived in some quarters as being a dangerous strategy, open to abuse by national courts only too willing to decide not to trouble the Court of Justice. Arnall cites the case of *Re Sandhu*,<sup>92</sup> in which the House of Lords declined to seek a preliminary ruling, despite being the UK’s court of “last resort”, using *acte clair*. Arnall comments that “there can be little doubt that the case should have been referred to the European Court... The *CILFIT* decision played an influential part in producing this wholly undesirable outcome”.<sup>93</sup>

However, in *CILFIT*, the ECJ was well aware of the potential for abuse and purported to protect its *acte clair* doctrine with demanding safeguards. The Court issued very clear instructions that *acte clair* must be used with caution.<sup>94</sup>

“Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.”

The Court continued:<sup>95</sup>

“To begin with, it must be borne in mind that Community legislation is drafted in several languages and that different language versions are equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

“It must also be borne in mind, even when the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to

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<sup>89</sup> *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] E.C.R. I-8151, at paragraph 30

<sup>90</sup> *Ministério Público & António Gomes Valente v Fazenda Pública* [2001] E.C.R. I-1327, at paragraph 17

<sup>91</sup> *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] E.C.R. 3415, at paragraph 16 (1985) *The Times*, 10<sup>th</sup> May

<sup>93</sup> Arnall, “*The Use and abuse...*”, *supra*, at pp. 631 – 636

<sup>94</sup> *CILFIT*, *ibid*, at paragraphs 16 – 17

<sup>95</sup> *Ibid*, at paragraphs 18 – 20

it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

“Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to the state of its evolution at the date on which the provision in question is to be applied.”

*CILFIT* and *acte clair* only apply to questions of interpretation – it does not apply to questions raised by national courts pertaining to the validity of secondary legislation. In *Gaston Schul* (case C-461/03), the Court stated that *CILFIT* “cannot be extended to questions relating to the validity of Community acts”.<sup>96</sup> The Court explained:<sup>97</sup>

“Firstly, 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, as the case may be.

“The main purpose of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty.”

### **The *CILFIT* criteria (paragraphs 16 – 20)**

In paragraphs 16 – 20 of *CILFIT*, the Court laid down four criteria that should be satisfied before a national court or tribunal can decide to refrain from seeking a preliminary ruling under Article 234 EC (3) using *acte clair*.

#### **Criterion One: Equally obvious to the courts of the “other” Member States**

The first criterion is that the national court “*must be convinced* that the matter is *equally obvious* to the courts of the other Member States”<sup>98</sup> as well as to the Court of Justice. In 1982, with an EEC membership of 10 States, there were nine “other” Member States; in 2008, with EU membership now standing at 27 Member States, there are 26 “others”. As the EU looks to expand into the western Balkans and beyond, with the three official candidate States being Croatia, the former Yugoslav Republic of Macedonia and Turkey,<sup>99</sup> that is set to rise to 29 “other” States. The European Commission website lists five “potential” candidate states: Albania, Bosnia and Herzegovina, Kosovo, Montenegro and Serbia.<sup>100</sup> Should these all accede then the number of “other” Member States rises to 34.

In *Intermodal Transports* (case C-495/03), the Court simultaneously endorsed, and refused to extend the scope of, the first criterion. The Court stated that:<sup>101</sup>

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<sup>96</sup> *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] E.C.R. I-10513, at paragraph 19

<sup>97</sup> *Ibid*, at paragraphs 20 - 21

<sup>98</sup> Emphasis added

<sup>99</sup> [http://ec.europa.eu/enlargement/candidate-countries/index\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/index_en.htm)

<sup>100</sup> [http://ec.europa.eu/enlargement/potential-candidate-countries/index\\_en.htm](http://ec.europa.eu/enlargement/potential-candidate-countries/index_en.htm). The website lists “Kosovo under UN Security Council Resolution 1244” as a potential Member State

<sup>101</sup> At paragraph 39. Emphasis added

“[B]efore the national court or tribunal comes to the conclusion that the correct application of a provision of Community law is so obvious that there is no scope for any reasonable doubt as to the manner in which the question raised is to be resolved and therefore refrains from submitting a question to the Court for a preliminary ruling, it must *in particular* be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. On the other hand, such a court cannot be required to ensure that, in addition, the matter is equally obvious to bodies of a non-judicial nature such as administrative authorities.”

### **Criterion Two: “Authentic” Languages**

The second criterion states that courts and tribunals must bear in mind that Community legislation is “drafted in several languages”, each one of which is “equally authentic”. In 1982, Community legislation was drafted in seven languages: Danish, Dutch, English, French, German, Greek and Italian. There are now 22: Portuguese and Spanish (added in 1986); Finnish and Swedish (added in 1995); Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak, Slovene (added in 2004) and Bulgarian and Romanian (added in 2007). In addition, for preliminary rulings involving primary legislation, Irish should be added, bringing the grand total to 23 “equally authentic” languages that “must be borne in mind” when a national court or tribunal is considering *acte clair*.<sup>102</sup> This is set to rise to 26, with the addition of three new languages: Croatian, Macedonian and Turkish. If all of the “potential” candidate states were to accede then that would rise to 30, with the addition of Albanian, Bosnian, Montenegrin and Serbian.

A recent case before the Court of First Instance illustrates the difficulties posed. In *Commission v Germany* (case T-374/04),<sup>103</sup> the CFI was required to give an interpretation of the phrase ‘intended to be allocated’ in Directive 2003/87. The Court confirmed that “an interpretation of a provision of Community law... involves a comparison of the different language versions” before giving a careful examination of the Danish, Dutch, English, Finnish, French, German, Greek, Portuguese, Spanish and Swedish versions,<sup>104</sup> concluding that “significant nuances exist between the various language versions”.<sup>105</sup>

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<sup>102</sup> Article 29 of the Rules of Procedure of the Court Of Justice of 1<sup>st</sup> March 2008 states that ‘The language of a case shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish’. Only four of the present EU Member States have no official language – Austria, Belgium, Cyprus, and Luxembourg

<sup>103</sup> Judgment 7 November 2007

<sup>104</sup> At paragraph 95: “The phrase ‘que l’on souhaite ... allouer’ in the French version is reproduced in the Spanish and Portuguese versions, namely ‘que se prevé asignar’ and ‘que se pretende de atribuir’ respectively, all these versions thus expressing the same subjective character – involving a certain degree of independent will – of the individual allocation of emission allowances to the various installations. This character is toned down and becomes a simple intention in the versions drafted in English (‘intended to be allocated’), Danish (‘hensigten’), Finnish (‘aiotaan myöntää’) and Swedish (‘som avses’), where the phrase has been reproduced with a slightly different sense, namely as meaning ‘which the Member State would intend to allocate’. Moreover, in the German version (‘zugeteilt werden sollen’) and the Dutch version (‘bestemd om te worden toegewezen’), meaning ‘are to be allocated’, the individual allocation of emission allowances to the various installations has an increasingly neutral and objective character. This neutral and objective character is again accentuated slightly further in the Greek version (‘pou prokitai na diatethoun’) and the Italian version (‘saranno assegnate’), which present the individual allocation of emission allowances simply as a future act (‘will be allocated’).”

<sup>105</sup> At paragraph 96: “In light of the foregoing, significant nuances exist between the various language versions of criterion 10 of Annex III to Directive 2003/87, each of which is authentic; depending on the words used, those versions confer upon the individual allocation of emission allowances a character which is, rather, subjective and intentional or, on the other hand, a more or less objective and neutral character.”

### **Criterion Three: Community law and its peculiar “Terminology” “Legal concepts”**

As with the second criterion, this is something which national courts and tribunals must “bear in mind”.

### **Criterion Four: Teleological approach to interpretation**

According to the ECJ in *CILFIT*, this is something which “must be emphasised”.

#### ***Are the criteria too strict?***

Academic reaction to *CILFIT* over the years has been mixed. The consensus seems to be that the ECJ in *CILFIT* was right to endorse *acte clair*. However, opinion is divided about the four criteria to be satisfied by national courts before invoking the doctrine. In particular, criteria one and two appear to be very strict. Referring to criterion one, Peter Wattel asks, rhetorically, “For which Finnish judge is it obvious what his Portuguese or Greek colleague would consider obvious, or *vice versa*?”<sup>106</sup>

Hjalte Rasmussen is perhaps the most highly critical of the *CILFIT* criteria. While he endorses the ECJ’s decision to allow national courts to decide questions of EU law for themselves, he believes that the *CILFIT* criteria are so stringent that, *taken as a whole*, the judgment achieves the opposite of what the Court said it intended to do. Writing in 1984, he argued that *CILFIT* “means something very different from what it *prima facie* establishes... The real strategy is different from the apparent strategy. The real strategy... is not to incorporate an *acte clair* concept [but] to call the national judiciaries to circumspection when they are faced with problems of interpretation and application of Community law”.<sup>107</sup> Returning to the same theme in 2000, he argued that the ECJ’s workload problems were “self-inflicted... I refer to the submission straightjacket designed by the Court in *CILFIT*. This judgment has functioned as a magnet, drawing numerous, and often less-than-necessary, cases up to the Court”.<sup>108</sup>

Mancini and Keeling observed that Rasmussen’s analysis was “correct”, whilst endorsing his view that the *CILFIT* criteria narrow the availability of *acte clair*. They argued that the *CILFIT* criteria – which they referred to as “stringent conditions” – restricted the “circumstances in which the clarity of the provision may legitimately be sustained to cases so rare that the nucleus of its own authority is preserved intact”.<sup>109</sup> More recently, Paul Craig and Gráinne de Búrca supported the views above by stating that the Court of Justice had placed “significant constraints” on the exercise of *acte clair* “in the hope that national courts would play the game and refuse to refer only when matters really were unequivocally clear”.<sup>110</sup>

However, Anthony Arnall took a different, more optimistic, perspective. Writing in 1989, he suggested that the “overall effect” of *CILFIT* was to “enable national judges to justify any reluctance they might feel to ask for a preliminary ruling [and] to encourage national courts to decide points of Community law for themselves.”<sup>111</sup> Referring to the *CILFIT* criteria, he argued that “only the requirement that the different language versions be compared... had any teeth”.<sup>112</sup>

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<sup>106</sup> Peter Wattel, “Köbler, *CILFIT* and Welthgrove: We can’t go on meeting like this” (2004) 41 C.M.L. Rev. 177, at p.179

<sup>107</sup> Rasmussen, “The European Court’s *Acte Clair* Strategy in *CILFIT*” (1984) 9 E.L. Rev. 242, at p.259

<sup>108</sup> Rasmussen, “Remedying...”, *supra*, at p.1082

<sup>109</sup> F. Mancini & D. Keeling, “From *CILFIT* to ERT: The Constitutional Challenge facing the European Court” (1991) 11 YEL 1

<sup>110</sup> “EU Law: Text Cases and Materials” 4<sup>th</sup> edition (OUP, 2008), at p.476

<sup>111</sup> Anthony Arnall, “The Use & Abuse of Article 177 EEC” (1989) 52 M.L.R. 622, at p. 626

<sup>112</sup> *Loc. cit.*

This was not, in fact, the first time Arnall had made the point that only the second criterion had “any teeth”.<sup>113</sup> However, in that earlier article in 1985, Arnall actually re-phrased the first criterion, stating that the national court “*had to be satisfied* that the meaning of the provision in question would be equally obvious to the European Court and to courts in the other Member States”.<sup>114</sup> The reader is reminded that what the Court actually said in *CILFIT*, and repeated in *Intermodal Transports*, is that national courts of last resort “must be convinced”, not just “satisfied”, about the attitudes of all the other courts. It is submitted, however, that there is a world of difference between the two: being convinced about something is one thing; being satisfied about something is very different. It will be further submitted, moreover, that the first *CILFIT* criterion should indeed be changed to what Arnall claimed that it said.

It is contended here that the *CILFIT* criteria, when laid down in the autumn of 1982, were very difficult to satisfy – and that the ECJ intended exactly that: for them to be very difficult (but not impossible) to satisfy. However, now, in the summer of 2008, those same criteria have become practically impossible to satisfy.<sup>115</sup> With respect, how *exactly* is a national court in one Member State to be “*convinced*” that the courts in all 26 “other” States would find the answer to a question “equally obvious”? It almost certainly cannot be done. What probably happens is that national court judges either default to Arnall’s test of being “satisfied” or, worse, simply ignore the first criterion altogether. And if the first criterion is being ignored, what about the others? Are they being ignored too?

A striking British example of *acte clair* being invoked – but the *CILFIT* criteria being ignored – is *R v Chief Constable of Sussex, ex parte ITF Ltd*.<sup>116</sup> Here, the House of Lords failed to invoke the preliminary rulings procedure, despite the fact that the case raised a number of interesting interpretational issues involving the present Articles 29 and 30 EC – the word ‘measures’ and the phrase ‘public policy’. The House was prepared to assume that the Chief Constable’s decisions that prompted the litigation were not ‘measures’ but that, even if they were, the ‘public policy’ derogation applied. Lord Cooke of Thorndon, for example, observed somewhat languidly that “Of course, *it is possible* that in [Article 29 EC] ‘measures’ has some special and more limited meaning... *I am content now to assume*, however, that what I have called the ordinary meaning is the correct one.”<sup>117</sup>

The *CILFIT* criteria were completely ignored. It is submitted that, had they been used, a preliminary reference would have been inevitable, at least on the ‘public policy’ point. After all, never mind whether the courts in the other Member States would all agree, even the courts *in England* could not agree with each other.<sup>118</sup> Academic reaction to the *ITF* case was, rightly, hostile. Estella Baker commented that *ITF* was “far from an exemplary illustration of the courts discharging their duty to apply Community law. Although it is probable that the end result is the correct one, *it is impossible to be certain*. At least three moot points lie buried in the case... there is a persuasive argument that a reference should have been made”.<sup>119</sup> Similarly, Erica Szyszczak noted that the appeal to the House of Lords

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<sup>113</sup> Anthony Arnall, “*Reflections on Judicial Attitudes at the European Court*” (1985) 34 I.C.L.Q. 168, at p.172

<sup>114</sup> *Loc. cit*; emphasis added

<sup>115</sup> To similar effect see Angus Johnston, “*Judicial Reform...*”, *supra*, at p. 501, who describes the *CILFIT* criteria as “excessively limited”

<sup>116</sup> [1999] 2 A.C. 418; [1998] 3 W.L.R. 1260

<sup>117</sup> [1999] 2 A.C. 418, at p. 451; emphasis added

<sup>118</sup> The Divisional Court had decided that Article 29 had been infringed and that Article 30 was not available ([1996] Q.B. 197). The Court of Appeal, meanwhile, disagreed, deciding that Article 30 provided a defence ([1998] Q.B. 477)

<sup>119</sup> Estella Baker, “*Policing, Protest and Free Trade*” [2000] Crim. L.R. 95, at p. 101. Emphasis added



“required the interpretation of a number of Community law concepts... It is surprising that the House of Lords did not make an Article 234 reference”.<sup>120</sup>

It may not be stretching a point to suggest that, were such a judgment to be given now, the House could find itself the subject of a state liability claim from the disappointed applicants, following the landmark ECJ judgment in *Köbler v Austria* (case C-224/01).<sup>121</sup> Peter Wattel makes the point that the combination of *CILFIT* and *Köbler* “leads to a conclusion that if a national highest court wants to avoid the real risk of making its government liable, it had better ask for a preliminary ruling in basically every case involving a question of EC law possibly conferring rights of individuals which has not yet been addressed by the ECJ”.<sup>122</sup>

### ***Should the Criteria be relaxed?***

Rasmussen clearly thinks so. He has argued, persuasively it is submitted, that *CILFIT* will continue to “function as a magnet”, unless it is overruled, or at least re-written. He has called for the Court “to rewrite *CILFIT*’s submission criteria, thereby watering down some of the stringency of the conditions”.<sup>123</sup> In *Wiener* (case C-338/95),<sup>124</sup> Advocate General Jacobs also made the case for relaxing the *CILFIT* criteria.<sup>125</sup> He pointed out that “it is necessary to interpret [Article 234 EC], like all other general provisions of Community law and in particular the provisions of the Treaty, in an evolutionary way”.<sup>126</sup> He continued:<sup>127</sup>

“Returning therefore to the *CILFIT* conditions, I would suggest that they do not need to be reconsidered (except perhaps on one point) but that they should apply only in cases where a reference is truly appropriate to achieve the objectives of [Article 234 EC], namely when there is a general question and where there is a genuine need for uniform interpretation.

“The one point on which the *CILFIT* conditions might in my view be reconsidered or refined is the statement that “an interpretation of a provision of Community law ... involves a comparison of the different language versions”. Although the Court preceded that statement by pointing out that “the different language versions are all equally authentic”, I do not think that the *CILFIT* judgment should be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages (now numbering 11 – or 12, if the Treaties and certain other basic texts are in issue). That would involve in many cases a disproportionate effort on the part of the national courts; moreover, reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself, although it is far better placed to do so than the national courts. In fact the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions, and for putting greater

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<sup>120</sup> Erica Szyszczak, “*Fundamental Values in the House of Lords*” (2000) 25 E.L. Rev. 443, at pp. 445, 446

<sup>121</sup> [2003] ECR I-10239, in which the Court declared that the “principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance”, at paragraph 59. See also *Traghetti del Mediterraneo SpA v Italy* (case C-173/03) [2006] ECR I-5177, at paragraph 30

<sup>122</sup> Peter Wattel, “*Köbler, CILFIT and Welthgrove...*”, *supra*, at p.178

<sup>123</sup> Rasmussen, “*Remedying...*”, *supra*, at p.1082. *Due, supra*, at p.15 also considered the possibility of re-writing the *CILFIT* criteria, but rather disappointingly simply stated that “it will be for the Court of Justice to determine whether or not it needs to be made more flexible”

<sup>124</sup> *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495

<sup>125</sup> [1997] E.C.R. I-6495; [1998] 1 C.M.L.R. 1110

<sup>126</sup> *Ibid* at paragraph 59

<sup>127</sup> *Ibid* at paragraphs 64 and 65

weight on the context and general scheme of the provisions and on their object and purpose. The reference in the *CILFIT* judgment would be better regarded, in my view, as an essential caution against taking too literal an approach to the interpretation of Community provisions and as reinforcing the point that they must be interpreted in the light of their context and of their purposes as stated in the preamble rather than on the basis of the text alone. The text can be particularly misleading in the case of technical legal terms, which, as the Court goes on to point out, may not have the same meaning in Community law as they have in the legal systems of the Member States.”

Rasmussen unsurprisingly agrees, noting that AG Jacobs “should be praised for taking in this case the initiative to officially open the necessary reconsidering of the wisdom of *CILFIT*”.<sup>128</sup> He goes on to suggest that a “*CILFIT II*” should be drafted:<sup>129</sup>

“The thrust of a *CILFIT II* should be to give the initiative back to the judges of the Member States, trusting them to solve on their own far more questions of interpretation... The job to pin down on paper the demarcation line between those cases which will deserve EC judicial attention in the future and those classes of cases which the national judges ought to decide on their own responsibility will not be easy, but it is as indispensable as difficult.”

#### **So how should *CILFIT II* be worded?**

Paragraph 16 of *CILFIT* is the logical starting point for a *CILFIT II*. In other words, where there is no reasonable doubt, *acte clair* applies. To redefine the criteria, it is submitted that Arnulf’s rephrasing of the first *CILFIT* criterion and AG Jacobs’ suggestions regarding the second *CILFIT* criterion should be adopted. Criteria three and four can be retained intact. The following is therefore suggested as a possible *CILFIT II*:

1. The correct application of EU law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.
2. Before it comes to the conclusion that such is the case, the national court or tribunal must be satisfied that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.
3. It must be borne in mind that Community legislation is drafted in several languages and that different language versions are equally authentic. The national court or tribunal is not, however, required to examine any given measure in every one of the official languages of the Union.
4. It must also be borne in mind, even when the different language versions are entirely in accord with one another, that EU law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States.
5. Finally, every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to the state of its evolution at the date on which the provision in question is to be applied.

We therefore arrive at a compromise solution: a set of criteria which are “stringent” but not “excessively” so; which are more likely to be accepted as such and applied more conscientiously by national courts, rather than treated as wholly unrealistic and simply ignored. With a *CILFIT II*, Rasmussen’s “magnet” might lose some of its pulling power.

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<sup>128</sup> Rasmussen, “*Remedying...*”, *supra*, at p.1108

<sup>129</sup> *Op. cit.*, at p.1109

**Conclusion**

As the EU expands, the preliminary rulings procedure will come under further strain. Numerous reform proposals have been advocated over the last quarter century, but two are endorsed here. The CFI should be entrusted to handle preliminary rulings concerning the free movement of goods; and the notoriously stringent *CILFIT* criteria should be relaxed.

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*June 2008*