Menu

REALaw

European and comparative administrative law

CILFIT 'Motionless Titan' Has Moved, albeit Softly and with Circumspection: Consorzio Italian Management II, by Lorenzo Cecchetti

21 JAN 2022

1 COMMENT

*The unwritten exceptions to the duty to refer, and most notably the so-called '*acte clair *doctrine' forged in the well-known* CILFIT *case, have been the subject of much doctrinal attention and severe criticisms. Confronted with a preliminary ruling on the interpretation of Article 267(3) TFEU referred to by the Italian* Consiglio di Stato *in a dispute concerning public procurements of services, AG Bobek advocated a paradigm shift which was not upheld by the Grand Chamber. However, the judgment, rendered on the 39th anniversary of* CILFIT, *brings about three major and multifaceted add-ons to the previous case-law, concerning the 'relevance' criterion in relation to national procedural rules, the conditions for the application of the* acte clair *doctrine, and the duty to state reasons. By refining some aspects of the 'keystone of the EU judicial system',* Consorzio Italian Management II *('*CIM II*') is a must-read judgment.*

Introduction

'contextualise' them. On the other hand, the flexibility inherent in this case-law is undoubtedly among the reasons for its longevity.

In *Consorzio Italian Management II* ('*CIM II*') (Case C-561/19), the European Court of Justice (ECJ) was once again called to interpret Article 267(3). The question, referred by the Italian *Consiglio di Stato* in a dispute concerning public procurements of services, allowed Advocate General ('AG') Bobek, in his Opinion, to propose to profoundly revisit *CILFIT*. The judgment rendered by the Grand Chamber on 6th October 2021, on the 39th anniversary of that judgment, did not follow the AG's opinion. In upholding the conditions set out in *CILFIT*, the ECJ added three major refinements to this line of case-law, concerning the 'relevance' criterion in relation to national procedural rules, the conditions for the application of the *acte clair* doctrine, and the duty to state reasons.

This piece will focus on the answer provided by the ECJ to this first preliminary question, which will be analysed from an EU law perspective. I will not instead deal with the public procurement facets of the case, on which please refer to the post by Sánchez-Graells in this Blog. There is, in addition, a further preliminary point to make. Although the investigation on the exceptions to the duty to refer involves major theoretical questions and practical issues for the EU legal order and the European integration process (especially after *Köbler–Traghetti del Mediterraneo* and *Commission v France*), the in-depth analysis of these aspects falls outside the scope of this comment.

More precisely, the contribution reads as follows. The backdrop against which the first preliminary question must be considered is briefly introduced first. AG Bobek's stance on this question will be subsequently sketched. The analysis will then focus on the ECJ's reasoning, with specific regard to the three aspects mentioned above. The concluding remarks will outline the more general context in which the judgment shall be understood.

Why has Article 267(3) TFEU come under the spotlight?

It is worth recalling that a first referral for preliminary ruling had been already made by the *Consiglio di Stato* in the very same national proceeding, resulting in the judgment handed down by the ECJ in *Consorzio Italian Management I* (Case C-152/17, hereinafter '*CIM I*') on 19th April 2018. It is only a few months later that the applicants in the main proceeding submitted further questions on the compatibility of the relevant Italian legal framework with several provisions of the Treaties and of the Charter of Fundamental Rights of the EU (the 'Charter') (in this regard, see the comment by Sánchez-Graells), although the case had been set down for judgment.

Although some of those questions had not been answered in *CIM I*, doubts arose on the actual existence of a duty to refer the new questions under Article 267(3) TFEU considering the advanced stage of the proceeding and the first referral made in the same case. This is precisely the subject of the first

Moving beyond *CILFIT*: The Opinion delivered by AG Bobek

To fully grasp the proposal put forward by the AG, it is necessary to bear in mind the *CILFIT* criteria, with specific regard to the condition for the application of the *acte clair* doctrine. Indeed, this doctrine has been one of the major conundrums of the reflection on the role of national courts in the EU judicial structure even before *CILFIT* (see *e.g.*, Pierre Pescatore, *L'interpretation du droit communautaire et la doctrine de l'acte clair*, in *Bulletin de l'association des juristes européens*, 1971, pp. 49-72, at 70-71). On *CILFIT*, please refer to the introductory post by Arnull in this Blog.

According to AG Bobek, the last instance national courts ought to be under a duty to refer only (i) when they are confronted with doubt having general character on the interpretation of EU law, (ii) on which there is objectively more than one reasonably possible interpretation, and (iii) for which the answer cannot be inferred from the existing case-law of the Court of Justice (Opinion, para 131 ff.). On top of this, a more general obligation comes to the fore: should a relevant question be submitted to the national court, if one of these three conditions is not met, that court shall explicitly and clearly provide 'adequate reasons' about this conclusion (Opinion, para 166 ff.).

The paradigm shift proposed by the AG thus concerns the very 'soul' of the duty to refer, which shall pass from a 'subjective reasonable doubt as to the correct application of EU law in respect of the outcome of the specific case' to 'an objective divergence detected in the case-law at the national level thereby threating the uniform interpretation of EU law'.

In doing this, it is advocated to move upside down the duty to refer, in blatant contrast with the wording of Article 267(3). On this, suffice it to say, on the one hand, that the wording of the Article was never considered a decisive factor in the case-law under analysis, as *Da Costa* and *CILFIT* show. On the other hand, on a closer look, the paradigm shift might have served to align EU law with practice. Indeed, more than ten years ago, it had been argued that 'the general rule (the obligation to submit the reference) [had] become an exception to a new general rule (the faculty, under the *CILFIT* terms, to make a reference)' (see Daniel Sarmiento, "Amending the Preliminary Reference Procedure for the Administrative Judge", *Review of European Administrative Law*, 2009, p. 37; cf. Opinion, paras 127-8).

Why then should the ECJ have revisited *CILFIT*? AG Bobek put forward four main arguments. First, from a theoretical perspective, the asymmetry between the rationale of the duty to refer (guaranteeing the objective uniform interpretation across the EU) and that underlying the *acte clair* exception (mainly relating to subjective doubts) is unconvincing. Moreover, the subjective character of the preliminary questions would blur the dividing line between the interpretative tasks of the ECJ and the application of EU law which should rest with the national courts (Opinion, paras 90-8). Secondly, should *CILFIT* conditions be applied rigidly, the *acte clair* exception would be an utterly unpracticable path to follow (Opinion, Para 99 and ff.), as previously held by several AGs (see *e.g.*, Jacobs, Stix-Hackl, Ruiz-Jarabo

refer has in practice evolved too as last instance national courts are – let's say 'generally' – exercising self-restraint and discretion which are incompatible with the *CILFIT* criteria (Opinion, paras 122-8).

As a matter of fact, the AG pointed out, and rightly so, that a different level of analysis could have been adopted. Indeed, on its surface, the first preliminary question entailed three major issues which could have been solved in light of established case-law of the Court, namely (i) the role of the parties in raising a question, (ii) the possibility to set some procedural time limits to submit questions to national judges, and (iii) the possibility of a second request for a preliminary ruling within the same proceeding (Opinion, paras 23-31). While the Court's answer on the first and third aspects mirrors the conclusions reached by the AG, on the second one, a contrast with the AG's stance can be detected, as we are about to see.

The Judgment rendered by the Grand Chamber: Nothing new under the Sun for the exceptions to the duty to refer?

The first preliminary question was in its wording quite 'modest' and answerable based on the previous ECJ's case-law. Nonetheless, the Grand Chamber laid down a sort of '*Bildungsroman*', which illustrates all logical steps that last instance national courts must follow in assessing whether they are under a duty to refer. This more theoretical first part is combined with a second one aimed at providing the *Consiglio di Stato* with a clear answer considering the doubts expressed in the order for reference (I will refer to this second part as the 'outcome-oriented part' of the judgment). This structure, which echoes the two levels of analysis provided for in the Opinion, does not appear completely convincing. Indeed, the Court's reasoning on the exceptions to the duty to refer is sometimes divided into two parts, which can hardly be kept together by cross-references, as we will see below.

Before analysing the three major 'add-ons', it is worthwhile pointing out that the judgment overtly establishes a close and direct link between Article 267 and 'the protection of individual rights conferred by [EU law]' (*CIM II*, para 29). This marks a step in the direction towards the understanding of the preliminary reference within the context of the EU law system of remedies and in light of the right to effective judicial protection (on this link, see *e.g.*, G Tesauro, *The Effectiveness of Judicial Protection and Co-operation between the Court of Justice and the National Courts*, in *Yearbook of European Law*, 1993, pp. 1-17; Mastroianni; and Gentile & Bonelli in this Blog).

A second preliminary remark concerns the *acte clair* doctrine. The Grand Chamber, in upholding *CILFIT*, modified the wording of the *acte clair* exception. Most notably, the 'correct *interpretation* of EU law' takes the place of the traditional wording ('correct *application*'), at least in the French, Italian, German, Spanish, Portuguese, and Romanian linguistic versions – while the English one maintains the original formula (*CIM II*, para 33). It is possibly a low-impacting detail. However, the distinction between 'interpretation' and 'application' is a sensitive issue, to which it was given much importance in AG

As for the significant refinements to the previous case-law on Article 267(3) TFEU, the first one regards the assessment of the 'relevance' (French: *pertinence*) criterion.

First, with no intention of opening Pandora's box, the Grand Chamber seems to have upheld the reading according to which the irrelevance of the question amounts to an actual 'exception to a duty', rather than being a situation in which no duty exists (cf. Opinion, paras 61-3). Subtle as it is, the very opposite conclusion could have been drawn from *CILFIT*. Indeed, Paras 8-11 of this judgment concern the meaning of 'question raised' (*CILFIT*, para 8), not the 'exceptions' to the duty to refer. The opening of Para 11 confirms this reading as it marks a sharp contrast between, on the one hand, the 'irrelevance scenario' and, on the other, the situation where the recourse to EU law is necessary to enable national courts to decide a case.

Second, the outcome-oriented part of the judgment seems to add something new to what is stated in general terms on the *pertinence* criterion in Paras 34 and 35, which are instead consistent with the previous case-law. Heavily relying on *Aquino*, the ECJ affirms that not all the procedural rules limiting the possibility of the parties to raise pleas in law in the main proceeding are incompatible with EU law: indeed, provided that the principles of equivalence and effectiveness are observed, if a plea must be declared inadmissible on the basis of such national procedural law, a request for a preliminary ruling *cannot* be regarded as 'necessary' and 'relevant' for that court to be able to give judgment (*CIM II*, para 65). Here, the *Consiglio di Stato* succeeded in gently accompanying the Court on acknowledging the – existence of some – outer limits of the line of case-law increasingly intrusive into national procedural dynamics (whose foundations had been laid down in *Simmenthal* and *Rheinmühlen I*, see Martinico & Pierdominici), contrary to what happened in previous cases and, for instance, in *Consiglio Nazionale dei Geologi*. This explains why, as mentioned, the conclusion reached by the AG on the basis of the established case-law of the Court is different.

We might wonder if relying on *Aquino* in the case at issue is methodologically sound. There is undoubtedly a profound difference between the two cases as in the former there was not an ongoing dispute. Indeed, since the appeal was declared inadmissible, the Court there recalled its case-law on 'general or hypothetical questions' and affirmed that the request for the preliminary ruling was not 'necessary for the effective resolution of a dispute' (*Aquino*, paras 45-6).

b) On the conditions for the application of the acte clair *doctrine*

A second major, threefold add-on regards the *acte clair* conditions.

First, it is boldly stated that last instance national courts are not under a duty to examine each and all the authentic language versions, without prejudice to the fact that divergences in these latter shall be borne in mind, especially when they are set out by the parties and are verified (*CIM II*, para 44). This

of several other ways, in so far as none of them seem sufficiently plausible to the national court – we

may say – is not sufficient for concluding that there is a 'reasonable doubt' on its interpretation (*CIM II*, para 48). In other terms, not-sufficiently serious doubts are not *per se* detrimental to the possibility of invoking the *acte clair* doctrine. Put in this way and with no intent of overlooking the profound distinctions between the two legal orders, parallelism may be drawn with the Italian Constitutional Court's judgment No. 356/1996. In short, this judgment established the principle according to which references for constitutionality review of Italian laws are admissible only when the national judges cannot reach an interpretation complying with the Constitution. On the contrary, if the reference is based on the possibility to single out unconstitutional interpretations of the law, the question shall be considered as inadmissible. Although not amounting to the paradigm shift advocated by AG Bobek, this statement modifies the subtle compromise between the interest of the 'uniform interpretation and application of EU law' and the need to rely on and trust the highest national courts in favour of the latter, thus marking a decisive step forward towards the relaxation of the original criteria.

However, this relaxation goes hand in hand with some refinement on *Ferreira da Silva e Brito* and *X and Van Dijk* as the Court held that the existence of 'diverging lines of case-law', within the same Member State or in different Member States, could be the smoking gun precluding the recourse to the said doctrine (para 49).

c) The duty to state reasons

The third major development is the explicit reading of Article 267 TFEU 'in the light of the second paragraph of Article 47 of the Charter' (*CIM II*, para 51), advocated by several AGs in the past (in general on this third aspect, see the comment by Gentile & Bonelli). As is well-known, Article 47(2) corresponds to Article 6 (1) of the European Convention of Human Rights (ECHR), which imposes a duty upon national courts to state reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question (see *e.g.*, *Ullens de Schooten v Belgium*, *Vergauwen and Others v. Belgium*, *Dhahbi v Italy*, and *Schipani v Italy*).

More precisely, in the judgment under investigation, the Court held that 'the statement of reasons for its decision [not to refer] must show' that one of the three *CILFIT* scenarios occurs (*CIM II*, para 51). Unlike AG Bobek's Opinion, this duty involves also the 'irrelevant questions' (cf. Opinion, para 168) and stems not from Article 47 of the Charter only (cf. Opinion, para 171). Moreover, the statement is not 'characterised' by the use of the adjective '*adequate*' (cf. Opinion, paras 167-170), although this might be implicit in the very notion of 'statement of reasons'.

The substantive development in this regard might thus seem rather limited. However, the acknowledgement of such a duty to state reasons, directly resulting from Article 267 and linked to a fundamental right protected by the Charter, may contribute to the capacity of *CILFIT* to serve as a supervisory mechanism of the highest national courts. Indeed, the reasoning of the Court shows a close

reasons upon last instance national courts might contribute to raising a shield against the 'threats' of

infringement procedure and, albeit it probably is still a paper tiger, of state liability (a 'dog which must be allowed to bark' according to AG Hogan in *Randstad*; in the same vein, see De Pasquale).

From a broader perspective, forming an alliance between Article 267 TFEU and Article 47 Charter might result usefully in governing the notoriously worrisome Rule of Law crisis that the Union is experiencing.

Concluding remarks

With this judgment, the 'motionless Titan' has undoubtedly moved, albeit softly and with circumspection. This is not enough to be defined as a 'revolution' but the refinements I briefly illustrated undoubtedly constitute an 'evolution'. The analysis of this evolutionary path will contribute to the reflection on the nature and functions of the preliminary ruling procedure today and on the relationship between the EU legal order and Member States' ones. Without venturing down these challenging paths here, two concluding remarks are offered.

Firstly, in addition to 'technical reasons' behind the rejection of the AG's (namely, the profound disregard of the wording of Article 267(3) and the modest workability of some of the proposed 'new criteria'), the choice in favour of the 'continuity approach' was also based on opportunity-related considerations. In light of the ongoing tense relationships between the ECJ and some national supreme courts, a sudden methodological and constitutional shift would have brought new difficulties (commenting the Opinion, Martinico & Pierdominici doubted about the opportunity of such a change). Other considerations, such as the peril of diminishing the added-value of the *CILFIT* case-law, namely its 'flexibility', might have been taken into consideration too (the importance of this element has been stressed, for instance by AG Tizzano in *Lyckeskog*; and, recently, by Torresan).

Secondly, as I did not focus on the two other preliminary questions, suffice it to say that they were considered to be inadmissible for the very same reasons underlined by the Court in *CIM I*. In short, the referring court failed to clearly explain the reasons why it considers that the interpretation of several Treaty provisions 'is necessary or useful', merely setting out the questions of the applicants in the main proceedings without giving its assessment (*CIM II*, para 70). Why recall this now? To stress how this judgment shall be considered as forming part of a more general phenomenon in the relationships between the *Consiglio di Stato*, the Italian court referring the most to the ECJ (see the 2020 Annual Report on the Judicial Activity), and the latter. This phenomenon may be linked to the profound evolution that the Union and its law have undergone over the last three decades. Confronted with a radically changed EU legal framework and with its augmented pervasiveness into national law, national courts are increasingly keen to test the national implementation of EU law against such a framework and, by doing this, to better understand their role in the composite judicial architecture of the EU. Hence, the judgment under analysis, along with, for instance, *Consiglio Nazionale dei Geologi*, *Randstad*, and the pending *Hoffmann-La Roche* case, are nothing but tiles of the same puzzle.

Suggested citation: L. Cecchetti, "*CILFIT* 'motionless Titan' has moved, albeit softly and with circumspection: *Consorzio Italian Management II*", *REALaw.blog*, available at https://realaw.blog/?p=898.

Categories:

EFFECTIVE JUDICIAL PROTECTION

Published by ymarique
View all posts by ymarique

SHARE THIS:

LinkedIn Print Twitter Facebook Email

LIKE THIS:

Like

Be the first to like this.

PREVIOUS

Judicial Control of Administrative Cooperation in Tax Matters, Taxpayers' Rights and the Notion of "Foreseeable Relevance" in Light of the CJEU Case Law

NEXT

Book launch: 'European Union Law in Context' by Ester Herlin-Karnell, Gerard Conway, Aravind Ganesh,10.02.2022,11:00

1 Comment

Pingback: Cilfit 2.0: Will It Matter on the Ground? Some Empirical Reflections, by Jasper Krommendijk – REALaw

COMMENTS ARE CLOSED.

Top Posts

La jurisprudence des petits pas: C-561/19, Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA, by Giulia Gentile and Matteo Bonelli

Overseeing Trilogues: What Is the Impact of Administrative and Judicial Watchdogs?, by Maarten Hillebrandt

A roadmap toward protecting fundamental rights in composite banking law enforcement, by A Karagianni

Cilfit on Trial?, by Anthony Arnull

CILFIT 'Motionless Titan' Has Moved, albeit Softly and with Circumspection: Consorzio Italian Management II, by Lorenzo Cecchetti

Latest Posts

A roadmap toward protecting fundamental rights in composite banking law enforcement, by A Karagianni

The Obligation and Sensitivity of Administrative Independence under EU law: Time for an updated Toolbox?, by Lena Enqvist & Markus Naarttijärvi

Outsourcing Rulemaking Powers, by C Jenart

The shared management of EU funds: new perspectives and challenges, by M Eliantonio, E Korkea-aho, and N Vogiatzis

Organising intensive care transport in the Euregio Meuse-Rhine: Examining differences and identifying solutions, by L Kortese and S Sivonen

Categories

Select Category

Tags

#AFSJ #Belgium #Book_Launch #call_for_papers #civil_service #Denmark #ECHR_art_10 #England #EU #EU_funds #France #GDPR #Germany #Hungary #Italy #Lithuania #Netherlands

You are welcome to submit your pieces either to the **journal** [click here] or to the **blog** [click here].