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The Classics of EU Law Revisited: *CILFIT* and *Foto-Frost*

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The decisions in *CILFIT*[40] and *Foto-Frost*[41] are most certainly classics of the ECJ's jurisprudence, which have served to define and shape the nature of the relationship between the Community courts and national courts under Article 234.

The Three Limbs of *CILFIT*

The decision in *CILFIT* is, of course, best known for what the ECJ said in relation to the *acte clair* doctrine. It should nonetheless be recalled that the ECJ's holding in that respect was but part of a more general ruling concerning the nature of the relationship between national courts and the ECJ under Article 234. The ECJ held that national courts or tribunals against whose decisions there was no judicial remedy under national law must, where a question of Community law was raised before them, comply with their obligation to make a reference, unless the question raised was irrelevant, or the Community provision in question had already been interpreted by the Court, or where the correct application of Community law was so obvious as to leave no scope for any reasonable doubt.[42] The three criteria, relevancy, prior ECJ ruling and *acte clair* were grounded in an admixture of normative and practical considerations.

The *relevancy criterion* flowed from the very wording of Article 234, which requires that a decision on the question raised is necessary to enable the national court to give judgment. In *CILFIT* the ECJ made it clear that the courts or tribunals referred to in Article 234(3) have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment, with the consequence that they are not obliged to refer a question concerning the interpretation of Community law raised before them if that 'question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case'.[43]

[40] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.
[41] Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.
[42] See, more recently, Case 495/03 *Intermodal Transports BV v Staatssecretaris van Financien* [2005] ECR I-8151.
[43] Case 283/81 *Srl CILFIT*, para 10.

In normative terms, this clearly made sense in the light of the wording of Article 234, and also served to ensure that answers to questions of Community law were grounded, in the sense that there really was a 'case or controversy' relating to the Community legal issue, which would frame the ECJ's response. In practical terms, the relevancy criterion served to prevent the ECJ from using its scarce judicial resources on the resolution of disputes where Community law was irrelevant, thereby also preventing the 'strategic' deployment of Community law argument in national courts as a delaying tactic by litigants.

The *CILFIT* judgment also developed the pre-existing law in relation to *the effect of a prior ECJ ruling* on the existence of an obligation to refer by national courts of last resort. It reaffirmed the earlier *Da Costa* ruling,[44] and confirmed that the authority of an interpretation under Article 234 already given by the Court could deprive the obligation to refer of its purpose and thus empty it of its substance.[45] The ECJ in *CILFIT*, however, extended this aspect of *Da Costa*, making it clear that this could also be so not only where the question raised was materially identical with a question that had already been the subject of a preliminary ruling in a similar case, but also where previous decisions of the Court had already dealt with the point of law in question, 'irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical',[46] subject to the caveat that the national court might still choose to refer if it wished to do so, more especially where it was unclear about a specific facet of the earlier ruling. An earlier decision could therefore be relied on by the national court in a subsequent case, irrespective of whether the former decision had arisen in for example proceedings under Articles 226 or 230, where the later case took the form of an Article 234 action. The ECJ in *CILFIT* also made it clear that this could be so even though the two cases might not be strictly identical, provided that the essence of the legal point arising in the second case had been answered in the earlier decision.

There were once again normative and practical considerations that influenced the ECJ in this respect. In normative terms, the authority of the Court's decisions was thereby enhanced, since they became authoritative rulings for all national courts.[47] The ECJ's rulings were no longer only of 'bilateral' relevance for the national court that requested the ruling. They would henceforth have a 'multilateral' impact on all national courts. The reverse side of the same coin was equally significant. It was precisely *Da Costa* as affirmed and extended by *CILFIT* which turned national courts into Community courts of general jurisdiction in their own right. Once the ECJ had issued a ruling on a particular point it was then for national courts to apply this ruling in subsequent cases and they should only trouble the ECJ where they felt unsure about some aspect of the prior ruling. EU law without *CILFIT* would therefore have looked and been very different, at least so far as the nature of the overall Community legal architecture was concerned. The result of *CILFIT* and *Da Costa* was that national courts became 'enrolled' as part of a network of courts adjudicating on Community law, with the ECJ at the apex of that network. They become 'delegates' in the enforcement of EC law, and part of a broader Community judicial hierarchy.

[44] Cases 28–30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31.
[45] Case 283/81 *Srl CILFIT*, para 13.
[46] *Ibid*, para 14.
[47] H Rasmussen, 'The European Court's *Acte Clair* Strategy in *CILFIT*' (1984) 9 *EL Rev* 242.

The normative considerations driving *Da Costa* and *CILFIT* were reinforced by those of a practical nature. Even though these rulings were given at a time when the ECJ was not subject to the same workload problems as it is now, it would nonetheless have been regarded as wasteful for all concerned if the national court was obliged to refer, and the ECJ was obliged to hear a case where it had resolved the substance of the legal issue in a prior case. A judicial system could not be supposed to exist on such terms. The national courts would not see the sense of a system which placed pressure on them to allow issues to be litigated again, where the ECJ had already given a considered judgment. There is of course inherent in this regime the risk that a national court might misinterpret past ECJ authority. Any system of precedent inevitably entails certain 'error costs', the possibility of mistakes by national courts. The benefits are, however, very significant and include the increased volume of Community law which can be litigated, mostly correctly, at any one time, and also the important symbolic advantage which flows from the recognition that the national courts are part of a Community judicial hierarchy. It should be noted that a study found a high rate of national implementation of ECJ rulings, 96.3 per cent.[48]

It was, however, the third limb of *CILFIT*, which was concerned with the *acte clair* doctrine, that proved to be most controversial. The ECJ held, as is well known, that even where there was no prior ruling a national court of last resort was permitted not to refer where 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.[49] This conclusion was tempered by the imposition of strict conditions that had to be satisfied before the national court could legitimately conclude that the matter was indeed *acte clair*. These conditions required the national court to be satisfied that the matter would be regarded as equally obvious in the different language versions; it had to be mindful that Community law used its own terminology, and that legal concepts did not always bear the same meaning in different legal systems; the national court was also required to interpret particular provisions in the light of Community law as a whole. The current indications are that the ECJ is content with the formulation in *CILFIT* and shows no inclination to modify the ruling to any significant degree.[50] It is true that in *Intermodal*[51] the ECJ declined to extend the *CILFIT* conditions, holding that a national court was not required to ensure that the matter was equally obvious to bodies of a non-judicial nature, such as administrative authorities. Subject to that caveat, the ECJ reaffirmed the *CILFIT* condition that before declining to refer a national court must be convinced that the matter was so obvious that there was no scope for any reasonable doubt as to the way in which the question should be resolved, and more especially that the matter was equally obvious to other national courts and to the ECJ.[52]

[48] S Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 *European Union Politics* 397.

[49] Case 283/81 *Srl CILFIT*, para 16.

[50] Case C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwalitiet* [2005] ECR I-10513, paras 15–25; Case T-47/02 *Danzer and Danzer v Council* [2006] ECR II-1779, paras 36–37.

[51] Case 495/03 *Intermodal Transports*, para 39.

[52] *Ibid*, paras 38–9.

The rationale for the *CILFIT* ruling was debated and contested in the academic literature. Mancini and Keeling[53] followed Rasmussen,[54] who maintained that the judgment was based on an astute strategy of 'give and take'. This theme was developed by Mancini and Keeling, who argued that the ECJ's strategy was to concede to national courts the power not to make a reference when the matter was clear, but then to restrict 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'.[55] The Court hoped thereby to induce national supreme courts to use willingly the mechanisms for judicial co-operation provided by the Treaty, and reduce the risk that Community law might be the subject of divergent interpretations.

The wisdom of this strategy was, however, questioned by those such as Arnull, who argued that national courts still controlled the application of the *CILFIT* criteria for *acte clair* and could therefore manipulate them if they wished to do so.[56] Advocates of this view therefore questioned the desirability of this aspect of the *CILFIT* ruling and implicitly if not explicitly argued against any relaxation of the conditions laid down by the ECJ. Others took a different view. There were those such as Advocate General Jacobs who argued that national judges should not have to consider all the official language versions of Community acts.[57] Rasmussen went further, and argued that the *CILFIT* conditions should be modified, this being one way to meet the practical workload problems currently besetting the ECJ.[58] On this view *CILFIT* should be modified so as to give more power to national courts to resolve cases, even where the legal issues involved in such cases were not straightforward. This expanded vision of *acte clair* would serve in effect as the method for demarcating the line between those cases that warranted attention by the ECJ, and those that could be left for determination by the national courts.

It is helpful once again to distinguish the normative and practical considerations that underlie the *acte clair* doctrine and the reactions to it. In normative terms there is much to be said for the basic proposition that 'clear' cases can be decided by national courts, even those of last resort, without recourse to the ECJ. The national courts operate once again as the delegates of the ECJ for the application of Community law, and the latter can then utilise its time in deciding more problematic cases. This of course begs the question of what constitutes a 'clear case'. Lawyers can and indeed do argue about the meaning of just about anything. This reductionist point should not, however, be pressed too far. The reality is that the *CILFIT* conditions were designed to ensure that, so far as possible, national courts would not regard cases as *acte clair* unless they really were free from significant interpretive doubt. It is, however, questionable whether the injunction on national courts to consider all different language versions of the relevant text is either necessary or desirable in an expanded Community, with the increase in the number of official languages. To this extent it may well be desirable to loosen the *CILFIT* conditions. It is, however, doubtful whether the doctrine should be changed over and beyond this. It is more specifically questionable whether it should be changed in the manner suggested by

[53] F Mancini and D Keeling, 'From *CILFIT* to *ERT*: The Constitutional Challenge Facing the European Court' (1991) 11 *Yearbook of European Law* 1.
[54] H Rasmussen, 'The European Court's *Acte Clair* Strategy in *CILFIT*' (1984) 9 *EL Rev* 242.
[55] Mancini and Keeling, 4.
[56] A Arnull, 'The Use and Abuse of Article 177' (1989) 52 *MLR* 622.
[57] Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495.
[58] H Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 *CML Rev* 1071, 1109.

Rasmussen, for the following reason. We should undoubtedly think broadly of possible strategies to ease the workload of the ECJ. Part of this strategy might be to leave more cases to be resolved by national courts, although I doubt whether this is the optimal solution. In any event, whatever view one takes on this particular issue, it is inappropriate to attempt to effectuate this change by liberalisation of the *acte clair* doctrine, because it distorts its foundations. A matter does not become *acte clair* in any meaningful sense of that term merely because one decides that the matter is not worthy of the attention of the ECJ. A criterion that provides that the ECJ will hear cases based on the importance or significance of the issue being litigated, with other cases being left to national courts even if they are not straightforward, is qualitatively different from the concept of *acte clair*.

There are also practical considerations underlying the *acte clair* doctrine in something like its present form. In practical terms it allows straightforward cases to be disposed of expeditiously by national courts, thereby saving costs for litigants and the court system alike. There is inevitably the possibility of error costs, but, as we have seen, that is always so whenever a matter is left for the disposition of national courts. The danger of incorrect constructions by national courts becoming embedded should not, however, be overstated. If a national court were minded to do this intentionally in a particular case it would be subject to the possibility of damages liability pursuant to *Köbler*.[59] This would be *a fortiori* so if the national court were more systematically to interpret matters as *acte clair* where they did not warrant this appellation, and there is the further possibility that the Member State might be subject to an enforcement action under Article 226.[60] In any event, the matter might still come before the ECJ via a different court from the same legal system, or from a different legal system. It would also be open to the ECJ to correct aberrant interpretations by national courts, in the context of a case on a related point that has come before it, although the implications of this for prior decisions at national level would be subject to *Kühne*.[61]

The Limits of *Foto-Frost*

The decision in *Foto-Frost*[62] is central to the relationship between national courts and the ECJ under Article 234. The ECJ's conclusion that national courts had no power to invalidate a Community norm of their own volition was based on a variety of arguments.

The ECJ accepted that Article 234 did not settle the issue. It accepted also that it was open to national courts to conclude, after listening to the arguments advanced by the parties, that the Community measure challenged was valid. The principal argument advanced by the ECJ for holding that national courts could not invalidate a Community norm was that it would thereby jeopardise the uniformity of Community law: 'divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the

[59] Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

[60] See the Commission reasoned opinion in relation to Sweden, C(2004) 3899.

[61] Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837.

[62] Case 314/85 *Firma Foto-Frost*. See also Case C–27/95 *Woodspring DC v Bakers of Nailsea Ltd* [1997] ECR I-1847; Case C-461/03 *Gaston Schul*, paras 15–25; Case C-344/04 *R on the application of IATA and ELFAA v Department of Transport* [2006] ECR I-403, paras 27–32.

fundamental requirement of legal certainty'.[63] This was backed up by a secondary argument based on the analogy between Articles 230 and 234: since Article 230 gave the ECJ exclusive jurisdiction to declare void an act of a Community institution in a direct action, the coherence of the system required that where the validity of a Community act was challenged indirectly via Article 234 before a national court the power to declare the act invalid should also be reserved to the Court of Justice.[64] The third and final strand of the argument was that the ECJ was best placed to decide on the validity of Community acts. This was because the Protocol on the Statute of the Court of Justice allowed Community institutions whose acts were challenged to participate in the proceedings to defend the validity of the acts in question, and also allowed the ECJ to gather information from Member States and institutions which were not participating in the proceedings.

There is of course an interesting analogy and contrast between *CILFIT* and *Foto-Frost*. The former, as we have seen, stands for the proposition that national courts may decide cases for themselves either where there has been a prior ECJ ruling on the issue, or where the matter is *acte clair* in the sense considered above. *Foto-Frost* read together with the *ICC* case[65] stands for the proposition that national courts should follow prior ECJ rulings declaring a Community act to be void, but cannot decide on the invalidity of a Community act in the absence of an ECJ ruling on the point, notwithstanding the fact that the invalidity may be clear, although they may be able to give interim relief.

The interesting issue is whether *Foto-Frost* should be relaxed so as to enable national courts to invalidate a Community norm. One's view on this issue depends in part on how far one is convinced by the nature of the arguments advanced by the ECJ in *Foto-Frost*. Thus some have questioned the need for uniformity, which is the ECJ's principal argument. I do not share these doubts. There would be considerable practical and conceptual problems if Community norms were to be regarded as invalid in some national systems and not in others. These problems would be exacerbated in an expanded Community of 27 Member States. The procedural advantages of having such matters litigated before the ECJ, allowing participation by the Community institution whose acts are challenged and the gathering of salient information from other Community institutions and Member States, should also not be underestimated. I am therefore unconvinced by arguments that the *Foto-Frost* limitation on national courts should be removed.

This does not, however, mean that matters cannot be improved. We need to press a little further to understand why and how this might be achieved. We should not lose sight of the reason why Community norms are challenged indirectly via the national courts. The primary reason is of course that the limits of standing for direct actions preclude any claim being brought under Article 230, with the consequence that the only method of challenge for an individual claimant is an indirect action via Article 234. If the standing limits under Article 230 were to be relaxed, then it would be open to individuals to proceed directly before the CFI, and many would naturally choose to do so. The validity of the Community measure could then be determined by an expert Community court, with the procedural advantages for the parties to the litigation mentioned by the ECJ in *Foto-Frost*. The liberalisation of the standing rules for direct actions would therefore

[63] Case 314/85 *Firma Foto-Frost*, para 15.
[64] *Ibid*, para 17.
[65] Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze dello Stato* [1981] ECR 1191.

significantly reduce the incidence of indirect challenge to Community norms in national courts, and hence reduce also any difficulties faced by litigants as a result of the *Foto-Frost* limit on national courts. This change would, moreover, have the added benefit that such cases would be heard by the CFI, rather than the ECJ, thereby helping to reduce the work load of the latter.