The Preliminary Ruling Procedure: A Legal Vacuum in Union Law?

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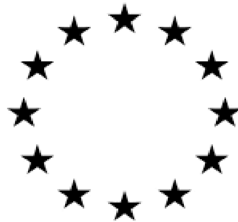
A Discussion of the CILFIT Criteria in Light of the ECJ's *Consorzio* Judgment



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A. Introduction

The preliminary ruling procedure of Art. 267 TFEU allows courts of the EU member states to submit certain questions on the interpretation and validity of Union law to the European Court of Justice (hereinafter "**ECJ**" or "**the Court**"). Insofar, it has played an undisputedly important role not only in advancing European integration in general but also the harmonization in the field of civil law which is particularly affected by European specifications.[1] Art. 267(3) TFEU constitutes an obligation to refer for national courts of last instance but in 1982, the ECJ formulated the so-called CILFIT doctrine, stipulating by now well consolidated exceptions to that obligation - most notably the *acte clair* and the *acte éclairé*.

The CILFIT doctrine has never been exempt of criticism, however, in recent years those critics have grown more numerous and vocal, even likening the preliminary ruling procedure to a legal vacuum, or with *Jaeger,* a "union law-free zone"[2]. Considering the importance of this procedure for the uniform application of Union law, such criticism - if found to be true - would put the European Union as a community of law at risk. In *Consorzio,* a preliminary reference made by the Italian *Consiglio di Stato,* the ECJ recently had the opportunity to take another stance on the CILFIT criteria. Posed by AG *Bobek* in his opinion, the Court had to *inter alia* answer the question whether the CILFIT doctrine still provides the necessary answers to guarantee a reasonable implementation of the preliminary reference procedure.

[1]Cf. I. Klauer, *Die Europäisierung des Privatrechts - Der EuGH als Zivilrichter*, 1998, at 17 et seqq.; Fredriksen, 'Die Zusammenarbeit zwischen dem EuGH und deutschen Zivilgerichten im Lichte des Vorabentscheidungsverfahrens nach Art. 234 EGV', 26 *Berliner Online Beiträge zum Europarecht* (2005) 1, at 6.
[2] Jaeger, 'CILFIT nach dem Urteil Consorzio: Rückenwind für den Acte clair', 1 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2022) 19, at 19.

B. Objectives of the Preliminary Ruling Procedure

The preliminary ruling procedure of Art. 267 TFEU can be described as one of the essential driving forces of European integration. This description covers various dimensions:

For one, the preliminary ruling mechanism is the procedural safeguard of the ECJ's exclusive power to interpret and annul Union law.[3] It provides an indirect mechanism to review the legality of EU acts by allowing a preliminary reference on validity.[4] Furthermore, Art. 267 TFEU safeguards the ECJ's monopoly on interpretation and decreases the risk that a national court will adopt an incorrect or inconsistent interpretation.[5]

Another dimension concerns the relationship between the ECJ and the national courts. The preliminary ruling procedure is a non-contentious court-to-court procedure without any possibility of initiative for the concerned parties.[6] These characteristics make it a unique procedure within the remedies available before the ECJ. The Court itself emphasized the relationship of cooperation between the national courts and the Court that is embodied in the obligation to make a reference in Art. 267(3) TFEU.[7] Insofar, the preliminary reference procedure reflects the complexity not only of the European legal framework, but also of the European judicial order. It acknowledges the reality that the national courts are more numerous and have better resources than the ECJ as a single court responsible for an ever-growing number of member states.[8] They take on the role of a gatekeeper and thus offer some relief in workload for the ECJ.[9] On the other hand, it also results in the procedure's success being dependent on the national courts actually participating in it, i.e. making the reference; a participation to which they are obliged under Art. 267(3) TFEU but which cannot be enforced by the ECJ.

Most notably however, the preliminary reference procedure is a key instrument in the coherent development of Union law. Integral principles like the supremacy of Union law[10], direct effect[11],

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[3] Cf. Kühling and Drechsler, 'Alles "acte clair"? - Die Vorlage an den EuGH als Chance', 41 *Neue Juristische Wochenschrift* (NJW) (2017) 2950, at 2951.
[4] E.g. Case 263/02 P, *Commission v Jégo-Quéré* (ECLI:EU:C:2004:210), at para. 30.
[5] Joutsamo, 'Community law - National law relationship - judicial cooperation under the system of preliminary rulings (Art. 177)', *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* (1991) 337, at 339; Broberg and Fenger, 'Theorie und Praxis der Acte-clair-Doktrin des EuGH', 6 *Europarecht (EuR)* (2010) 835, at 838.
[6] C. Barnard and S. Peers (eds.), *European Union Law* (2nd ed., 2017), at 293; Case 44/65, *Hessische Knappschaft v Maison Singer* (ECLI:EU:C:1965:122); D. Chalmers, G. Davies and G. Monti, *European Union Law* (4th ed., 2019), at 167.
[7] Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para.7.
[8] Cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 166.
[9] *Ibid*., at 167; L. Hornuf and S. Voigt, 'Preliminary References - Analyzing the Determinants that Made the ECJ the Powerful Court It Is', 3769 *CESifo Working Paper Series* (2012) 1, at 5.
[10] Case 6/64, *Costa v ENEL* (ECLI:EU:C:1964:66).
[11] Case 26/62, *Van Gend en Loos* (ECLI:EU:C:1963:1).

state liability in damages[12], procedural autonomy[13], equivalence and effectiveness[14] have all been developed by the ECJ through preliminary rulings as well as significant rulings in most fields of secondary Union law.[15] At the same time, the preliminary ruling procedure is a means to ensure that Union law is applied uniformly across all member states.[16] Two quotes almost forty years apart demonstrate the continued importance of this dimension. In 1974, the ECJ opened its judgment in the case of *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* by stating:

> *"Article 177 [now Art. 267] 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. […] [I]t 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."*[17]

A similar sentiment is displayed in the 2011 judgment of *Commission v Spain*:

> *"[…] [I]t follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision […] for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union."*[18]

The importance of the preliminary reference procedure of Art. 267 TFEU within and for the functional structure of the European Union can therefore hardly be overestimated.

C. The CILFIT Criteria

While the wording of Art. 267(3) TFEU suggests an absolute duty to refer relevant questions imposed on courts of last resort, the ECJ has essentially created two exceptions to this obligation in the judgments *Da Costa*[19] and *CILFIT*[20].

The first exception stipulates that a reference is not obligatory if the referred question is materially identical to a question already answered in a previous preliminary ruling or to points of law that

[12] Joined Cases 6/90 and 9/90, *Francovich* (ECLI:EU:C:1991:428).
[13] Case 33/76, *Rewe* (ECLI:EU:C:1976:188).
[14] Case 45/76, *Comet BV v Produktschap voor Siergewassen* (ECLI:EU:C:1976:191).
[15] C. Barnard and S. Peers (eds.), *supra* note 6, at 294; D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 180.
[16] Cf. C. Barnard and S. Peers (eds.), *supra* note 6, at 294; Case 66/80, *International Chemical Corporation v Amministrazione delle finanze dello Stato* (ECLI:EU:C:1981:102), at para. 11. See also Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1974:3), at para. 2.
[17] Case 166/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1974:3), at para. 2.
[18] Case 281/09, *Commission v Spain* (ECLI:EU:C:2011:767), at para. 42.
[19] Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie* (ECLI:EU:C:1963:6).
[20] Case 283/81, *CILFIT* (ECLI:EU:C:1982:335).

have already been addressed by the Court.[21] This situation is described as an *acte éclairé*.[22] Of course, even in case of an *acte éclairé*, the national court in question *may* still refer the case to the ECJ under Art. 267(2) TFEU[23]; the exception merely eliminates the obligation.

As a second exception, there is no obligation to refer where the correct application of Union law is so obvious as to leave no scope for any reasonable doubt to the manner in which the question raised is to be resolved.[24] Continuing the terminology on exceptions, this exception is referred to as the *acte clair* doctrine.

Sensing perhaps that the second exception of the *acte clair* doctrine in particular with its indefinite legal terms was open to misuse by national courts unwilling to conduct the reference to Luxembourg, the ECJ imposed concrete requirements for determining when a reference was not necessary. National courts wanting to forego a reference have to (1) compare all language versions of the provision of Union law at stake, (2) take account of the peculiar Union law terminology and of the different meaning of legal concepts in Union law and in the national legal systems, and (3) place every provision of Union law in its context and interpret it in light of Union law as a whole and of its particular state of evolution.[25] These conditions are referred to as the CILFIT criteria.

In recent years, the ECJ has clarified and amended the CILFIT conditions in a number of judgments. In *X and van Dijk*, the Dutch Supreme Court (*Hoge Raad*) had asked the ECJ to clarify whether the fact that a question was referred for a preliminary ruling by a lower national court precluded the highest national court from taking the view that the correct application of Union law is so obvious as to leave no scope for reasonable doubt.[26] The ECJ emphasized the national court's discretion in determining whether it assumed an *acte clair*. In accordance with the principle of cooperation that the preliminary reference procedure is based on, the interpretation of the CILFIT criteria would be conducted independently by the respective national court of last resort.[27] Stating further that an *acte clair* should be considered in the light of the particular circumstances of the case, the Court concluded that a reference by a lower national court did not preclude a court of last resort to come to the conclusion that an *acte clair* was involved.[28]

[21] Joined Cases 28-30/62, *Da Costa v Nederlandse Belastingadministratie* (ECLI:EU:C:1963:6); Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para. 14.
[22] C. Barnard and S. Peers (eds.), *supra* note 6, at 300; D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 191.
[23] The ECJ would not issue a decision on the merits in case of an *acte éclairé*, instead the Court would issue an order or a note pointing out the existing case law and suggesting that the referring court withdraw its preliminary reference, cf. B. Wägenbaur, '*EuGH VerfO*' (2nd ed., 2017), Art. 99, at paras. 3 et seqq.
[24] Case 283/81, *CILFIT* (ECLI:EU:C:1982:335), at para. 16.
[25] *Ibid.*, at paras. 17-20.
[26] Joined Cases 72/14 and 197/14, *X and van Dijk* (EU:C:2015:564), at para. 32.
[27] *Ibid.*, at paras. 57-59.
[28] *Ibid.*, at para. 60.

The judgment of *X and van Dijk* was followed closely by the judgment of *Ferreira da Silva*.[29] In this case involving an action against collective redundancy, the Portuguese Supreme Court (*Supremo Tribunal de Justica*) had invoked an *acte clair* by stating there was no reasonable doubt regarding the interpretation of the relevant Union law. The parties to the case had a different view and initiated an action for civil liability against the Portuguese state for breach of Art. 267(3) TFEU during which the court of first instance made a reference to the ECJ to ask whether the Portuguese Supreme Court was obliged to make a reference in the foregoing case under Art. 267(3) TFEU. While in this particular case, the ECJ assumed there was no *acte clair* and the *Supremo Tribunal de Justica* thus breached its obligation to refer[30], on a more general level, the Court stated that the fact that other national courts may have rendered contradictory decisions did not stop a provision from being an *acte clair*.[31] It therefore allowed some scope for disagreement about the interpretation of a provision before the matter had to be referred.[32] *Ferreira da Silva* can be regarded as a continuation of the jurisprudence started in *X and van Dijk* where the Court ruled on the question of diverging opinions between a lower and a higher court, i.e. within one member state.

In general, there are limited possibilities to review the application of the CILFIT criteria. Theoretically, the European Commission or other member states could bring an infringement proceeding under Artt. 258 and 259 TFEU if they were of the opinion that a national court wrongly assumed an *acte clair* or an *acte éclairé*. For an individual, however, the only mechanism to determine misuse of the CILFIT criteria appears to be by way of the doctrine of state liability in damages, as first established in *Köbler*[33]. To date, there are relatively few instances of a member state being successfully sued in application of the *Köbler* case-law because of a failure to refer.[34]

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[29] Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565).
[30] As it happens, this was the first time since the introduction of the preliminary ruling procedure that the ECJ assumed such a breach of the obligation to refer.
[31] Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565), at para. 41.
[32] D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 194; Limante, 'Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a More Flexible Approach', 54 *Journal of Common Market Studies (JCMS)* (2016) 1384, at 1392.
[33] Case 224/10, *Köbler* (EU:C:2003:513). A number of states have developed an alternative remedy that is linked to the denial of access to justice or the denial of the right to a fair trial, cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 190; Valutytė, 'Legal Consequences for the Infringement of the Obligation to make a Reference for a Preliminary Ruling under Constitutional Law', 19 *Jurisprudence* (2012) 1171, at 1182; Lacchi, 'Multilevel Judicial Protection in Preliminary References', 53 *Common Market Law Review (CMLRev)* (2016) 679.
[34] D. Chalmers, G. Davies and G. Monti, *supra* note 6, 190; Varga, 'National Remedies in the Case of Violation of EU Law by Member State Courts' 54 *Common Market Law Review (CMLRev)* (2017) 51, at 56.

D. The Preliminary Ruling Procedure in Practice

In order to adequately give an assessment of the CILFIT criteria, it is necessary to look at their practical implementation – as well as the application of the preliminary ruling procedure in general. Several observations apply:

One is the preliminary ruling procedure's evident increase in importance over the years, in particular over the last 20 years. This observation can be quantified in the number of proceedings resolved before the ECJ. Whereas in 2000, preliminary ruling procedures already had a share of 51 %[35] of all ECJ decisions, in 2010 that number was up to 59 %[36] and by 2020 two-thirds of all decisions were based on preliminary ruling procedures.[37] This development also appears to be continuing for the foreseeable future: Of the 725 new procedures brought before the ECJ in 2020, 556 were intended for a preliminary ruling; taking the percentage above 75 %.[38] That the ECJ now has to deal with a generally higher caseload than 20 years ago[39] is, of course, a natural consequence of the EU's continued expansion.

Another observation concerns the referral rate of the individual member states. There are significant differences in the total number of referrals from member state to member state. Since the introduction of the preliminary reference mechanism in 1961, national courts in some member states consistently refer cases to the ECJ less frequently than courts in other member states. While these variations can be explained by structural factors, such as the date of accession, population size, economic activity, social conflicts and specific interests, to some extent[40], there remain differences that cannot fully be attributed to structural factors. One example of two member states with substantially diverging referral rates are Germany and France - both founding members of the European Communities and the two most populous countries in the EU. While Germany boasts a traditionally high number of preliminary references to the ECJ with an average of 80,9 cases per year between 2000 and 2020 (139 in 2020), France referred an average of 23,1 cases in the same period (21 in 2020).[41] Another example can be drawn by comparing referral statistics of the Baltic countries (Estonia, Lithuania, and Latvia) which all joined the EU in 2004. Since then, Estonia used the preliminary reference mechanism in 33 cases (3 in 2020), Lithuania in a total of 75 cases (7 in 2020), and Latvia in 94 cases (17 in 2020) - despite Lithuania being the

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[35] Court of Justice of the European Union, Annual Report on Judicial Activity 2000, 2001, 3., at 3.
[36] Court of Justice of the European Union, Annual Report on Judicial Activity 2010, 2011, D., at 8.
[37] Court of Justice of the European Union, Annual Report on Judicial Activity 2020, 2021, at 214.
[38] *Ibid.*, at 209.
[39] In 2000 the Court completed 526 proceedings, up to 792 in 2020, cf. Court of Justice of the European Union, *supra* note 35; Court of Justice of the European Union, *supra* note 37.
[40] Cf. Rösler, 'Die Vorlagepraxis der EU-Mitgliedstaaten', *Europarecht (EuR)* (2012) 392, at 392; Broberg and Fenger, Variations in Member States' Preliminary References to the Court of Justice - Are Structural Factors (Part of) the Explanation?', 19 *European Law Journal (ELJ)* (2013) 488, at 500.
[41] Court of Justice of the European Union, *supra* note 37, at 231.

most populous of the three countries and comparatively similar population sizes of Estonia and Latvia.[42]

This pattern extends to preliminary references by national courts of last resort. Between 1978 and 2001, the French Administrative Court of last resort (*Conseil d'État*) considered Union law 191 times but made only 18 references. During the same period, the Austrian Constitutional Court (*Verfassungsgerichtshof*) referred about half of the cases in which it considered Union law.[43]

In view of these pronounced differences in the member states' referral practice and the ongoing rapid increase in the density of Union law, it appears probable that a high number of proceedings before national courts are not being referred despite involving relevant interpretation issues. At the same time, these divergences demonstrate that domestic courts in different member states apply different standards when assessing a duty to refer - which in turn suggests both flexibility and a certain ambiguity in the application of the criteria for a referral.

E. Criticism of the CILFIT Criteria

The CILFIT judgment has been discussed and criticized since it was passed in 1982. In particular, the Advocates-General repeatedly raised critical thoughts in the decision-making process before the ECJ in regards to the CILFIT criteria.[44]

I. Lack of Practicality of the *Acte Clair* Doctrine

To date, national courts have been reluctant to comply with the obligation to refer to the ECJ as part of the preliminary ruling procedure. The reasons for this are *inter alia* uncertainties in regards to the application of the *acte clair* doctrine.[45]

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[42] *Ibid*., at 231. Estonia has a population size of 1,3 Mio.(https://eacea.ec.europa.eu/national-policies/eurydice/estonia/population-demographic-situation-languages-and-religions_en) , Lithuania of 2,8 Mio. (https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-44_en) and Latvia of 1,9 Mio. (https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-40_en).

[43] D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 190; Fenger and Broberg, 'Finding Light in the Darkness: On the Actual Application of the Acte Clair Doctrine' 30 *Yearbook of European Law (YBEL)* (2011) 180, at 188. Preliminary references by constitutional courts pose a separate issue as the constitutional courts often do not classify themselves as a 'court or tribunal' within the meaning of Art. 267 TFEU and refuse the possibility of a referral for this very reason, and a discussion of it would exceed the limitations of this paper. For further information see e.g. Dicosola, Fasone, and Spigno, 'After the Treaty of Lisbon and the Euro-Crisis' 16 *German Law Journal (GLJ)* (2015) 1317, at 1318; Millet and Perlo, ‚The First Preliminary Reference of the French Constitutional Court to the CJEU: Révolution de Palais or Revolution in French Constitutional Law?', 16 *GLJ* (2015) 1471, at 1472.

[44] Cf. Case 338/95, *Wiener v Hauptzollamt Emmerich* (ECLI:EU:C:1997:352), Opinion of AG *Jacobs,* at paras. 54 et seqq.; Case 495/03, Intermodal Transports (ECLI:EU:C:2005:215), Opinion of AG *Ruiz-Jarabo Colomer*, at paras. 99 et seqq.; Joined Cases 72/14 and 197/14, *X and van Dijk* (ECLI:EU:C:2015:319), Opinion of AG *Wahl*, at paras. 62 et seqq.

[45] Obert, 'Zur Zukunft der CILFIT-Doktrin', 18 *Zeitschrift für das Privatrecht der EU (GPR)* (2021) 150, at 152; Case 72/14, *X amd van Dijk* (ECLI:EU:C:2015:319), Opinion of AG *Wahl,* at para. 1.

On a subjective level - the condition of the absence of reasonable doubt - there is a considerable degree of vagueness which cannot be ascertained or verified. Additionally, the CILFIT criteria set objective demands on the national courts that are virtually unattainable.[46] With its strict criteria for the assumption of an *acte clair*, the ECJ demands a hardly achievable comprehensive examination of the wording, systematics, meaning and purpose, as well as comparative legal considerations of the Union law in question.[47] The ECJ pointed out in its CILFIT judgment that all language versions of the Union law in question are equally compulsory.[48] At the time of the CILFIT judgment the EU had 7 official working languages, while today there are 24. Given the required degree of certainty, an examination of the interpretation in all languages by the court of last instance would be necessary.[49] Since a comparison of all language versions can be considered practically impossible for the national courts, the comparison and examination of jurisdiction of courts from other member states becomes an insurmountable obstacle. Often, the national courts will only be able to assume that they reach the same conclusion. The obligation to carry out such an extensive examination lessens the practical significance of the *acte clair* doctrine.[50]

The strict requirements imposed on the complex process of interpretation, which national courts have to carry out, mean that it is almost impossible to assume that there is an *acte clair*.[51] Nevertheless, courts of last instance of the member states regularly refrain from a referral because they believe that they can solve the respective Union law question on their own with the necessary self-confidence or they want to elude the complex examination of all language versions of the Union law in question and jurisdiction of the other member states.[52]

Additionally, the concept of doubt used by the ECJ in CILFIT is not clearly defined. Doubts about the meaning of a provision can never be completely ruled out from a critical point of view.[53] Since the national courts have discretionary powers to decide whether there is reasonable doubt, they have the possibility to refrain from a reference by relying on apparent but inexistent clarity even though a reference is, in fact, necessary due to the disputability of a question.[54] This is problematic because a careless use of the CILFIT doctrine could result in a flawed application of Union law at the national level.[55] The consequence is contradiction. Because the requirements to establish an *acte clair* in the true meaning of the CILFIT case-law are exceptionally high, the

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[46] Obert, *supra* note 45, at 152.
[47] K. Hummert, *Neubestimmung der acte-clair-Doktrin im Kooperationsverhältnis zwischen EG und Mitgliedstaat*, 2006, at 35.
[48] Case 495/03, *Intermodal Transports* (ECLI:EU:C:2005:215), Opinion AG *Stix-Hackl,* at para. 99.
[49] Broberg and Fenger, *supra* note 5, at 839 et seqq.
[50] Palmstorfer and Kreuzhuber, 'Keine Abkehr von Cilfit - Anmerkung zum Urteil des EuGH v. 6.10.2021', *Zeitschrift Europarecht (EuR)* (2022) 239, at 242; K. Hummert, *supra* note 47, at 37.
[51] K. Hummert, *supra* note 47, at 37.
[52] *Ibid.*, at 39.
[53] *Ibid.*, at 37.
[54] Jaeger, *supra* note 2, at 20.
[55] C. Barnard and S. Peers (eds.), *supra* note 6, at 300 et seq.

criteria are often neglected or applied in a superficial way. Consequently, the strict interpretation of the CILFIT doctrine might arguably have the opposite effect than intended, not intensifying but limiting judicial scrutiny.[56] In conclusion, the ambiguous interpretation poses a strong barrier in the communication process between national and European jurisdictions.[57]

Aside from the national courts, even the ECJ does not apply the criteria consistently. Looking at the jurisprudence citing the CILFIT criteria, it is striking that while judgments refer to the CILFIT judgment and some even refer to the exceptions, none of them actually apply the criteria concretely.[58]

II. The Advanced Stage of Development of the EU

The CILFIT judgment shows the ECJ's endeavors to define its own competences as broadly as possible by means of a narrow definition of the *acte clair* doctrine and, on the other hand, to leave the national courts as little scope of decision-making as possible. The judgment was passed in 1982, thus at a time when the European internal market was not yet complete and the level of development of the EU was not as advanced as it is today. At this point in time, the ECJ was still striving to take on as many proceedings as possible in order to consolidate its position and to advance the development of Union law.[59] In the meantime, this situation has changed due to the establishment of the European jurisdiction and the greatly increased demands on the ECJ.[60] Accordingly, the CILFIT criteria are criticized as outdated.[61] It is argued that they must be adapted to the challenges that the modern EU poses to its legal protection system.[62]

The effectiveness of the jurisdiction of the ECJ depends in particular on the cooperation of national judges, which in return depends on the acceptance of the Court's jurisdiction by the national courts.[63] That being the case, critics have voiced the opinion that it would make sense not to burden the national courts with unfulfillable criteria, but to accommodate them in order to bring about a sensible handling of the *acte clair* doctrine by appealing to their willingness to cooperate. Only by strengthening the responsibility of the national courts and transferring tasks to them as "*union courts*" within the framework of a relationship based on the division of labor

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[56] K. Hummert, *supra* note 47, at 39.
[57] Hilpold, 'Stärkung der Vorlagepflicht letztinstanzlicher Gerichte', 45 *Neue Juristische Wochenschrift (NJW)* (2021) 3290, at 3291.
[58] Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565); Joined Cases 72/14 and 197/14, *X and van Dijk,* (ECLI:EU:C:2015:546); Case 379/15, *Associatio France Nature Environnement* (ECLI:EU:C:2016:603); Case 561/19, *Consorzio Italian Management v Catania Multiservizi* (ECLI:EU:C:2021:291), Opinion AG *Bobek,* at para. 80.
[59] K. Hummert, *supra* note 47, at 38.
[60] L. Malferrari, *Zurückweisung von Vorabentscheidungsersuchen durch den EuGH*, 2003, at 225 et seq.
[61] Jaeger, *supra* note 2, at 19.
[62] *Ibid*., at 19; L. Malferrari, *supra* note 60, at 228.
[63] Case 72/14, *X amd van Dijk* (ECLI:EU:C:2015:319), Opinion of AG *Wahl,* at para. 64; K. Hummert, *supra* note 47, at 38.

can the preliminary ruling procedure be dealt with properly. Through their margin of assessment the national courts are given the task of ensuring that Union law is effective by checking whether clarification by the ECJ appears necessary for its further development.[64]

III. Ensuring the Effectiveness of the Preliminary Ruling Procedure

An evaluation of the CILFIT criteria must also take into account the objectives of the preliminary ruling procedure. As already described, the preliminary ruling procedure has a dual purpose. On the one hand, it maintains the uniformity of Union law. On the other hand, the preliminary ruling procedure ensures the effective application of European law. Consequently, individual legal protection in the European Union is better guaranteed. Theoretically, legal unity would be best achieved by the ECJ taking a position on all questions of European law.[65] However, some critics argue that in a complex and extensive legal system such as the European one, it would serve legal unity more if the ECJ would concentrate on giving clear, well-reasoned and well-thought-out solutions to fundamental legal problems than for it to settle the greatest possible number of legal questions, regardless of their importance, as quickly as possible.[66] At a certain point, the increase in the quantity of decisions entails a decrease in their quality.[67] Apart from a few exceptions, it has become normal for most national courts to treat European law not like international law but very much like higher-ranking national law. Therefore, the most frequent use of the preliminary ruling procedure is no longer necessary for the effective application of European law. The cooperation relationship between the national courts and the ECJ must be adapted to the changed status and the new requirements of European integration.[68]

IV. Differentiation between Application and Interpretation

Another point of criticism, particularly expressed by Advocate General *Bobek*, is that the reasoning for the obligation to refer is not expressed consistently in the practice of the ECJ. The CILFIT judgment explicitly referred to the correct and proper *application* and *interpretation* of Union law. AG *Bobek* proposes that when it comes to the *application* of Union law, the national courts should be exempt from the obligation to refer.[69] Since the ECJ includes the application of Union law in the scope of 'absence of reasonable doubt', national courts also submit questions of

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[64] K. Hummert, *supra* note 47, at 39 et seq.
[65] *Ibid*., at 225 et seq.
[66] *Ibid*., at 227; Case 17/00, *De Coster* (ECLI:EU:C:2001:651), Opinion AG *Colomer,* at para. 62.
[67] L. Malferrari, *supra* note 60, at 227.
[68] *Ibid*., at 228.
[69] Case 561/19, *Consorzio Italian Management v Catania Multiservizi* (ECLI:EU:C:2021:291), Opinion AG *Bobek,* at para. 135 et seq.

fact and rather technical questions of application.[70] However, critics advocate that the role of the ECJ should primarily consist of formulating and further developing the essential principles and abstract standards of Union law which can be left for concrete application to the national courts.[71]

This differentiation becomes necessary especially because of the ECJ's increasing workload. If the national courts nowadays generally treat Union law like higher ranking national law, it is no longer necessary for this willingness to be constantly promoted through the preliminary ruling procedure. Instead, the increase of quantity and complexity of European law leads to an overload of preliminary ruling procedures.[72]

V. Systematic Coherence of Union Law Remedies

Advocate General *Bobek* makes another argument as to why it is necessary to revisit CILFIT: the systematic coherence of Union law remedies. The CILFIT criteria are disconnected from Union law's own means of enforcing the obligation to make a reference under Art. 267(3) TFEU. There is no specific and direct Union law remedy available to the parties if they believe that their right to have a case referred to the ECJ has been violated.[73]

Since the judgment in *Köbler*[74] 2003, there is the possibility of obtaining legal redress before national courts because of damage caused by the violation of individual rights through the judgment of a last-instance national court. Therefore, the infringed law must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct link between the breach of the obligation incumbent on the member state and the damage sustained by the parties.[75] However, AG *Bobek* argues that Art. 267(3) TFEU is not a rule intended to confer rights on individuals, so the non-compliance with the obligation to refer can actually not invoke state liability on its own.[76] This shows a dogmatic incoherence regarding the *Köbler*-requirements of state liability and their application on the preliminary ruling procedure. Furthermore, the standard in such cases is an obvious violation of the applicable law, which may lead to a sufficiently serious breach. *Bobek* declares that the CILFIT criteria, objectively, play no role in the evaluation of whether or not there has been a violation of other Union laws.[77] Therefore, this mechanism for legal protection is practically insufficient.[78]

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[70] T. Groh, *Die Auslegungsbefugnis des EuGH im Vorabentscheidungsverfahren*, 2005, at 32 et seqq.
[71] Obert, *supra* note 45, at 151 et seq.
[72] L. Malferrari, *supra* note 60, at 220 et seqq.
[73] Opinion AG *Bobek, supra* note 58, at para. 113.
[74] Case 224/10, *Köbler* (EU:C:2003:513).
[75] *Ibid*., at para. 51 et seq.; Case 168/15, *Tomásová* (ECLI:EU:2016:602), at para. 22 et seq.
[76] Opinion AG *Bobek, supra* note 58*,* at para. 115.
[77] *Ibid.,* at para. 115.
[78] Hilpold, *supra* note 57, at 3292.

In contrast, infringement proceedings pursuant to Art. 258 TFEU were fully implemented in 2018 in the judgment *Commission v. France*, in which the ECJ decided that a member state was in breach of Union law specifically for the failure of a last-instance national court to make a reference to the ECJ in order to fulfill their obligation to refer in a situation where the interpretation of the substantive provisions of Union law in question was not so apparent as to leave no scope for reasonable doubt.[79] This judgment can be assessed as a plea to the national courts to take their obligation to refer more seriously. It is not to be expected that the European Commission will take more action to protect individual rights in this context in the future, due to the universality of its control function. The decision whether to take action will depend on several political considerations.[80]

Furthermore, in that judgment the ECJ referred to the CILFIT in general and contended itself with merely stating that the criterion - the absence of reasonable doubt - was laid down in CILFIT, without applying it. AG *Bobek* accuses the ECJ of a hardly defendable selectivity as to what is in fact being applied and enforced, as well as why and how that application and enforcement takes place. This lack of consistency in enforcing the obligation to refer increases the uncertainty in regards to the preliminary ruling procedure.[81]

F. The Paradigm Shift[82] Proposed by AG *Bobek*

In light of this criticism against the CILFIT criteria it is no real surprise that in his opinion on the *Consorzio* case, Advocate General *Bobek* seized the opportunity to suggest a re-definition of the criteria developed under Art. 267(3) TFEU to the ECJ.

The key idea of *Bobek's* proposal can be described in the following way: The subjective approach of the CILFIT criteria with its reasonable doubt criterion as the center point should be shifted towards a more objective understanding of the duty to refer, meaning that there shall be such duty if there is an "*objective divergence detected in the case-law at the national level and thereby threatening the uniform interpretation of EU law (...)*".[83] Thus, *Bobek* suggested that there shall be an obligation to refer under Art. 267(3) TFEU provided three conditions are fulfilled, i.e. the case raises "[1] *a general issue of interpretation of EU law (as opposed to its application);* [2] *to*

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[79] Case 416/17, *Commission v France (Advance payment)* (ECLI:EU:2018:811); Opinion AG *Bobek, supra* note 58, at para. 116.
[80] Hilpold, *supra* note 57, at 3292.
[81] Opinion AG *Bobek, supra* note 58, at para. 120.
[82] *Ibid.*, at para. 4.
[83] *Ibid.*, at para. 133.

which there is objectively more than one reasonably possible interpretation; [3] *for which the answer cannot be inferred from the existing case-law of the Court of Justice (...)*".[84]

The first important change to the CILFIT criteria in *Bobeks's* proposal is that in order to assume an obligation to refer all three of the above mentioned criteria must be fulfilled cumulatively rather than being stand-alone exceptions to the obligation to refer.[85] This would mean a drastic dogmatic change to the obligation to refer since national courts would not search for an exception to the obligation to refer as under CILFIT but rather decide whether all criteria to create such an obligation are met. Second, an obligation to refer shall only arise from questions regarding the interpretation (and not the application) of Union law.[86] *Bobek* drawed a line between application and interpretation, stating that an issue of interpretation requires a *"reasonable and appropriate level of abstraction"*[87] meaning that the interpretation shall be of *"general or generalisable impact"*[88]. Third, as his key idea already mentioned above, *Bobek* suggested replacing the often criticized *acte-clair* criteria defined by the lack of any reasonable doubt by a more objective criteria defined as the existence of objectively more than one reasonably possible interpretation.[89]

Furthermore, according to *Bobek*, national courts shall not be obliged to carry out research regarding divergent opinions on a certain issue of interpretation of Union law but rather be attentive towards any divergence in legal interpretation brought to their attention.[90] Lastly, there shall be no obligation to refer if a certain legal question can be settled by taking a look into the ECJ's established case-law.[91] This criteria can be seen as a confirmation of the *acte éclairé* since it follows the same principles: there is no need to refer a certain question to the ECJ if that question has already been answered. Nonetheless, *Bobek* emphasized that national courts even in such a case may seek guidance from the ECJ if they need clarification or want to depart from a certain definition.[92] Finally, according to *Bobek*, national courts must give adequate reasons in case they conclude that a certain case which raises a question of Union law doesn't meet one or more of the three criteria.[93]

[84] *Ibid.*, at para. 134.
[85] *Ibid.*, at paras. 166 et seq.
[86] *Ibid.*, at para. 135.
[87] *Ibid.*, at para. 144.
[88] *Ibid.*, at para. 147.
[89] *Ibid.*, at paras. 150 et seq.
[90] *Ibid.*, at para. 157.
[91] *Ibid.*, at paras. 158 et seq.
[92] *Ibid.*, at paras. 162, 164.
[93] *Ibid.*, at paras. 166 et seq.

G. The *Consorzio* Judgment

In its decision on *Consorzio*[94] the ECJ did not fully adopt the changes to the CILFIT doctrine as suggested by AG *Bobek*, rather, it affirmed its case law on the duty to refer according to Art. 267(3) TFEU. Nonetheless, the ECJ made a few small but relevant amendments.

First, the Court adopted a new version of the *acte clair* doctrine stating that a national court "*may refrain from referring to the Court a question concerning the interpretation of Union law (...) where the correct application of Union law is so obvious as to leave no scope for any reasonable doubt*". At first glance, the wording appears to be identical with the ECJs judgment in CILFIT. Nevertheless, there is a small difference: Unlike in CILFIT, the ECJ uses the term "interpretation" instead of "application" in the French and Italian versions of *Consorzio*, which suggests that the Court followed *Bobek*'s proposal.[95]

Second, the Court addressed the challenges that arise from having different language versions of Union law provisions: It reiterated that one language version cannot serve as the basis of a provision of Union law but that it must be interpreted and applied in the light of all language versions.[96] The ECJ then put a limit to the national courts' obligation to assess all language versions by stating that a national court cannot be required to examine each of the language versions but must be aware of existing divergences especially when those divergences have been subject to the case or were raised by the parties.[97]

Third, the Court introduced a new, more objective approach regarding the concept of doubt. It stated that for a national court of last instance to be freed from its duty to refer the national court must conclude *"that there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of EU law"*.[98] This means a development towards a more objective understanding of the *acte clair* considering that until *Consorzio* the Court referred to doubts of the national court itself rather than doubts raised by (objective) circumstances.[99] However, the Court outlines that the mere fact that different interpretations of a provision of Union law exist does not result in there being a reasonable doubt.[100] Nonetheless, the Court emphasized the necessity of a "particularly vigilant (...) assessment" especially if the national court is made aware of divergent case law among the courts of one member state or between the courts of several

[94] Case 561/19, *Consorzio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799).
[95] *Ibid*, at para 33, French version: "*l'interprétation*", Italian version: "*interpretazione*".
[96] *Ibid.*, at para. 43.
[97] *Ibid.*, at para. 44.
[98] *Ibid.*, at para. 47.
[99] Obert, 'Fortentwicklung der CILFIT-Judikatur', *Zeitschrift für das Privatrecht der EU (GPR)* (2022) 11, at 15.
[100] Case 561/19, *Consorzio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799), at para. 48.

member states.[101] In this context the ECJ once again accentuated the national courts responsibility for the correct use of the preliminary ruling procedure.[102]

Fourth, the Court concretized the national courts' obligation to give sufficient justification in case it decides to refrain from making a reference under Art. 267(3) TFEU. In this context, it referred to Art. 47(2) of the Charter of Fundamental Rights of the European Union (CFR). In particular, the Court demanded that the national courts clarify whether the question posed was irrelevant to the case or if there was an *acte éclairé* or an *acte clair*.[103]

H. A New Nuanced Standard After *Consorzio*

Even though the ECJ did not make any radical changes to the CILFIT doctrine in *Consorzio*, the new version of CILFIT means a new nuanced standard regarding the duty to refer under Art. 267(3) TFEU.

I. Interpretation vs. Application

The ECJ has re-adopted the *acte clair* doctrine by replacing the term "application" with "interpretation". Even though the English language version of the judgment still shows the word "application", this must be considered a translation inaccuracy given that the Italian and the French version of the judgment use the word interpretation. On the one hand, this could be seen as a concession to the critics of the *acte clair* - especially to AG *Bobek* -, who could argue that the scope of application of Art. 267(3) TFEU is now reduced to questions of interpretation of Union law. On the other hand, it stands out that the ECJ did not give any reasons for adopting this new understanding of the *acte clair*. This could lead to the assumption that the ECJ simply intended to repeat the wording used by Art. 267 TFEU. In both scenarios, it is a rather big surprise that the ECJ did not deal with the arguments made by AG *Bobek*. As a consequence of this lack of reasoning, national courts of last instance now face uncertainty about how to interpret and apply the new version of the *acte clair* doctrine.

In any case, the use of the term "interpretation" should not be seen as a fundamental change to the *acte clair* doctrine with the intention of trying to reduce the scope of the preliminary ruling procedure as suggested by AG *Bobek*. Instead, it could be conceived as a mere linguistic change which does not affect the basis of the well-consolidated *acte clair* doctrine since a fundamental change on the doctrine would require a solid reasoning. As a consequence, it is unlikely that the

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[101] *Ibid.*, at para. 49.
[102] *Ibid.*, at para. 50.
[103] *Ibid.*, at para. 51.

use of the term "interpretation" in the *acte clair* doctrine will lead to a significant decrease in the number of preliminary reference procedures since the term still leaves room for the national courts of last instance to decide whether to declare that a question raises matters of interpretation and thus could be referred. By not even mentioning the argument made by AG *Bobek*, the ECJ showed that it does not see the distinction between application and interpretation of Union law to be a useful and practical criterion when it comes to determining the scope of the duty to refer.

Limiting this scope to questions of interpretation of Union law would also cause the risk of a so-called "escape into application"[104], meaning that national courts of last instance could refrain from making a reference to the ECJ by using the justification that the case only raises questions of the application of Union law and not of its interpretation. This would eventually endanger the uniform interpretation of Union law.[105] From this point of view, it makes sense that the ECJ emphasized the importance of mutual trust between itself and the national courts as it heavily relies on the latter exercising their "gatekeeper-function"[106] appropriately. Nonetheless, in regard to the omission of the term "application" the ECJ should have made its intentions clearer because the subsequent lack of certainty could turn out as an obstacle for a trustful and transparent relation between the Court and the national courts of last instance. In this regard, the change in wording must be evaluated by its practice to be certain of its effects.

II. The Shift of Responsibility to the Disputing Parties

In *Consorzio*, the ECJ basically confirmed the subjective CILFIT criterion. Certainly though, the Court continued to further objectify the crucial condition that there must not be any reasonable doubt as to the correct interpretation of the law. In addition, the objective requirements with regard to the examination of language versions and alternative decisions by national courts of other member states were changed. Thereby, the standard with regard to the decision whether the conditions for an *acte clair* are fulfilled or not has been refined. It is questionable though whether these modifications have led to a better manageability of the *acte clair* doctrine.

1. Plausible Alternatives of Interpretation

With the explicit implementation of an objective element - the absence of *circumstances* that are capable of giving reasonable doubt - the Court seems to move towards AG *Bobek's* proposal for a more objective approach regarding the declaration of an *acte clair* by the national courts. From now on, there has to be a *plausible* alternative of interpretation to affirm an *acte clair.* This

[104] Obert, *supra* note 45, at 153; Jaeger, *supra* note 2, at 21.
[105] Palmstorfer and Kreuzhuber, *supra* note 50, at 251 et seq.
[106] Cf. D. Chalmers, G. Davies and G. Monti, *supra* note 6, at 167.

continuation of objectifying the *acte clair* doctrine is a positive modification, particularly, because the ECJ provides a clear definition, when those circumstances are given:

> *"[...]the mere fact that a provision of EU law may be interpreted in another or several other ways, in so far as none of them seem sufficient plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision."*[107]

Big changes in practice, however, are not to be expected, because the connection to objective indications is nothing new. Factually, the Court had already used objective indications in judgments before *Consorzio*.[108] Nevertheless, more clarity with regard to the *acte clair* doctrine is an improvement which serves legal certainty and could contribute to a further harmonization concerning the standard that is applied by the national courts in deciding whether an *acte clair* is given or not. As a result, there is a more objective limit to the margin of discretion of the national courts, which could benefit the enforcement of the preliminary ruling procedure in the future.

2. Subjective Knowledge of the National Courts

The Court mitigated the requirements concerning the examination of all official language versions and alternative interpretations by national courts from different member states. It explicitly abandoned the national courts' obligation to examine the Union law in question in all official languages which is an advancement since it is doubtful whether the national courts ever carried it out. However, the Court emphasized that the national courts have to be considerate and exceptionally careful in the assessment of an *acte clair,* if they have subjective knowledge of such differences among language versions. The national courts have to apply the same diligence if they have subjective knowledge of alternative interpretations in judgments of other member states. This shift to the subjective knowledge of the courts is an improvement in two ways.

First, the disputing parties are encouraged to introduce differences in language versions and interpretations by courts from other member states into the legal trial. The responsibility to identify those differences is shifted to the disputing parties, which entails a reduced workload for the national courts. Consequently, the role of the disputing parties is strengthened in the preliminary ruling procedure.

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[107] Case 561/19, *Consorzio Italian Management and Catania Multiservizi* (ECLI:EU:C:2021:799), at para. 48.

[108] Case 495/03, *Intermodal Transports BV* (ECLI:EU:2005:552) - deviating interpretation by authorities; Joined Cases 72/14 and 197/14, *X and van Dijk,* (ECLI:EU:C:2015:546) - doubts of a lower-ranking court regarding the interpretation of Union law in question; Case 160/14, *Ferreira da Silva e Brito* (EU:C:2015:565) - contradicting judgments of courts from other member states.

Second, the national courts no longer have to fulfill the unattainable requirement of comparing all official language versions, which might have facilitated misuse of the *acte clair* in the past. The more realistic requirements could possibly eliminate the need of the national courts to elude the examination of alternatives in the interpretation of the Union law in question by escaping into the adoption of an *acte clair*. This serves the purpose of the preliminary ruling procedure to ensure the uniform interpretation of Union law in the EU and also strengthens the cooperative character of the judicial dialogue.

III. Importance of the Obligation to State Reasons

By reaffirming the national courts' obligation to state reasons in case they refrain from making a reference to the ECJ, the Court prevents the national courts from giving superficial or meaningless justifications.

There are different perspectives to this affirmation: First, it has a symbolic meaning that the ECJ (for the first time in this context) referred to Art. 47(2) CFR - the right to a fair trial -, because thereby the Court explicitly declared that an insufficient reasoning from the national courts would constitute a violation of individual rights. It should be noted though that no effective mechanism to enforce a violation of Art. 47(2) CFR currently exists. However, the mentioning of Art. 47 (2) CFR has already led to a vivid discussion regarding the implementation of such a mechanism.[109]

Second, the emphasis on the obligation to state reasons can be seen as an attempt to encourage the national courts to exercise their function properly and apply self-control but also as criticism towards the approach of some national courts.[110] Third, the ECJ also acted in its own interest: The reasons given by the national courts present the only way for the Court to further investigate whether the national courts apply the CILFIT doctrine according to the case law of the Court. Fourth, the reaffirmation of the obligation to state reasons can be seen as a concession to AG *Bobek* who in his opinion on *Consorzio* stressed the importance of the national courts' duty to state reasons.[111]

For the future, it needs to be observed whether the national courts will put these changes into practice. Unfortunately, it remains a major issue that there is no effective mechanism of EU law to enforce any violation of the obligation to state reasons, an issue that neither AG *Bobek* nor the Court did address in *Consorzio*.

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[109] Hilpold, *supra* note 57, at 3292.
[110] Obert, *supra* note 99, at 17.
[111] Opinion of AG *Bobek, supra* note 58, at para. 169.

IV. CILFIT - Still A Legal Vacuum?

As can be concluded from the foregoing, the changes to the substance of the *CILFIT* criteria in *Consorzio* are fairly limited. Ultimately, major changes were also not to be expected since they would stand in contrast to the Court's own interest. Derived from its position as the monopolist on the interpretation and validity of Union law, the ECJ has the natural aspiration to receive the 'right' preliminary references, i.e. those cases that are integral for shaping and furthering the development within the European Union. The only method to ensure this objective are criteria that allow for a wide range of referrals. Insofar, the ECJ's approach can be compared to trawl netting at the bottom at the sea.

However, *Consorzio* can be regarded as an indication that the ECJ acknowledges the increased responsibility of national courts within the cooperative system of the preliminary ruling mechanism. Against the backdrop of continuous harmonization, the gatekeeper-role taken up by national courts gains more and more importance, as they ultimately decide which cases are referred and for which cases they deem the CILFIT criteria fulfilled. The adaptations to CILFIT that were now established in Consorzio take account of this development on two levels:

First, the attempt to objectify the CILFIT standard in order to achieve a more homogeneous interpretation by the national courts. As already pointed out above, the practical significance of this more objective standard is questionable because the lack of a uniform monitoring mechanism means that there is no possibility for the ECJ to interfere in the national courts' discretion when it comes to preliminary referrals.

Second, the closer involvement of the parties to the proceeding through the requirement of subjective knowledge by the national courts takes account of the increased workload both the ECJ and the national courts are facing. The parties tend to have greater resources than the courts, especially in cases involving significant economic interests, and - with the *Consorzio* adaptations - are now incentivized to provide the national courts with the necessary knowledge to instill the amount of reasonable doubt necessary for a preliminary reference.

At the same time, the changes in *Consorzio* mean a *de facto* shift in responsibility from two actors - the ECJ and the national courts - to three actors - the ECJ, the national courts, and the parties to the proceeding. Due to the non-contentious nature of the preliminary ruling procedure, the parties to the referred procedure were traditionally of little relevance. The explicit linking of the exacerbated obligation to state reasons with the right to a fair trial (Art. 47(2) CFR) now indicates a strengthening of the role of the parties to the proceeding. Nevertheless, this measure will not exceed mere symbolic character if it is not enforceable. Once again, the need for a pan-European

enforcement mechanism for infringements in relation to the preliminary ruling procedure becomes clear. Until such a mechanism exists, the preliminary ruling procedure will indeed remain a legal vacuum to some extent. In this light, the adapted standard after *Consorzio* might help a potential future enforcement mechanism.

I. Conclusion

The ECJ's decision in *Consorzio* once again illustrates the balancing act between theory and practice that can often be observed where the framework of the European Union is concerned. Since its introduction, the preliminary ruling procedure has been a cornerstone in the coherent development of European integration and the current statistics demonstrate that its value remains undiminished. In this light, it is unsurprising that the ECJ wants to ensure its grasp as *the* authority on the interpretation of Union law for the indefinite future. At the same time, it faces the harsh reality of a rapidly growing number of preliminary references and is confronted with the challenge of ensuring the mechanism's practicality. With its adaptations to the CILFIT doctrine, the ECJ tries to resolve this conflict of interests by emphasizing the accountability of actors other than itself: the national courts and the parties to the proceeding. Of these changes, the stronger involvement of the parties to the proceeding is a particularly welcome addition. At the same time, the analysis of the *Consorzio* judgment reveals that the need for a uniform enforcement mechanism specifically designed to meet the characteristics of the preliminary ruling procedure is becoming increasingly urgent.