Preliminary rulings – a mechanism in need of repair?

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Introduction

This article takes the perspective of the national judge on the issues of preliminary rulings.[1] It will partly draw on reflections stemming from more recent cases on the duty to refer cases before a national court to the Court of Justice of the European Union (CJEU). However, it will also take into account some factors particular to the role of a national court to the debate as well as comment on recent developments in one specific national court, namely the German Constitutional Court, BVerfG.

The article is divided into the following parts 1) an introductory part on union law in general, 2) a part on the tensions within the system of preliminary rulings according to article 267 of the Treaty of the Functioning of the European Union (TFEU), the leading case on the interpretation of that article, CILFIT, and the more recent case Commission v. France from 2018, 3) a part concerning the difference between interpretation and application of union law from a national perspective and – lastly – 4) a part on the possible need for new guidance on how national courts of last instance should understand the duty to refer in article 267, especially in the light of the decision of the BVerfG in May 2020, finding a preliminary ruling from CJEU ultra vires and therefore of no legal effect in Germany.

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[1] Earlier versions of this text were presented in November 2019 at a seminar at the European Court of Justice in Luxembourg with members of all the high courts of the EU present and in September 2020 at a joint seminar in Stockholm held by the Swedish Supreme Administrative Court and the French Conseil d'État.

Union law from a national point of view

The starting point of any analysis of how national courts deal with union law must be the way union law affects national legal systems. Much can be said about this and most of the details are well known. I would therefore like to focus on a few characteristics that stand out to a national judge and give a necessary background to the issue of how the system of preliminary rulings works from a national judge's point of view. Some of the points I make concern only legislation, but some are also relevant when discussing the impact of case law from CJEU, which must be regarded as part of union law in this context.

a) The fact that there are different language-versions of union law that sometimes do not always correspond well with each other.
b) The fact that union law specifically uses its own definitions of legal concepts and actions, sometimes different from national definitions, sometimes not.
c) The fact that union law often (and in the case of Sweden almost always) is structured and phrased in a way not similar to national legislation – the level of detail, the relationship between the main rule and its exceptions and the relative lack of any specific guidance from the legislative process on how to interpret different provisions are examples of this difference from a Swedish point of view. Other national systems may have other differences, but many or most will have significant differences of some kind between their national legislative traditions and products of the union law.
d) The fact that the CJEU in its case law – for good reasons, no doubt – often will give the national courts guidance concerning the criteria, or of a number of factors, to take into consideration concerning the interpretation of a specific rule, but will not give detailed guidance on how to apply those criteria in a specific case (or in a certain set of circumstances). Many times, the national court could have known – or at least made a qualified guess – on the criteria or factors being relevant, the court's problem being rather just how to weigh them in relation to each other in a specific (legal and factual) situation. This is however still the job of the national court and the procedure of preliminary rulings is not very helpful there.

In summary I would like to provoke you somewhat in claiming that for a national court, union law – and the question of how to apply it – is almost never clear! That is of course somewhat of an exaggeration, but the abovementioned factors contribute to a situation where the uncertainty

that faces a national judge when it comes to the application of union law very often is one of degree and not of kind.

CILFIT, the success of union law and recent developments

The part of Article 267 TFEU that we are particularly interested in here is the third paragraph, which sets out the duty of courts of last resort to refer questions on the interpretation of union law to the CJEU. The case CILFIT from 1982 is still the seminal case on how to interpret that duty.[2] When it comes to the that ruling, there are a few things worth pointing out when you regard that case from a national perspective. They are all quite obvious but it can still be helpful later on to recollect them.

Firstly, it is a case in which CJEU finds exceptions to a rather clear provision in the treaties. These exceptions are based on the idea that the provision require that that there is "a question" of union law before the national court which requires an interpretation of union law. The important point is that CJEU is creating a room for maneuver for the national courts that the text of the treaties does not necessarily implies. A strict interpretation of article 267 would not give such a leeway to national courts.

Secondly, it is important to note that these exceptions were absolutely necessary; a strict interpretation of article 267 is not feasible for a number of practical and theoretical reasons. There was a need to find a balance between the tasks of national supreme courts and CJEU, even if such a balance is not obvious from the wording of the treaties, as they position the CJEU at the pinnacle of the union's legal system.[3]

Lastly CILFIT was decided in the 1980's. The Union has grown immensely since then, both in geographical scope as well as policy-wise. Union law has had more than 30 years since then to influence national legal orders and the case law of the CJEU is now a much richer and much more comprehensive source of law than it was at that time. National courts of all instances have much more experience of union law and some areas of law dealt with by national courts are more or less completely dominated by union law – VAT tax issues and public procurement, to mention only two.

Now, all of these factors connect to the issue of what it is that has made the union legal system such an unprecedented success. Common

[2] Case 283/81, EU:C:1982:335.

[3] This inbuilt tension between the position the treaties give to the CJEU and the constitutional/practical validity of such a position is discussed further below. However, it should already here be stressed that it is part of the structure of the union's legal system and thus something the CJEU has had to deal with for a long time, often with such wise balancing acts as in CILFIT.

wisdom – which I think is correct – to a large degree attributes this to the special relationship between national courts and the CJEU. National courts have found the direct access to CJEU to be a very helpful instrument and applied it in such a way that union legislation has been given effect on the national arena even when this has had unexpected results (COSTA ENEL, Francovich). The spirit of cooperation and the trust between the national courts and the CJEU has been a cornerstone in building an effective legal regime in the union. National courts of all instances have in general been very loyal to the interpretations of union law delivered by the CJEU, even when in conflict with traditional interpretations of the national legal order and/or policies. In my view, respect for the rule of law and common legal ideals such as foreseeability and stability have played an important part in this open reception of rulings from Luxembourg by national courts.[4]

Which brings us to the case Commission v. France from 2018.[5] Why? Because, from a national judge's perspective – and particularly a judge in a court of last instance – this case rocks our world a bit. Three aspects about the case stand out and at the same time provide the basics of the case.

The national case leading to the decision by the CJEU concerned taxation in rather complicated circumstances with several involved companies and issues about how tax should be handled under certain relations of ownership between these companies.

The case went to the administrative court of last instance in France, the Conseil d'État and the French court asked for a preliminary ruling from the CJEU, as it identified that the legal issues at hand were complicated and it was not clear how to interpret the law.

When the French court got its answer, it started to apply it to its case. However, in the meantime, the CJEU had made another ruling on similar legal issues, concerning British legislation. The Conseil d'État took note of that case, discussed its impact in the reasoning of its decision and found – wrongly as it would turn out – that it did not affect the French situation under consideration. The main argument for this conclusion was that British legislation on company law was different from the French and that the new case from CJEU did not affect the situation at hand.

The Commission took France to court for a breach of its treaty duties, as the French court had not referred its case to the CJEU even though there could be some doubt as to how union law should be interpreted. And the CJEU found that the French court under these circumstances was in breach of its duty to refer.

[4] Perhaps unsurprisingly, I do not subscribe to the various theories of national judges as political actors trying to enhance their institutional or personal power or as conservative preservers of their own position within the national legal system and thus inherently reluctant to apply union law. But that is a topic for another paper.

[5] C-416/17, EU:C:2018:811.

From a national judge's point of view this outcome is hard to interpret as anything but a rather stark signal to national courts of last instance that the duty to refer is to be observed very strictly indeed. Even in situations where you already have referred a question and got an answer and when you have identified and analyzed relevant case law coming from CJEU before and after the referral, you still must pose a question if there is any doubt whether your possible solution could be "wrong" from CJEU's point of view. Considering the abovementioned identification of how uncertain union law can be from a national legal perspective and the constant production of new law and new cases from the union, this has the potential of undermining the balance established by CILFIT.

Against the background of what we above have found to be the status of "clarity" in union law in general it is suggested that the message sent by the decision in Commission v. France to the national courts of last instance is that many, many more questions are required in order to fulfill the duty of article 267 (3) TFEU. Is that really what union law requires, what the union's legal system needs at this point of its development and what the CJEU wants? All these questions should probably be answered in the negative.

Interpretation and application

President Lenaerts of the CJEU has presented a clever and elegant way out of a too far-reaching duty to refer, namely, to make a clearer difference between the interpretation and the application of union law. From this perspective, national courts are often (too often) asking about the application of already known criteria in concrete cases, not about the more general interpretation of union legal norms. If national courts could be more focused on asking questions concerning the interpretation instead of application of union law, the CJEU would be able to provide clearer, more useful and faster answers, fulfilling its role to a higher degree. That is how I understand the general thrust of President Lenaert's idea.

There is much to like about this suggestion of how to move forward with the tricky issue of finding a balance in the use of the procedure of preliminary rulings. It also resounds with the experience described above that national courts often already know most of what the answer from EJC will contain and that the repetition of criteria or factors seldom are of much practical use.[6] I am also reminded of AG Jacobs proposal to CJEU

[6] Item d) above. A caveat must be included here. Firstly, national courts can definitely benefit from an "unsurprising" answer from CJEU as it may put the court on firmer ground in its legal analysis. Secondly, it does happen that the CJEU's analysis of the legal

some 30 years ago in the “pajamas-case” Weiner not to answer some more obvious questions from national courts – cases where it clearly was not difficult to interpret union law correctly, but where the national court asked anyway.[7] The court did not take up AG Jacobs’ idea, but held on to the more traditional approach of helping national courts when asked.

However, from a national judge’s perspective there is a problem with this elegant and concept-based solution to our problem of how to understand the duty to refer. For me, this problem stems from insights in the general theory of interpretation (hermeneutics) and in particular from some observations made by the German philosopher Hans George Gadamer.

According to Gadamer – and I think he is in essence right on this point – interpretation and application cannot be separated into two easily distinguished categories in any circumstance where interpretation is necessary. He points to the fact that interpretation is always done in a context where the result is to be applied in some sense (even if that can be quite mundane). Interpretation is not done for its own sake, but for practical reasons – to understand something in order to do (or abstain from) something. And that practical purpose of the interpretation will by necessity affect it in a circular way (part of the so-called hermeneutic circle). Another purpose – another context – could lead to another interpretation of the same phenomena or facts.[8]

For legal interpretation this implies that the judge is always interpreting and applying at the same time and that interpretation is always done with the intention of applying (or not applying) a certain legal norm. Judges do not try to interpret the law just for a pastime, they try to decide the outcome of cases before them concerning the lives and futures of individuals and companies. It is a practice deeply set in context. This is also, I think, part of the explanation as to why national courts sometimes refer questions to the CJEU that from the outside are difficult to see as issues of interpretation – for example the pajamas case mentioned above. That judge (or judges, as it was) thought that the problem was one of interpretation, even if a detailed one. It is difficult to say they were totally wrong, even if one could say that they could have had more confidence in their ability to interpret existing case-law at the time.

issues is different from the national court’s analysis and so the case completely “turns around” when the answer arrives from Luxembourg. For a Swedish example, see HFD 2018 ref. 38.

[7] EU:C:1997:552.

[8] A perhaps unnecessary example would be the frequently asked question “what is the time?”. Usually this would imply that the speaker would like to know the time of day, but in a setting of philosophers or quantum-physics, it could actually refer to something else, the nature of “time” as a concept. It would be a question of interpretation to decide what meaning would be the most plausible, but most of the time (!) this would be obvious for the participators of the exchange.

All in all, I think that the idea of solving the problems of too many referrals by introducing a more or less clear-cut separation between interpretation and application is a risky approach. It will not always be workable in practice and may just as well provide more uncertainty rather than clarity in the area of the complex relation between national courts and the CJEU. The best we could hope for is, I think, that some improvement may be achieved as the distinction signals a certain restrictive attitude but I find it unlikely that it will work as a game-changer in the functioning of preliminary rulings as such or as a cure of the potential ills of Commission v France. It is not enough.

Time to revisit CILFIT?

Let us now turn back to CILFIT and the perspective of national supreme courts. I earlier claimed that union law is characterized by uncertainty to a large degree, at least more so than most national law. This is also true for the case of the "rule" established by CILFIT. The reason for this is that the legal standard established in CILFIT leads to two unclear legal situations – one in the national system and one in the CJEU.

For a national court of last instance CILFIT must – for reasons already mentioned above – be interpreted as giving some leeway to the national court in when to refer a case to CJEU. That much is clear. But the case does not give much guidance on how to exercise that discretion, as it seems to give with one hand and take back with the other. I am now thinking about the various criteria the CJEU laid down in the case on when a national court could abstain from referring. Interpreted strictly, these paradoxically almost negate the main message of the case. Such an interpretation would seem irrational and must be refuted. Another interpretation has to be made but the very text of CILFIT makes this difficult.

This requires the national courts to develop their own standards within a straitjacket of legal language that does not allow for much room for maneuver. The solution to this problem will of course come to vary among the member-states, as indicted by the different number of questions asked by national supreme courts from different member states. One often overlooked explanation to this variance is, in my opinion, this fundamental lack of clarity in how to interpret and apply article 267 TFEU.[9]

[9] Most of the now vast discussion on the varying numbers of cases referred to the CJEU from national supreme courts in different member states focus on whether judges want to ask questions or on the influence of national legal/economic structures. For examples and a fruitful discussion, see Broberg, Fenger and Hansen, A Structural Model For Explaining

In my own court I think we try to be as loyal as possible to the union's legal system, while at the same time trying our best to solve the legal issues involved without overburdening the CJEU. This is not a "bright-line" standard as you can see. It is almost inevitable that some such decisions can be questioned as "wrongly" not being referred to CJEU and that some questions asked can be called "unnecessary". I imagine that that this is the state of affairs in many other member states as well. The conclusion is that we have a wide area of legal and practical uncertainty on how to apply the criteria of CILFIT in national supreme courts and that this uncertainty has been created by the case itself. This is not a very satisfactory situation and one that only the union legislator or the CJEU can address.

At the same time, the somewhat paradoxical criteria of CILFIT put the CJEU in a similar position of uncertainty and discretion. It puts the CJEU in a position with a large room for maneuver – which can be helpful in many cases – that from a national perspective can give the impression of a certain arbitrariness in the assessment of whether national courts have fulfilled their obligation to refer questions or not. This can in itself be a threat to the spirit of cooperation and trust that has been so important for the development of the union's legal system, as it may undermine the CJEU's legitimacy in the eyes of national judges. The structure of union law gives the CJEU a lot of power over national supreme courts and that power should be exercised with some care as to not run the risk of breaking the unique bond between national courts and the CJEU. One must remember that from a national judge's perspective his or her powers as a judge stem from the national constitution, not from union law, and that in any real conflict between these different legal regimes, the judge will be in a difficult position where upholding the constitutional system empowering him or her might be the only solution.

We will soon turn to these issues below, but I would here like to suggest that the decision in Commission v. France is one of those (few) instances where the CJEU's interpretation of union law is not immediately convincing to national judges. It is a "misstep" in the difficult path the CJEU has to tread in order to balance the different needs of the legal system of the union within the framework of CILFIT. Such "missteps" are perhaps unavoidable in all legal (and human) endeavour, but as the CJEU holds a (or even the) central position in the system of union law it is perhaps more hurtful for that system than any such transgression made by a national court.

Member State Variations in Preliminary References to the CJEU, 45 European Law Review 599 (2020) with references on p. 601.

A constitutional intermission

The discussion on preliminary rulings and the relation between national (supreme/constitutional) courts and the CJEU must also be framed within the larger discussion on the overall relationship between national constitutional law and union law. We know very well the basic parts of this story; union laws demand supremacy in relation to any national legal provision to safeguard the uniform application of union law while national constitutional laws demand that all transfer of national public power to an international organ be in accordance with the legal rules laid down in the constitution.

In practice this potential conflict of perspectives (and legitimacies) has been avoided. From the national perspective this has been achieved by adopting the "Solange" – formula; a compromise of restraint while threating to play the ace of spades in the form of national constitutional law. From the union law perspective, the conflict has been avoided by the CJEU by including different national constitutional demands into the basic principles of union law (as union law is built on the legal traditions of the member states, this is not such a bold move as it might seem) and thus been able to "internalize" the external threat. The CJEU has at times found that union law includes the same or similar constraint on power as national constitutional law and the potential conflict has been defused.[10] Once again, it has been a fine balance to keep for national courts as well as for the CJEU, the prospect of mutually assured destruction (MAD) looming in the background. Well, until recently, for things seem to have changed…

Let us look at two clear examples of that change and be mindful of the fact that the CJEU's decision in Commission v. France came in between these national court decisions.

In 2016 the Danish Supreme Court in the case Ajos[11] found that the conclusions of the CJEU in its preliminary ruling in C-441/14 Dansk Industri could not be given effect in Denmark due to internal Danish legal (and constitutional) factors. The national court thus ignored the answers given by the CJEU and decided the case on other grounds.

In 2020 the German Constitutional Court decided a case on the constitutionality of German participation in certain decisions of the European Central Bank (ECB).[12] This case was also decided after receiving the answer to a request for preliminary ruling from the CJEU.[13] In its decision, the national court found – in no uncertain terms – that the EU and CJEU had

[10] See such cases as Omega (EU:C:2004:614) and Wittgenstein (EU:C:2010:806).
[11] Supreme Court of Denmark, Case 15/2014, decided 2016-12-06.
[12] 2 BerVerfG, case BrV 859/15, decided 2020-05-05.
[13] Weiss and Others, C-493/17, EU:C:2018:1000.

acted outside its judicial mandate according to treaties and that its – and ECB:s – decision was not binding in Germany due to its unconstitutional character.

Both these decisions stem from the fact that the preliminary rulings of CJEU in the cases concerned did not convince the national court at all and (most likely) were believed to be obviously wrong, and not only open to legal debate (the German court said so expressly). The game has clearly changed!

So, the question is, what happens now that the genie is out of the bottle? Will there be a stalemate between national courts that doubt CJEU's decisions and the unions' institutions? Or will pressure from the Commission and further case-law from CJEU make those national courts back down? What will member states do in the meantime? Anyhow, we face the danger of a rapid decline of the spirit of cooperation between courts that has served the union so well for so long. It is difficult to say what will happen, but it seems that all involved would be well advised to really consider whether a "power-game of courts" in the EU is in the interest of judicial values such as legal certainty and protection of individual rights or political values such as stability and prosperity. Institutional prestige and "being right" may have to take a back seat when evaluating the options facing the players involved.

Conclusion

So, where does all this lead us? I would suggest that it should stimulate us to think about revisiting CILFIT and the criteria established there regarding the duty of national supreme courts to refer cases to CJEU. If it would be possible to do what the CJEU for so long has refrained from doing – to refine, revise or even refute those not very helpful criteria of CILFIT. In doing so, we would come a long way in decreasing the double uncertainty (mentioned above) that we are all subject to today.

A reform of CILFIT can be accomplished in several ways and I will briefly touch on two options for the CJEU. The first would be to boldly take on CILFIT in a new case on the interpretation of article 267 (3) FTEU and try to carve out a set of clear and comprehensive guidelines for how to understand and apply that rule today. This would be a difficult task indeed, as the text of the article sets some limits to what can be done by legal interpretation and an ambition to give national courts a "final" set of instructions on when to refer might prove impossible to achieve. The weight of tradition and the newly decided Commission v. France may also stand in the way of such a sudden overhaul of established practices. Another path would be to avoid that ambition and instead try to move more slowly,

case by case, to reform the principles of CILFIT. That approach would leave some room for dialogue with national courts as well as a certain flexibility, but it would take time and be dependent upon the existence of cases where these issues appear in a way suitable for the CJEU to deal with them. I think the latter way would be preferable for several reasons and that seeds for such a move have already been planted by the CJEU in the past.[14] Now it may be time to make those seeds grow and weed out the roots of any unwanted plants already there.

The result of such a new take on the duties of national supreme courts cannot be addressed here, but from my experience I would like to think that it could lead to a new stage in the successful story of legal cooperation and dialogue within the union's legal system, where national courts from the very beginning have played the double role of being union courts as well with some success. Given the development of the EU since the 1980's perhaps their role could be acknowledged more clearly now than in CILFIT.

However, such freedom requires trust and trust is earned. I would like to think that national courts – in particular supreme courts – by now have earned that trust by managing the effects of union law in their respective legal system for a long time. They are using what is by now established legal methods with good help from the ever-growing guidance of case-law from CJEU. Maybe the double message of CILFIT of restricted discretion no longer is needed and that it is time to let go of it?

And maybe it is first and foremost for the CJEU to close the growing gap of distrust that we have seen in the exceptional decisions of national courts of late. The court must regain its "Fingerspitzgefühl" for when its (r)evolutionary style of legal interpretation is in order and when more traditional legal thinking can do the job.[15] And this must be done with the ever-growing complexity of the union's legal order in mind as it has grown from a loose framework on certain economic freedoms to comprehensive fields of law and policies for large sectors of the member states internal affairs. Maybe the time to "skynda långsamt" (hurry slowly), as the Swedish proverb goes, is here and now.

As a closing metaphor on what this could mean in practice, I think of my own children, who quite recently have left home for a life as grown-ups. Maybe the CJEU should take the position of a parent letting go of a child in relation to the supreme courts of the member states: "I believe you can make it on your own, I trust you to make the right decisions, but I will

[14] See i.e Ferreira da Silva e Brito and Others, EU:C:2015:565.

[15] Another issue is that one might say the same about national courts, the timing of the BVergfG decision to directly oppose the CJEU could have been better than in a context where the rule of law is questioned in certain member-states and the legitimacy of the union's legal system is perhaps more important than ever. But that is also a theme for another paper.

always be there for you if you fail and give the best possible guidance from my own experience to put you back on the right track." As a national judge, could you ask for anything more?