Stanford – Vienna
Transatlantic Technology Law Forum

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European Union Law Working Papers

No. 81

The License to Kill Uniformity? The Evolution of the Acte Clair Doctrine from 'CILFIT' to 'CIM II'

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2023

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

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Fridolin accomplished his postgraduate master's degree in European and International Business Law at the University of Vienna in 2023 with highest distinction.

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Suggested Citation

This European Union Law Working Paper should be cited as:

Fridolin Fahringer, The License to Kill Uniformity? The Evolution of the Acte Clair Doctrine from 'CILFIT' to 'CIM II', Stanford-Vienna European Union Law Working Paper No. 81, http://ttlf.stanford.edu.

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Abstract

In the 1982 judgment 'CILFIT' (*Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*) the Court of Justice of the European Union (CJEU) introduced the controversial 'acte clair' doctrine, granting national courts the discretion to independently interpret EU law and refrain from referring the case to the CJEU in certain 'clear' cases.

Intended as a means of alleviating the burden on the CJEU, the doctrine also favored a division of EU law between the Union and national level(s). In the following decades, the acte clair doctrine developed a life of its own on the many domestic levels of the EU Member States. Frequently, unclear and contentious legal situations were dealt with by domestic courts without involving the CJEU, often to the frustration of individual legal actors.

With the judgment 'CIM II' (*Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*) in 2021, the CJEU aligns the acte clair doctrine with the Member States' domestic practice on the one hand and further attempts to introduce more transparency and control over the seemingly chaotic domestic behavior on the other. By requiring national courts to *e.g.*, provide reasons to justify the rejection of a request for a preliminary reference, the CJEU unequivocally calls the domestic courts for a more stringent compliance and seemingly improves individual legal actors' prospect to successfully invoke a violation of their (procedural) rights.

While the innovations may appear promising at first glance, a closer examination reveals their lack of enforceability and tendency to further promote the fragmentation and politicization of EU law at the national level(s): The conditions for claiming damages within the context of state liability are rarely met, and such claims are often decided by the same courts responsible for violating the obligation to refer in the first place. The European Commission's infringement procedure under Article 258 TFEU, by design cannot be regarded as an effective conceptual remedy. Consequently, even as of CIM II, the European Court of Human Rights remains the only present reliable redress mechanism for disgruntled individuals. However, CIM II also widens the loophole for 'renegade' courts to evade scrutiny from the European Court of Human Rights, thus creating an unprecedented opportunity for abuse and further fragmentation, particularly at the expense of the legal position of individual legal actors.

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1 Introduction, topic and structure of the thesis

1.1 Acknowledgments

I would like to express my sincere gratitude to my esteemed thesis advisor, Prof. Fina, especially for his guidance, support, and rapid feedback. His help has been important for shaping the direction and scope of this thesis.

Furthermore, I would like to thank my family for their support during my master's program, in particular the research and elaboration of this thesis. Despite the burdensome venture, their support provided me with the necessary motivation and vigor to overcome any difficulties and ultimately complete this project.

1.2 Introduction

The European Union's internal market is one of the world's largest economic areas, comprising nearly 450 million inhabitants in 27 Member States.[1] This magnificent status was achieved almost entirely by the jurisprudence of the Court of Justice of the European Union ('**CJEU**').[2]

The dogma of the CJEU was and is a simple one: Integration by equal application of EU law guided by one single interpreter. It is therefore not surprising that being 'king of the hill' is one of the CJEU's most jealously guarded prerogatives as the rejection of the EU's accession to the European Convention on Human Rights ('**ECHR**') – and thereby subordinating the EU to another, second court issuing binding and perhaps contradicting decisions within the EU jurisdiction – illustrates.

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[1] The World Bank, 'Population, total - European Union' (*data.worldbank.org*, 2021) <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=EU> accessed 4 February 2023

[2] Stefan Auer et al., 'The law as a tool for EU integration could be ending' (*chathamhouse.org*, 2021) <https://www.chathamhouse.org/2021/10/law-tool-eu-integration-could-be-ending>

Considering the CJEU's conservative and stringent control over the uniformity of EU law, it was perceived rather sensational when the CJEU fundamentally liberalized the precedential effects in the ruling 'Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health' ('***CILFIT***')[3] in 1982. Therein, the CJEU waived a considerable portion of its fundamental privilege by vesting domestic courts with the discretionary power to interpret EU law on their own and abstain from referring a case to the CJEU in specific 'clear' cases: The EU '*acte clair*' doctrine was born.

This ruling – as well as succeeding further case law – has been applied many times, however never in '*in a fully coherent and clear manner*'.[4] Rather, it bifurcated the assessment of EU law between Union and domestic level, often unlawfully depriving the individual of the competent 'legal judge' – the CJEU. This triggered a still ongoing debate in the EU legal community comprising both condemning and endorsing voices of the EU '*acte clair*' doctrine or as Advocate General ('**AG**') Capotorti described it: a '*lively controversy in progress among legal writers and discernible in decisions of national courts*'.[5]

With the latest 'update' as of the 2021 ruling 'Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA' ('***CIM II')***, the CJEU attempts to introduce more transparency and control in the seemingly chaotic domestic conduct by *inter alia* mandating courts to provide reasons in case a requested reference to the CJEU is refused.

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[3] Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. [1982] ECR 1982-03415 ('***CILFIT***')
[4] Limante, 'Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach' (2016) 54 JCMS 1384 ('***Limante 2016***') 1385
[5] Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. [1982] ECR 1982-03415, Opinion of Advocate General Capotorti ('***Opinion AG Capotorti***') para 2; Edward, 'CILFIT and Foto-Frost in their Historical and Procedural Context' in Maduro, Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) ('***Edward 2010***') 176

The current *acte clair* principle as of *CIM II*, its effects on the uniformity of EU law, and the individual litigants' remedial possibilities shall be the centerpiece of this thesis ('**Thesis**').

1.3 Research question and thesis

Question: Is the current applicable version of *CILFIT's acte clair* doctrine as of *CIM II* sufficiently countering its initial inherent fragmenting effects? How will the introduced novelties interplay with the current available remedies for the individual litigant?

Thesis: With *CIM II* the CJEU further develops the *acte clair* principle first introduced in *CILFIT* in 1982, by both attaching novel obligations such as the obligation to state reasons as well as liberalizing the multiple stringent conditions from *CILFIT*. The current version of *CILFIT*'s *acte clair* has still not sufficiently alleviated its fragmenting characteristics from its inception. Rather, the CJEU creates a greater leeway for misuse and abuse as it provides additional loopholes and thereby stimulates further arbitrary discretion.

Research gap: The author of the Thesis (**'Author**') will discuss the development of the current active version of the *acte clair* doctrine and ultimately attempt to determine its effects on the uniformity of EU law and the individual litigants' remedial possibilities in case of a breach of Article 267 (3) TFEU.

Expected findings: The author expects to find that the current version of *CILFIT* unsuccessfully refurbishes the old inadequate and insufficient model rather than bringing the *acte clair* to the 21st century and further increases the leeway for misuse and abuse.

1.4 Structure of the Thesis

In this Thesis, the Author will analyze and discuss the development of the *CILFIT* ruling and the *acte clair* doctrine, the current status quo, and its meaning for EU law as well for the remedies of the individual litigant.

In the first part of the Thesis (*chapter 2*), the Author will elaborate the reference model of Article 267 of the Treaty of the Functioning of the European Union ('**TFEU**'), its history including a brief overview of the development of the European Union jurisdictional precedent, the landslide judgment *CILFIT* introducing the *acte clair* principle to EU level jurisprudence, and the further development of that principle ultimately culminating in *CIM II*.

In the second part of the Thesis (*chapter 3*) the Author will illustrate (i) the practical conduct of courts and their different national assessment of the *acte clair* principle and diverging reference discipline, as well as an overview of (ii) the current available countermeasures and remedies to tackle any unlawful assessments of domestic courts.

On the basis on these findings, the Author will in the final part of the Thesis (*chapter 4 and 0)* attempt to systematically illustrate the current effective formula of the *acte clair* principle, how it addresses the flaws of the previous model, and the novel risks entailed.

1.5 Delineation

The Author will analyze the historical evolution of the *acte clair* doctrine from its inception in 1982 to its latest contribution in 2021 and attempt to illustrate its current effective version. Due to the undisplayable amount of possible case law both on national and EU level, the Author will focus

on the most pertinent case law of the CJEU.[6] The Thesis will incorporate pertinent case law and literature until December 2022.

The Author will focus on the aspects of fragmentation and legal protection of the individual litigant's rights and remedies and assess their effect on the 'holy trinity' of countermeasures: (i) State prosecution under Article 258 TFEU, the (ii) appeal to the European Court of Human Rights ('**Human Rights Court**'), and (iii) State liability damages under the *Frankovich/Köbler* regime.

The Author will not consider additional possible (experimental) remedies or organizational aspects, such as the workload of the CJEU, in depth.

2 The preliminary reference function of Article 267 TFEU

In the following the Author will outline the cruciality of the preliminary reference for the formation of a common economic and judicial area (*2.1.1*) and further describe the functioning and characteristics of Article 267 TFEU (*2.1.2*), in particular its absent remedial properties with regard to the individual litigant's legal position.

[6] These are *CILFIT*; Case C-99/00 *Criminal proceedings against Kenny Roland Lyckeskog.* [2002] ECR 2002 I-04839 ('***Lyckeskog***'); Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado português*. [2015] Court reports – general ('***Ferreira da Silva***'); Joined Cases C-72/14 and C-197/14 *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën.* [2015] Court reports – general ('***X & Van Dijk***'); Case C-379/15 *Association France Nature Environnement v Premier ministre and Ministre de l'Écologie, du Développement durable et de l'Énergie*. [2016] Court reports – general ('***AFNE***'); Case C-416/17 *European Commission v French Republic.* [2018] Court reports – general ('***Commission vs France***'); Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA.* [2021] ECLI:EU:C:2021:799 ('***CIM II***')

2.1 Relevance and function

2.1.1 The importance of uniform interpretation within the EU legal system

The role of the CJEU was paramount for the formation of the EU's internal market.[7] In contrast to ordinary legislation procedure, jurisprudence may create – or rather *define* – law by adjudication without being bound by any formalistic legislative procedure rule such as voting majorities, stalemates etc. Finding a judgement is therefore much more 'efficient' and 'easier' than drafting, debating, and implementing new (secondary) EU legislation, which in the past often comprised (precedented) principles previously stipulated by the CJEU.[8] Also, a court must in any event decide on a case, even in *non liquet* scenarios,[9] whereas legislation simply will not be implemented if the competent body fails to reach sufficient majority thresholds.

This above-mentioned characteristic enabled the CJEU to silently further the integration step by step even in the period when the European integration reached an impasse in the second half of the 20th century and legislative development stalled.[10] Although the European Commission ('**EC**') is often referred to as the '*engine*' of the EU,[11] it was in fact the CJEU being vastly responsible for the integrational process of the EU as a whole.

Due to its capability of ruling over the compatibility of domestic law with Union law and declaring contradicting domestic law 'void' and unapplicable, the CJEU's conduct generally resembles that

[7] Compare also Bobek, 'The Court of Justice, the national courts, and the spirit of cooperation' in Lazowski, Blockmans (eds.), *Research Handbook on EU Institutional Law* (1st edition, Edward Elgar 2016) 353
[8] Fahringer, 'Essay on European Internal Market Law' (2022) unpublished
[9] Compare also Wahl, Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' (2018) 55 CMLR 511 ('***Wahl & Prete 2018***') 512; Rabello, 'Non liquet: From modern law to Roman law' (2004) 10 Annual Survey of International & Comparative Law 63
[10] Auer et al (n 2)
[11] Thiele (2018). Europarecht (15th edition, niederle media) 93

of traditional constitutional state courts.[12] The single most important legal instrument and the '*jewel in the crown*' responsible for this both judicial and economic integration is the preliminary ruling function stipulated in Article 267 TFEU.[13] The preliminary reference function enabled the CJEU to push forward its evolutionary and transformative agenda and shape the EU's legal nature from mere obligations to a '*new legal order*' of international law.[14] Despite the preliminary reference function's rather simple nature, the CJEU used it to create the cross-border EU's judiciary system comprising and aligning both the CJEU as well as national courts to the current (and rather final) extent.[15]

Preliminary reference proceedings regularly comprise about three-quarters of all proceedings before the CJEU.[16] It is by far the most veritable cornerstone of the EU, as it helps domestic courts to interpret EU law as well as ensures that the law enshrined by the EU's 'constitution' – comprising *inter alia* the Treaty of the European Union and the TFEU (the '**Treaties**') – is equally applied in the same manner in all of the Member States of the EU by only one single interpreter.[17]

The reference procedure thereby completes the 'twin pillars of the Community's legal system', namely the direct effect and supremacy of EU law, which without '*the roof would collapse and the*

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[12] Mancini, Keeling 'From CILFIT to ERT: The Constitutional Challenge Facing the European Court' (1991) YEL 1991 ('***Mancini & Keeling 1991***') 8

[13] Craig, Búrca *EU Law: Text, Cases, and Materials* (7th edition, Oxford University Press 2020) ('***Craig & Burca 2020***') 496

[14] Case C-26/62 *van Gend & Loos v Netherlands.* [1963] English special edition 1963 00003 ('***Van Gend en Loos***'); Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 CMLR 9 ('***Tridimas 2003***') 9

[15] Chalmers et al. *European Union Law* (4th edition, Cambridge University Press 2019) ('***Chalmers et al. 2019***') 166

[16] Annual Report of Judicial Activity 2017 (2018) Publications Office of the European Union 102; Donnelly, de la Mare, 'Preliminary Rulings and EU Legal Integration: Evolution and Continuity' in Craig, de Búrca (eds.), *The Evolution of EU Law* (3rd edition, Oxford University Press 2021) ('***Donelly & de la Mare 2021***') 246, 263

[17] Report of the Court of Justice on certain aspects of the application of the Treaty on European Union [1995] EU Commission - Working Document, May 1995 para 11; Broberg, Fenger *Preliminary References to the European Court of Justice* (3rd edition, Oxford University Press 2021) ('***Broberg & Fenger 2021***') 2

two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion – beautiful but not much of practical utility.'[18]

2.1.2 Function & technical analysis of Article 267 TFEU

2.1.2.1 The provision

Article 267 TFEU (formerly Article 234 TEC and Article 177 EEC) generally outlines the institutional interactive relationship between the CJEU and the domestic courts regarding questions of interpretation of EU Law:[19] It defines the requirements for both the (i) presence of a *substantive* question of EU law as well as (ii) the *procedural* modalities of national courts when a reference is admissible ('*may*') or mandatory ('*shall*').

The provision reads as follows:

'*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is

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[18] Derrick, Alan *The substantive law of the EEC* (2nd edition, Sweet & Maxwell 1987) 28; *Mancini & Keeling 1991*, 2-3

[19] *Chalmers et al. 2019*, 166

necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court (…)'

Historically, the preliminary reference function accompanied the formation of the Community from its outset. Article 31 and 41 of the Treaty establishing the European Coal and Steel Community already defined the 'Court' to observe the common 'interpretation and application' which may give 'preliminary rulings on the validity of acts'[20] which was later incorporated more extensively into Article 177 EEC[21] and ultimately found its way into Article 267 TFEU.

Since the first reference in 1961, the CJEU amended and supplemented the preliminary reference model by its caselaw. In the beginning, also to foster the constitutional development within the EU, the CJEU accepted preliminary references more leniently and embraced even 'inappropriate' references.[22] This later changed however, as the workload of the CJEU increased.

2.1.2.2 The 'referrable' question:

Paragraph 1 of Article 267 TFEU differs between basically two scenarios in which a reference is admissible: In the first case the national court requests the interpretation of a provision directly

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[20] Treaty establishing the European Coal and Steel Community [1951] art 31, 41; *Edward 2010* p 173, *Broberg & Fenger 2021*, 1
[21] *Edward 2010*, 174
[22] Case 61/65 *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261; Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877; Joined cases 98, 162 and 258/85 *Michele Bertini and Giuseppe Bisignani and others v Regione Lazio and Unità sanitarie locali* [1986] ECR 1885; *Tridimas 2003*, 11

embedded in the Treaties (Art 267 para 1 lit a TFEU). The second case concerns the need for interpretation or verifying of the validity of secondary EU legislative acts if the national court requires further clarification of a directive or regulation or deems such incompatible with the Treaties to be set aside by the CJEU (Art 267 para 1 lit b TFEU)[23] – covering practically all primary and secondary sources of EU law.[24]

Paragraph 2 of Article 267 TFEU further defines an additional requirement, namely the requirement of substantive value of the referrable question for solving the pending case*:* A reference is generally only admissible if (i) a question about EU law (interpretation of the Treaties or interpretation or validation of secondary EU legislation) arises and (ii) '*such question virtually contributes to enable the referring domestic court to resolve the uncertainty required to adjudicate the pending legal matter.*'[25]

The CJEU therefore does not accept purely theoretical or academic questions, *e.g.,* whether a conflict between the national and community law exists. Further, the CJEU does not merely interpret EU law in an abstract manner, instead immerges into the core of the elevated dispute and renders a verdict both concrete and abstract enough[26] to provide sufficient guidance for the current pending case as well as for a general applicability in the future (*cf 2.2.1 for the precedential effects*).

Generally excluded are questions on national law, international law, private agreements, the specific application in the proceedings or procedural questions such as regarding the merits of the

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[23] Case 66/80 *SpA International Chemical Corporation v Amministrazione delle finanze dello Stato* [1981] ECR 1191; Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199; *Craig & Burca 2020*, 498

[24] Bobek (n 7) 4; Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012) O. J. C-338/01

[25] Compare also *CILFIT* para 10; Case C-350/13 *Antonio Gramsci Shipping Corp. and Others v Aivars Lembergs* [2014] EU:C:2014:1516 paras 9-10; *Wahl & Prete 2018*, 531; *Chalmers et al. 2019*, 186

[26] *Mancini & Keeling 1991*, 9; *Wahl & Prete 2018*, 533 and case law cited.

case or weighing of proof.[27] By the same token, the CJEU rejects '*purely internal*' matters comprising only (nationals of) one single Member State. However, the CJEU construes his competency over purely internal cases if (a) fundamental freedoms stipulated in the Treaties or the Charta are affected and/or (b) a Member State's purely domestic non-community provision directly and unconditionally refers to EU law.[28] Despite thereby extending the ambit of EU law, the CJEU warrants an uniform assessment of related situations to prevent a different treatment of legally different but factual similar/identical scenarios[29] and thereby unequivocally aims to counteract any divergencies from being incepted regardless of their nature.

In general, the CJEU will not question the provided merits of the case as it is for the domestic court to ascertain and define the merits of the dispute.[30] Generally or rather 'officially', the CJEU does not interfere with national legal systems and does not examine the validity of national law. The CJEU only assesses the national law's compatibility with EU law. Subsequently, it is for the referring domestic court to adequately implement the assessment into the core of the pending dispute.[31] However, it shall be noted that there are cases in which the preliminary ruling function is successfully (mis)used to attain a direct assessment of domestic legislation.[32]

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[27] *Broberg & Fenger 2021*, 121, 137 and case law cited.
[28] Case C-245/09 *Omalet NV v Rijksdienst voor Sociale Zekerheid* [2010] EU:C:2010:808 para 12; *Wahl & Prete 2018* 534, 535; *Craig & Burca 2020*, 498 and further case law cited.
[29] Compare also Joined Cases C-297/88 & C-197/89 *Massam Dzodzi v Belgian State* [1990] ECR 1990 I-3763 paras 33 et seq.; Case C-231/89 *Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Köln* [1990] ECR I-4003; Case 166/84 *Thomasdünger GmbH v Oberfinanzdirektion Frankfurt am Main* [1985] ECR *1985 -03001*; *Tridimas 2003*, 34
[30] Case 104/79 *Pasquale Foglia v Mariella Novello* [1980] ECR 1980-00745; Case C-614/14 *Criminal proceedings against Atanas Ognyanov* [2016] ECLI:EU:C:2016:514; Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] ECR 1999 I-05613; Case C-146/14 PPU *Bashir Mohamed Ali Mahdi* [2014] ECLI:EU:C:2014:1320; Case C-210/06 CARTESIO *Oktató és Szolgáltató bt* [2008] ECR 2008 I-09641 para 67; *Chalmers et al. 2019*, 168
[31] *Craig & Burca 2020*, 508-509
[32] Compare also Case C-419/04 *Conseil général de la Vienne v Directeur général des douanes et droits indirects* [2006] EU:C:2006:419; Case C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] ECR 1999 I-07447 para 46; Broberg, 'Acte clair revisted: Adapting the acte clair criteria to the demands of times' (2008) 45 CML Rev 1383 ('***Broberg 2008***') 1383, 1385 et seq.; *Donelly & de la Mare 2021*, 234

2.1.2.3 To 'may' or 'must' refer

Paragraph 2 and 3 of Article 267 TFEU define the different types of courts within the preliminary reference function. The provision distinguishes between

- lower courts which have a *discretion* to refer (Article 267 (2) TFEU) and
- supreme courts or '*courts against whose decision there is no judicial remedy under national law*', which are under an *obligation* to refer (Article 267 (3) TFEU),

provided that a decision on a question is necessary to enable a judgment (*cf 2.1.2.2 above*). If a question concerning the interpretation of EU law arises before a court against whose decision there is no appeal possible (generally supreme courts), such domestic court (of last instance) is under an obligation to refer the case to the CJEU. The rationale for the duty to refer in Article 267 para 3 TFEU is to prevent a body of domestic case law that is not in accordance with EU law from being established in a Member State.[33]

Article 267 TFEU renders the CJEU as ultimate body in charge, watching over the preliminary reference. It's caselaw on Article 267 (*cf 2.2*) supplements and further refines the obligations defined in Article 267 TFEU. Despite Article 267 (3) TFEU is phrased as 'obligation', the CJEU repeatedly emphasized it as 'independent responsibility': Since the domestic court is ultimately solely responsible, the obligation to refer is not intended as a real – enforceable – obligation in a traditional sense but rather a 'compulsory' entitlement[34] with negative effects entailed if not abided by (*cf 3.2*). The preliminary reference procedure therefore defines the relationship between the

[33] *Lyckeskog* para 14; Case C-2/06 *Willy Kempter KG v Hauptzollamt Hamburg-Jonas* [2008] ECR 2008 I-00411 para 41 *Craig & Burca 2020*, 500-501 and case law cited; *Broberg & Fenger 2021*, 207

[34] *CILFIT* para 15, Case C-118/11 *Eon Aset Menidjmunt OOD v Direktor na Direktsia "Obzhalvane I upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2012] ECLI:EU:C:2012:97 para 76; Case C-260/07 *Pedro IV Servicios SL v Total España SA* [2009] ECR 2009 I-02437 para 28; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR 2010 I-00365 para 56; *Donelly & de la Mare 2021*, 238

national courts and the CJEU as spirit of judicial cooperation, with the CJEU as interpreter sitting at the apex,[35] fortified further by the available countermeasures and remedies.

2.1.2.4 Uniformity

In order to wholly understand the complex problem deriving from *CILFIT* and the implementation of the *acte clair* doctrine, it is necessary to bear in mind the single most important achievement of the EU legal framework: The uniform interpretation and application of EU law.

Article 267 TFEU outlines the judicial interrelationship by direct cooperation between the national courts and the CJEU and aims to secure consistency, full effect, autonomy, and the uniform interpretation & application of EU law throughout the entire European Union. Not merely '*aesthetic*',[36] the uniformity of EU law is the CJEU's most precious commandment and crucial for the very existence of the EU itself.[37] The main purpose of the reference model is to warrant legal certainty across the entire Union and to counter any divergent lines of case law in (different) Member States which would jeopardize the very unity of the EU's legal order.[38] The importance of such is further highlighted by the fact, that the CJEU is even entitled to review decisions of the General Court under Article 256 (2) and (3) TFEU if there is a '*serious risk of the unity or consistency of Union law being affected.*'[39]

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[35] Compare *CILFIT* para 7; Bobek (n 7) 354 and case law cited
[36] *Mancini & Keeling 1991*, 2
[37] ibid 2; *CIM II* para 27; Mahrer, 'The CILFIT Criteria Clarified and Extended for National Courts of Last Resort Under Art. 267 TFEU' (2022) 7 European Papers <https://www.europeanpapers.eu/en/europeanforum/cilfit-criteria-clarified-and-extended-for-national-courts-of-last-resort> accessed 15 September 2022 ('***Mahrer 2022***') 268-269
[38] Case 314/85 (n 23) para 15; Case 66/80 (n 23) para 11; Report (n 17) para 11
[39] Compare also Hummelbrunner, 'The Unity and Consistency of Union Law' (2018) 73 ZOER 295, 298

2.1.2.5 Lower versus higher courts

The CJEU repeatedly held, that lower courts are entitled to refer a question to the CJEU even if a higher or supreme court has already ruled differently. According to the CJEU, national procedural rules – such as rules on binding decisions within a domestic legal hierarchy (precedent) – cannot deprive a lower court from its discretion to refer a case if such deems the higher courts ruling being in breach of EU law. The lower court must in any case have unconditional discretion to refer a case if considered necessary.[40]

Hence, Article 267 (2) TFEU strengthens the lower national courts' independence by vesting such with the ability to overturn domestic (case-)law, liberating themselves from national legal 'handcuffs'. Lower Courts are thus very important actors in the EU jurisdictional structure to provide the CJEU with cases against nationwide perhaps even protectionist tendencies, as they *inter alia* care generally less about intranational coherence and are considerably more 'reference-friendly' than supreme courts.[41]

2.1.2.6 The legal position of the individual litigant

Article 267 TFEU does not constitute a means of redress available to the parties of the dispute.[42] The preliminary ruling is unequivocally framed as 'reference' and not as an appellate model. Paired with the above-elaborated sole discretion of the domestic courts, no individual has an invokable

[40] Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR 2008 I-09641 paras 80, 93, 98; *Donelly & de la Mare 2021*, 239; See further Broberg, Fenger, 'Preliminary References as a Right— But For Whom?' (2011) 36 ELRev 276
[41] Compare also Schmidt *The European Court of Justice and policy process* (1st edition, Oxford University Press 2018) 37; Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR 2005 I-09981; Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19 JEPP 76 ('***Davies 2011***')
[42] *CILFIT* para 9

and enforceable right to have the case elevated and heard before the CJEU.[43] Only once the reference is made the litigant parties shall be heard in the proceedings before the CJEU.[44]

Further, in contrast to the subsequent rendered judgment of the domestic court implementing the CJEU's findings, the CJEU's 'judgment' or rather 'interpretative authority' itself is addressed only to the referring national court and is thus not enforceable neither by nor against any of the parties to the pending dispute.[45]

The domestic courts therefore serve as 'gatekeepers'[46] as they solely and unconditionally decide whether to refer a case or question irrespective of the wishes of the parties.[47] The role of the litigating parties is therefore limited to create the initial dispute which *might* trigger a reference and proceedings before the CJEU,[48] whose function resembles that of an '*expert witness*'[49] providing assessment of EU Law.

It shall be mentioned however that within the fair trial case law under Article 6 ECHR, the preliminary reference function is also considered as '*mechanism safeguarding the individual right to a fair trial*'[50] as will be elaborated extensively further below (*cf 3.2.4*).

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[43] *Craig & Burca 2020*, 496; *Chalmers et al. 2019*, 168
[44] Consolidated Version of the Rules of Procedure of the Court of Justice [2012] OJ L 265, 29.9.2012, p. 1–42, articles 96, 104; *Donelly & de la Mare 2021*, 249; Case C-169/15 *Montis Design BV v Goossens Meubelen BV* [2016] ECLI:EU:C:2016:790, Opinion of Advocate General Sanchez-Bordona 45 *Chalmers et al. 2019*, 168
[45] *Broberg & Fenger 2021*, 1
[46] *Chalmers et al. 2019*, 168
[47] Case C-251/11 *Martial Huet v Université de Bretagne occidentale* [2012] ECLI:EU:C:2012:133 para 24
[48] *Supra* note 44
[49] *Chalmers et al. 2019*, 170
[50] Krommendijk, '"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer' (2017) 42 ELRev 46 ('***Krommendijk 2017***')

2.1.2.7 The effects of the CJEU ruling

After having received the rendered judgment of the CJEU, the domestic court is bound to apply the *abstract* verdict of the CJEU to the *concrete* merits of the case. Despite the Treaties do not explicitly vest the judgements of the CJEU with precedential effects, they are *de facto* binding to all national courts and authorities and indirect sanctions for disregarding the case law of the CJEU may accrue (*cf 2.2.1 and 3.2*).[51]

2.1.3 Conclusion

Concludingly it can be held, that the preliminary reference function in Article 267 TFEU served as a vital contributor for creating both a common economic and judicial area by streamlining the interpretation and application of EU law equally within the entire EU. The obligation to refer in Article 267 (3) TFEU aims to prevent a body of national case law that is not in accordance with EU law from being established in any of the Member States. Albeit the preliminary reference is by no means an appeal mechanism for individual litigants, as the sole discretion rests with the domestic courts only.

2.2 *CILFIT* & subsequent caselaw: The history and development of the *acte clair* doctrine in EU law

Based on the elaborations on Article 267 TFEU and the importance of uniform interpretation above, the Author will in the following (i) illustrate the (historical) development of the EU precedent (2.2.1), (ii) the judgment of *CILFIT* initially incepting the *acte clair* (2.2.2) as well as (iii) follow-up case law amending the *acte clair* principle (2.2.3). A systematic (consolidated) overview of the current effective *CILFIT criteria* will be provided in a later stage (*cf 4.1.*)

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[51] Compare Bobek (n 7) 359, 361-362 and further cited references

2.2.1 Development of the EU 'precedent'

The qualification of a question being 'necessary to enable' to render a judgment is strongly tied to whether a similar or identical question has already been answered by the CJEU in the past and thus a pertinent precedent exists. The idea of such precedent in EU jurisprudence dates back to the early stages of the Community: In the 1963 case *Da Costa en Schaake*[52] ('***Da Costa***') the CJEU held, that similar or materially identical questions that have already been answered in a preceding case may cancel the obligation to refer. The national court may simply refer to the previous judgment, if the interpretative questions are identical and no new factors or merits are presented.[53] Hence, already in the sixties the CJEU recommended not to interpret Article 267 (3) TFEU too strictly and literal and implicitly provided for an escape valve in certain scenarios.[54]

This precedential effect was further iterated in the case 'ICC', where the CJEU made it clear, that its judgments – despite primarily affecting the legal relationship *inter partes* – unequivocally have multilateral effects and should thus be relied upon in succeeding pending matters.[55] Today, the precedential effects are explicitly enshrined in the CJEU's procedural rules which explicitly feature the term '*existing case-law'*.[56]

Da Costa originally turned the bilateral dialogue system between the CJEU and the referring court into a multilateral one,[57] in which a preliminary judgment unfolds effects on all other courts regardless of their previous participation. The idea of the precedent was to prevent identical cases

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[52] Joined cases 28 to 30-62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] English special edition 1963 00031 ('***Da Costa***')
[53] ibid
[54] Arnull 'The Use and Abuse of Article 177 EEC' (1989) 5 MLR 622, 623; *Da Costa*
[55] Case 66/80 (n 23) paras 13 et seq.
[56] Rules of Procedure (n 44) art. 99
[57] *Craig & Burca 2020*, 507

to be unnecessarily elevated to the CJEU just for it to reach the identical previous assessment. However, the regime of precedent inevitably entails certain 'error costs' as domestic courts might misinterpret past CJEU rulings,[58] as will be extensively elaborated below (*cf 3.1*).

In essence, the CJEU softened the stringent preliminary reference regime already about 20 years before *CILFIT* by allowing 'precedents' to circumvent the strict phraseology of Article 267 (3) TFEU.

2.2.2 The *CILFIT* case

Nearly 20 years after *Da Costa* initially established the European precedent, the CJEU extended the precedential effects in the landslide decision of *CILFIT* in 1982 by turning the obligation to make references to the CJEU into a discretionary decision.[59] In *CILFIT* the Italian Supreme Court made a preliminary reference, inquiring clarification on whether paragraph 3 of Article 267 TFEU (*back then Art 177 (3) EEC*) was '*conditional on the prior finding of a reasonable interpretative doubt*'.[60] In its response, the CJEU seized that opportunity to further liberalize the obligation to refer in Article 267 (3) TFEU by enabling domestic courts of last instance to refrain from a reference if certain criteria were fulfilled and thereby turning the obligation to refer into a discretionary choice: The *acte clair* theory in EU jurisprudence was born.[61]

It shall however be noted, that despite many commentators and Advocate Generals had used and proposed the term *acte clair* prior to *CILFIT*, the CJEU initially refrained from adapting such.[62]

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[58] ibid 530
[59] Sarmiento, 'Cilfit and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe' in Maduro, Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) ('***Sarmiento 2010***') 193
[60] *CILFIT* (n 3); Arnull (n 54) p 624
[61] Kornezov, 'The new format of the acte clair doctrine and its consequences' (2016) 53 CMLR 1317, 1317 ('***Korenzov 2016***'); compare also *Sarmiento 2010*, 193 et seq.
[62] *Edward 2010*, 179

Instead in *CILFIT*, the CJEU circumscribed the *acte clair* as 'reasonable-doubt-test',[63] a unique Europeanized version of the original French *acte clair*. However, ultimately, the CJEU itself adapted the term *acte clair* itself as a – seemingly – substitute term for the *reasonable-doubt-test*.[64]

The CJEU ruling (essentially) reads as follows:

'(…) *12 The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by the third paragraph of Article 177* [now Article 267 paragraph 3 TFEU] *might none the less be subject to certain restrictions.*

13 It must be remembered in this connection that in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 (Da Costa v Nederlandse Belastingadministratie (1963) ECR 31) the Court ruled that: "Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law … to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

14 The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have 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.

15 However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

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[63] *CILFIT* para 16
[64] Compare *X & Van Dijk* paras 59, 60

> *16 Finally, 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. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.* (…)'[65]

The CJEU thus understands Paragraph 3 of Article 267 TFEU as providing exceptions (the '***CILFIT scenarios***') in which a court of last instance may refrain from a reference if:

- the question is irrelevant,
- the question has already been decided or there exists a line of case law from which the answer is apparent (*acte éclairé*),[66] or
- '*the correct application of Community law is so obvious as to leave no scope for any reasonable doubt*' (*acte clair*)[67] even if pertinent case law (precedent) is absent.[68]

In the course of *CILFIT*'s reference proceedings before the CJEU, AG Capotorti dealt with the concept of *acte clair* and described it as '*if a provision is unequivocal, there is no need to interpret it*'.[69] Originally stemming from the French High Court jurisprudence, *acte clair* served the French courts to escape the firm grip of the executive body in competency disputes: Initially, under French law, the interpretation of international treaties was a privilege reserved to the executive body only, degrading the French courts to mere applicants of such interpretations. However, by declaring an

[65] *CILFIT* paras 12-16
[66] ibid para 13; compare *Broberg & Fenger 2021*, 210
[67] **Note**: In this thesis The Author will exclusively focus on the second case – the acte clair – as it poses the biggest discretion of interpretation and thus the biggest threat of fragmentation.
[68] *Craig & Burca 2020*, 505
[69] Arnull (n 54) 624; *Opinion AG Capotorti* para 4.

answer to a question 'clear and unambiguous', the French courts could immediately apply their view without having to priorly inquire an interpretation from the competent executive body.[70]

One should remember that the idea of an *acte clair* doctrine in EU law was actually not that of a novelty and dates back long before *CILFIT*. Already in 1963 AG Lagrange proposed the concept of *acte clair* to the CJEU in his opinion to the case *Da Costa*. He advocated, that in case a provision of EU law is unequivocal and unambiguous, such self-evident scenario – or *acte clair* – does not require any interpretation,[71] as it rather merely awaits for the mere application of the domestic court. The CJEU however rejected the proposal and rendered the above-elaborated EU-precedent instead (*cf 2.2.1*).[72]

In *CILFIT* however, bearing in mind how the French High Court had been (*deliberately mis*)applying the French *acte clair* to circumvent the obligation to refer a case (*cf 3.1.4*), AG Capotorti firmly advocated against AG Lagrange's proposal of the *acte clair*.[73] He held that the decision whether to make a preliminary reference, should be based on objective and specific criteria. He advised against referring only in cases where a '*reasonable interpretative doubt has arisen*', adding '*subjective and uncertain factors*', capable of preventing the reference model in Article 267 TFEU to attain its goal, namely to ensure '*certainty and uniformity in the application of Community law*'.[74] He highlighted, that before applying any provision of EU law, it is a logical

[70] Petric, 'How to Make a Unicorn or 'There Never Was an "Acte Clair" in EU Law': Some Remarks about Case C-561/19 Consorzio Italian Management' (2021) 17 CYELP 307 ('***Petric 2021***') 309; *cf* for a detailed discussion *CIM II*, Opinion of Advocate General Bobek ('***Opinion AG Bobek***') para 95
[71] *Da Costa*, Opinion Advocate General Lagrange
[72] *Da Costa* (n 52)
[73] *Opinion AG Capotorti* para 4; *Edward 2010*, 177
[74] *Opinion AG Capotorti* para 7

and practical necessity to first determine the meaning and scope of such, (*cf 4.2.3*),[75] thus inevitably involving an interpretative step.

The CJEU compromised and abstained from implementing the *acte clair* in its original wide French meaning, however giving it somewhat of a confined support:[76] The CJEU furthered the precedential effects from *Da Costa* by incepting the *reasonable-doubt-test*,[77] the EU variant of the French *acte clair*, however enshrined with certain stringent conditions:[78]

These conditions were further elaborated in paragraphs 16 to 21 of the *CILFIT* ruling in a detailed manner:

> '(…) *16 Finally, 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. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.*
>
> *17 However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.*
>
> *18 To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.*

[75] ibid para 4
[76] *CILFIT* paras 16 et seq.; *Craig & Burca 2020*, 530; *Edward 2010*, 177
[77] *CILFIT* para 16
[78] ibid para 16 et seq.; Compare also *X & Van Dijk*, Opinion AG Wahl para 53, *Sarmiento 2010*, 195

19 It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

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

21 In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community (…)'[79]

In a nutshell, the CJEU required, cumulatively, that the domestic court:

- ✓ …'*must be convinced*' that the answer to the question '*is equally obvious to the courts of the other Member States and to the Court of Justice*';[80]

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[79] *CILFIT* paras 16-21
[80] ibid para 16

- ✓ … must consider the EU law's '*characteristic features and the particular difficulties to which its interpretation give rise*';[81]
- ✓ … must consider that the different official languages of the EU are equally authentic and require a comparison for interpretation;[82]
- ✓ … must take into account that EU law uses unique terminology *sui generis* and further, that any legal concept deriving from EU law must be interpreted detached from possible national understandings;[83]
- ✓ … must interpret the question in the light of EU law as a whole,[84] hence consider the teleological and contextual aspects, and the objectives and evolutionary character of EU law.[85]

With *CILFIT* the CJEU initiated a leap forward in decentralizing the interpretation of EU law by entrusting national courts of last instance a limited wariness of such. By enshrining this novel clearance with strict conditions, the CJEU at the same time however secured and entrenched its position as a 'docket' controlling supervisor.[86]

Within this newly more federalized judicial system, national courts were valorized from mere applicants to (creative) actors of EU law,[87] however of limited nature: If applied literally and in an (utmost) strict manner, the *CILFIT criteria* would barely leave a realistic ambit less likely than finding a '*unicorn*'[88] or as *Mancini* and *Keeling* noted: It could not be reasonably expected for a national court to compare all languages, consider the characteristic features of Community law as

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[81] ibid para 17
[82] ibid para 18
[83] ibid para 19
[84] ibid para 20
[85] *Korenzov 2016*, 1321
[86] *Sarmiento 2010*, 192-193
[87] *Tridimas 2003*, 12; Compare also *Da Costa*
[88] *X & Van Dijk*, Opinion AG Wahl para 62

well as the objectives of Community law and its evolutionary character of such in the light of the Community as a whole etc. when determining whether a case was clear and free of doubt.[89] It comes only natural, that the national courts developed a more hands-on approach when applying the *CILFIT criteria*, resulting in the domestic *acte clair* case-law being such a fragmented chaos (*cf 3.1*).

With the many tweaks in *CILFIT* and the further liberalization of the precedent effects therein, the CJEU unequivocally addressed the surging numbers of preliminary references due to the legal and geographical growth of the EU (*cf 3.1.1*), albeit, inevitably entailing possible '*error costs*'[90] (*cf 3.1*).

2.2.3 Further developments

Unsurprisingly, the development of the EU *acte clair* doctrine did not stall with its initiation in the early eighties. The *acte clair* doctrine was later even incorporated into the CJEU's rules of procedure, providing for a truncated procedure by way of an 'procedural order' if one of the *CILFIT scenarios* is given.[91] It was however decades later, when the CJEU seemingly started to amend the original conditions:

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[89] *Mancini & Keeling 1991*, 3-4
[90] Craig, 'The Three Limbs of CILFIT' in Maduro, Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) 189
[91] Rules of Procedure (n 44) art. 99, 104; Compare also Vukcevic, 'CILFIT Criteria for the Acte Clair/Acte Éclairé Doctrine in Direct Tax Cases of the CJEU' (2012) 40 Intertax 654, 656

2.2.3.1 Lyckeskog

In judgments that succeeded *CILFIT*, the CJEU generally declined a relaxation of the *CILFIT criteria*.[92] However, the CJEU did not completely preclude the possibility in *Lyckeskog* in 2002.[93] Therein the CJEU had to deal with the question whether a court of last instance may refrain from referring a question in a clear case albeit not covered by the previously prescribed *CILFIT criteria*.[94] The CJEU did not seize the opportunity to reiterate the original *CILFIT criteria*, instead merely referred to *CILFIT* in a very rudimentarily manner ('(…) *limits accepted by the Court of Justice (CILFIT)*'). The omission of taking a stance on the *CILFIT criteria*, as some commentators perceived, indicated that the CJEU did not preclude the possibility that the criteria could be adjusted[95] and may therefore be understood dynamically.

2.2.3.2 Ferreira da Silva e Brito & X and Van Dijk

In 2015, more than 30 years after *CILFIT*, the CJEU for the first time seemingly altered the *CILFIT criteria* in the cases *João Filipe Ferreira da Silva e Brito and Others v Estado português* ('***Ferreira da Silva***') and *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën* ('***X & Van Dijk***'). Due to their simultaneous release and similar content, the Author will debate both cases in tandem in the following:

In *Ferreira da Silva*[96] a Portuguese court declined a requested preliminary reference since it considered the interpretation of the term in question, namely 'transfer of a business', was beyond

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[92]; C-461/03 *Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR 2005 I-10513; Case T-47/02 *Manfred Danzer and Hannelore Danzer v Council of the European Union* [2006] ECR 2006 II-01779,; Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR 2005 I-08151; *Donelly & de la Mare 2021*, 243

[93] *Lyckeskog* (n 6); *Chalmers et al. 2019*, 189

[94] *Lyckeskog* para 20,

[95] ibid paras 13 et seq.; *Broberg 2008*, 1387

[96] *Ferreira da Silva e Brito* (n 6)

any reasonable doubt. In the subsequent damages proceedings on the grounds of an alleged violation of Article 267 TFEU[97] (*cf 3.2.3*) the domestic court had to deal with the question, whether lower contradicting case law precluded an assessment to be beyond reasonable doubt, which it elevated to the CJEU for further clarification.[98] Relatedly, in the second case *X & Van Dijk*[99] the CJEU had to deal with the question, whether a court of last instance could find an *acte clair* regardless a lower court already referred the matter in question to the CJEU.[100]

In *Ferreira da Silva*, the CJEU ruled that a case may still be *acte clair*, even if other national courts have decided otherwise, therefore allowing a certain, limited scope for disagreement. However, courts of last instance are under an obligation to refer in any case if there are either divergent interpretations within (conflicting lines of) domestic case law or there is a chance of contradicting decisions also with those of other Member States.[101]

It shall be duly noted that *Ferreira da Silva* was the first case in which the CJEU confirmed a violation of the obligation to make a preliminary reference:[102] The CJEU found that the objective 'transfer of business' was highly contested in many Member States, evidencing difficulties in interpretation and thus a risk of divergencies in judicial decisions in the EU. In order to counter that risk, the Portuguese Supreme Court would have had to elevate the matter to the CJEU for further clarification[103] (*cf 3.1.4, 3.2*).

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[97] *Ferreira da Silva*; Weber, 'Shining a light on the acte clair' (leidenlawblog, 22 September 2015) <https://www.leidenlawblog.nl/articles/shining-a-light-on-the-acte-clair> accessed 4 August 2022
[98] *Ferreira da Silva;* Weber (n 97)
[99] *X and Van Dijk*; Weber (n 97)
[100] *X and Van Dijk;* Weber (n 97)
[101] *Ferreira da Silva e Brito* paras 42-44;
[102] *Limante 2016*, 1391
[103] *Ferreira da Silva e Brito* para 44, *Limante 2016*, 1392

In *X & Van Dijk* the CJEU showed more tolerance and held that a lower court's preliminary reference does not preclude a court of last instance from considering an *acte clair*.[104] The CJEU further emphasized the sole and independent responsibility of courts of last instance for determining whether the case involved an *acte clair*.[105]

The discrepancy between the two judgments, namely a previous reference of a lower court not precluding an *acte clair* (*X & Van Dijk*) on the one hand while on the other conflicting domestic lines of case law and differing interpretations in other Member States precluding such (*Ferreira da Silva*) was later picked up and criticized by AG Bobek in *CIM II*.[106] *Limante* however traced the different treatment in the circumstances of the merits: *Ferreira da Silva* involved a question giving rise 'to a great deal of uncertainty' whereas such was absent in *X & Van Dijk* .[107]

More important is however how the CJEU dealt with the individual *CILFIT criteria* to establish an *acte clair* case, in particularly what was omitted: In *Ferreira da Silva*, the CJEU only briefly reminded of the *CILFIT* case law however not mentioning the strict requirements (*cf 2.2.2*). The CJEU skipped the requirements of other courts assessing the same way, the language comparison, the EU specific terminology and the teleological and contextual interpretation.[108] In *X & Van Dijk* the CJEU referred to the *CILFIT criteria* only briefly, not elaborating on its content.[109]

Overall, the literature world perceived the elaborations in these two judgements as a new page being heralded in the history of the *acte clair*, introducing relaxation and leniency to the originally

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[104] *X & Van Dijk* para 60; Weber (n 97); **Note:** previously the CJEU found similar for administrative decisions within a Member State's jurisdiction, compare also Case C-495/03 (n 92) para 33; *Limante 2016*, 1390
[105] *X and Van Dijk* para 58
[106] *Opinion AG Bobek* para 83; compare also *Mahrer 2022*, 267
[107] *Limante 2016*, 1392
[108] *Ferreira da Silva* paras 38 et seq.; *Korenzov 2016*, 1323
[109] *X & Van Dijk* para 60-61; *Korenzov 2016*, 1323

stringent conditions.[110] However, in subsequent judgments the CJEU reiterated the *CILFIT criteria*, and some authors found it 'unclear' whether there really was a solid change in the line of *CILFIT* case law.[111]

2.2.3.3 Association France Nature Environment

About a year after *X & Van Dijk* and *Ferreira da Silva* were handed down, the CJEU took a slightly different stance in the case *Association France Nature Environment* ('***AFNE***').[112] The CJEU further reiterated the *CILFIT criteria* in a more detailed manner, namely the *reasonable-doubt-test* and the 'equally obvious' criteria (para 16 *CILFIT*),[113] the EU's holistic interpretation methods (para 17 and 20 *CILFIT*),[114] as well as the EU law's specific characteristics and difficulties of interpretation and judicial divergencies (para 21 *CILFIT*).[115] Interestingly, the CJEU thereby elaborated the *reasonable-doubt-test* as involving a 'slightest doubt'.[116] The incoherence between *AFNE* and the preceding judgments, particularly about the 'equally obvious' requirement, did not remain uncriticized.[117] It is further noteworthy, that the CJEU in any case mandates a reference if a refusal might lead to a possible departure from EU law (*the so-called Inter-Environment Wallonie criteria*).[118]

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[110] Compare also *Korenzov 2016*, 1325; *Chalmers et al. 2019*, 194; *Donelly & de la Mare 2021*, 243
[111] *Craig & Burca 2020*, 514
[112] *AFNE*; *Broberg & Fenger 2021*, 214
[113] *AFNE* para 48
[114] ibid paras 49
[115] ibid para 50
[116] ibid para 51
[117] Compare also *Broberg & Fenger 2021*, 215
[118] *AFNE* para 29 et seq. and further cited case law.; *Chalmers et al. 2019*, 194

2.2.3.4 Commission vs France and Belgium vs Commission

In 2018 in *Commission vs France*[119] ('Advance Payments', an Article 258 TFEU prosecution case about the violation of Article 267 TFEU, *cf 3.1.4, 3.2.2*) the CJEU generally referred to *CILFIT*, *Ferreira da Silva*, and *AFNE* however omitting the 'equally obvious' criteria.[120] The CJEU further ruled, that if 'reasonable doubt' exists, a refused reference poses a violation of Article 267 (3) TFEU capable of entailing Art 258 TFEU prosecution.[121] This was the first time a Member State was successfully prosecuted by the EC for failing to meet the obligation in Article 267 (3) TFEU.[122]

A year later, in 2019, in *Belgium v Commission* ('European Agricultural Guarantee Fund'), the CJEU again omitted the 'equally obvious' criteria.[123] *Bromberg* and *Fenger* took this departure from the *CILFIT criteria* as opportunity to declare the 'equally obvious' criteria no longer relevant, however acknowledging the uncertainty added by *AFNE*.[124]

2.2.3.5 CIM II

The 2021 case of *CIM II*,[125] and current peak of the *CILFIT* case law, may be considered a caesura in the incoherent and arbitrary past of the *acte clair* principle. Compared to the previous judgments it appears that the CJEU took the *acte clair*'s 40-year anniversary as opportunity to 'spring clean' and overhaul the badly aging jerry-rigged *CILFIT criteria* to better resonate with the present's pace and *Zeitgeist*. Therein the CJEU clarified the highly incoherent principles and contradicting lines

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[119] *Commission vs France* (n 6)
[120] ibid para 110 et seq.
[121] ibid para 112; Turmo, 'A Dialogue of Unequals – The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU: ECJ 4 October 2018, Case C-416/17, Commission v France' (2019) 15 ECLR 340, 346-347
[122] Turmo (n 121) 340 et seq.
[123] Case C-587/17 P *Kingdom of Belgium v European Commission* (European Agricultural Guarantee Fund) [2019] ECLI:EU:C:2019:75 para 77; *Broberg & Fenger 2021*, 215
[124] *Broberg & Fenger 2021*, 215; see further Arnull 'The UK Supreme Court and References to the CJEU' (2017) 36 YEL 314
[125] *CIM II* (n 6)

of case law in an extraordinary holistic and detailed manner as well as altered some of the core principles of the previous *acte clair* version(s).

In his opinion to the judgement, AG Bobek found that EU law, at its present level of maturity, no longer requires stringent oversight from the CJEU and stressed the need for a more liberal, decentralized, and vertical judiciary partnership in favor of domestic courts.[126] He advocated radically modifying the *CILFIT criteria* and implementing a more systematic test: A court of last instance should be mandated to refer a case only if (i) there is general doubt of the *interpretation* of EU law (ii), there is more than one objectively justified and reasonable possible interpretation, and (iii) the answer is underivable from existing case-law.[127] He further demanded to explain a refusal with 'adequate reasons'.[128] Thereby, the AG proposed turning the preliminary reference model upside down from a 'subjective reasonable doubt' to 'objective divergences in case law'.[129]

The CJEU basically rejected the AG's (radical) proposal and reaffirmed the previous *CILFIT criteria* in principle,[130] however both implementing minor – *evolutionary* – linear tweaks as well as unprecedented – *revolutionary* – novelties of scale (*cf 4.2, 4.2.1*):

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[126] *Opinion AG Bobek* paras 122 et seq;
[127] *Opinion AG Bobek* paras 131 et seq., 134;; Cecchetti, 'CILFIT 'Motionless Titan' Has Moved, albeit Softly and with Circumspection: Consorzio Italian Management II' (realaw.blog, 21 January 2022) <https://realaw.blog/2022/01/21/cilfit-motionless-titan-has-moved-albeit-softly-and-with-circumspection-consorzio-italian-management-ii-by-lorenzo-cecchetti/> accessed 30 October 2022 ('***Cecchetti 2021***')
[128] *Opinion AG Bobek* para 166
[129] *Cecchetti 2021*; Jäger**, '**CILFIT nach dem Urteil Consorzio: Rückenwind für den Acte clair' (2022), EuZW 2022 ('***Jaeger 2022***') 20
[130] *CIM II* paras 33 et seq.; *Jaeger 2022*, 18, 21; *Mahrer 2022*, 270

a) Maintaining CILFIT in principle

The CJEU rejects the AG's call for a more objective standard of the *acte clair*. Rather, the CJEU reaffirms the previously subjective assessment and the sole competency and responsibility of the domestic courts.[131]

b) The obligation to state reasons

As of *CIM II*, if a domestic court considers refusing a reference, it must henceforth justify its decision by providing reasons as to how the current case or question is covered by one of the *CILFIT scenarios*.[132] With this compliance measure the CJEU now basically obliges domestic courts to explain both why a reference is necessary or why such is not. As of *CIM II*, a domestic court must justify either decision, as the obligation to provide reasons is not only applicable to the *acte clair*, but rather to all *CILFIT scenarios.*[133] Strictly speaking, such duty is not a novelty at least with other legal mechanisms such as the Human Rights Court (*cf 3.2.4*) or within some Member States such as Sweden, which required to provide reasons long before *CIM II* (*cf 3.1.4*).

Further, despite reiterating that the preliminary reference does not serve the purpose of an available redress for the individual litigant,[134] the CJEU for the first time explicitly links the preliminary reference function directly and explicitly to the protection of individual rights conferred by Article 47 of the Charter of Fundamental Rights of the European Union ('***CFR***'). Thereby the CJEU in some way concedes that the preliminary reference function somehow serves as a supervisory

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[131] *CIM II* paras 39-46, compare also *Opinion AG Bobek*; *Jaeger 2022,* 21
[132] *CIM II* para 51
[133] ibid; *Mahrer 2022*, 271
[134] *CIM II* para 54

mechanism of the highest national courts in some way,[135] seemingly opening new possibilities for disgruntled individual litigants.

c) From 'application' to 'interpretation'

Furthermore, the CJEU for the first time discards the wording 'correct application' in favor of the term 'correct interpretation'.[136] In so doing, the CJEU further relaxes the stringent method in favor of domestic courts, rebalancing the reciprocal rights and interplay between the CJEU and domestic courts, shifting questions of application into the sole competency of domestic courts while remaining questions of interpretation within its own.[137]

d) Equally obvious to courts of last instance

A matter must now be equally obvious '*to courts of last instance*',[138] continuing the domestic hierarchical approach established in the previous case law (in particular *Ferreira da Silva* and *X and Van Dijk*, *cf 2.2.3.2*), reminding that the 'equally obvious' criterion is very well alive.

e) Lawfully restricting domestic procedural rules

The CJEU further repeats and states that procedural rules limiting the preliminary reference are not *per se* incompatible with EU law, provided that the principles of equivalence and effectiveness are abided by.[139]

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[135] Compare *CIM II* paras 29, 51; *Cecchetti 2021*
[136] *CIM II* para 33
[137] ibid; *Cecchetti 2021*; *Jaeger 2022,* 21
[138] *CIM II* para 40
[139] ibid para 61 et seq.; compare further Case C-3/16 *Lucio Cesare Aquino v Belgische Staat* [2017] ECLI:EU:C:2017:209; *Cecchetti 2021*

f) Amendment of comparable language Versions

A conservative and literal understanding of the *CILFIT criteria* technically demanded domestic courts to compare all 24 official EU-languages. In *CIM II*, the CJEU now attenuated this utmost unfeasible requirement: Domestic courts henceforth are not any longer required to consider all authentic languages of the EU. They are however urged to bear in mind the divergences stemming from the different language versions, especially when emphasized by one of the parties to the dispute.[140] The CJEU explicitly held, that examining one single language version may never suffice the language comparison requirement.[141]

g) Competing possible interpretations

The CJEU ruled that competing other possible interpretations do not *per se* preclude a case being *acte clair*, as long as none of these seem sufficiently plausible.[142] In other terms, the doubts that are not-sufficiently serious do not automatically negate the possibility of invoking the *acte clair* doctrine.[143]

h) Update on jurisprudential divergencies

The CJEU further reiterates the case law (in particular *Ferreira da Silva*) on inconsistencies and holds that existing diverging lines of case law within one or between several Member States do not *per se* preclude an *acte clair*. The existence of such however requires the domestic court to be particularly careful in its assessment.[144]

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[140] *CIM II* para 44 et seq; *Petric 2021*, 319
[141] *CIM II* para 43
[142] ibid para 48
[143] *Cecchetti 2021*
[144] *CIM II* para 49

i) Multiple references

It is further noteworthy that the CJEU found multiple preliminary references within the same proceedings admissible, required even if necessary to solve a question of EU law. The assessment of such a situation however remains in the sole discretionary power of the domestic court alone.[145]

2.2.4 Conclusion

In the past, the CJEU took the liberty of amending the principles rather inconsistently and incoherently. Especially *CIM II* indicates, that an omission may not be automatically regarded to constitute an abrogation of the *CILFIT criteria* as they might reemerge at a later stage.

3 Reference discipline, misconduct, and available countermeasures

In the following chapter the Author will elaborate the manner in which domestic courts (mis)apply the *CILFIT criteria* (*3.1*) as well as the availability and feasibility of countermeasures against such behavior (*3.2*).

3.1 Reference discipline

While the caseload problem[146] addresses the CJEU's working capacity and proper attending to all elevated cases, the reference discipline refers to the flipside of that aspect, namely if and how the domestic courts initially make a preliminary reference.

The shifting positions and partially even contradicting stance of the CJEU on the *CILFIT criteria* result in considerable uncertainties for domestic courts when to refer a case. This turned the – originally as exception to the rule rendered – permission into a '*quagmire*', making the *acte clair*

[145] *CIM II* para 59
[146] See further *e.g., Craig & Burca 2020*, 531 et seq.

susceptible to both errors and misuse,[147] ultimately resulting in an analysis of the CJEU's Research and Documentation Directorate (*cf 3.1.2*).

In the following, the Author will elaborate on the reference discipline of the courts, in particular, how the *acte clair* and the *CILFIT criteria* are interpreted and frequently (mis)applied. Further the Author will discuss the many forms the *acte clair* doctrine took on the domestic levels.

3.1.1 Reference discipline in numbers

The reference tradition situation within the different Member States of the EU is not homogeneous and can differ considerably: Neither the factors attributing to a positive reference nor the actual refused reference numbers may be conclusively ascertained, however, *Broberg* and *Fenger* traced structural elements such as population numbers, the domestic litigation tradition, or the political compliance with EU law in general to be the most decisive aspects.[148] They *e.g.,* find that civil law systems are more reference friendly than common law systems, and that older Member States refer more cases than their 'younger' counterparts.[149]

Dutch Courts *e.g.,* referred 8 out of the first 10 preliminary references.[150] Other – especially constitutional – courts however are rather widely reluctant to make use of the preliminary reference function. Until 2015, only 9 out of 18 constitutional courts had ever made a preliminary reference.[151] In the period from 1978 to 2001, the (highest) French Administrative Court evaluated EU law over 190 times yet referred only 18 cases. As a contrast, the Austrian Constitutional Court

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[147] *Korenzov 2016*, 1322; compare also Broberg, Fenger, 'Variations in Member States' Preliminary References to the Court of Justice: Are Structural Factors (Part of) the Explanation?' (2013) 19 ELJ 488, 488 et seq.
[148] Broberg, Fenger (n 147)
[149] *Broberg & Fenger 2021*, 39-40
[150] *Donelly & de la Mare 2021*, 251 and further cited case law
[151] Dicosola et al. 'Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis. (2015) 6 GLJ 1317, 1318

referred about 50 % of the cases where it dealt with the interpretation of EU law.[152] Within their first 10 years of EU membership of the novel Member States that acceded in 2014 (the so called 'A10 Countries'), they referred only a fraction compared to their older, western partners: While Poland, Bulgaria, Romania and Hungary on average referred about 10 cases, their older western counterparts referred between 20 and 80 per year.[153] In 2019, Germany, despite having only twice as many inhabitants as Poland referred almost three times as many cases.[154] Another study found UK courts were far less reference friendly than the courts of other Member States of the EU.[155]

A disregard for Union law can also be seen in the history of the French courts, which failed to apply the doctrines of primacy and direct effect of EU law for a very long time. For example, it took France 16 years to adopt the *Francovich* doctrine, the fundamental principle requiring Member States to provide compensation to individuals for accrued damages resulting from failures to (adequately) transpose an EU directive into national law.[156]

3.1.2 The Directorate-General for Library, Research and Documentation's 2019 study

In a study in 2019, the Directorate-General for Library, Research and Documentation ('***Directorate***') examined how the national courts (of last instance) interpret and apply the *reasonable-doubt-test* and the *CILFIT criteria* (*acte clair*).[157]

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[152] Fenger, Broberg, 'Finding Light in the Darkness: On the Actual Application of the acte clair Doctrine' (2011) 30 YBEL 180, 188

[153] Bobek, 'Talking Now? Preliminary Rulings in and from the New Member States' (2014) 21 Maastricht Journal of European and Comparative Law 782, 784; compare also the Annual Report 2013 of the Court of Justice of the European Union 106

[154] *Donelly & de la Mare 2021*, 250, 272-273

[155] Arnull (n 54) 637 and further cited references

[156] Turmo (n 121) 355

[157] Directorate-General for Library, Research and Documentation **'**Research Note: Application of the CILFIT case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law' **(**2019) and respective further cited case law and references

Therein the Directorate concluded, that national courts '*make generous use*' of the *CILFIT* discretion[158] however generally not consider themselves obliged to deal with every single condition of the *CILFIT criteria* extensively.[159] Most national courts frequently refer to the *CILFIT case law* to justify a refusal.[160] However, those elaborations lack a concrete and concise scope of the concept of *reasonable-doubt*.[161] Any attempts to further clarify that concept lack any general principles and are vastly exercised loosely case-by-case.[162]

The *CILFIT criteria* are only considered and addressed in '*exceptional circumstances*', often not sufficing the extensive standard appropriate for courts of last instance.[163] Furthermore, the Directorate witnessed national courts occasionally creating their own additional criteria as well as mixing separate *CILFIT scenarios*, namely the *acte éclairé* and *acte clair*.[164]

In detail the report *inter alia* found following common principles:

- National courts prefer the *acte éclairé* over the *acte clair*[165] and if courts resort to the *acte clair* exception, they frequently simply negate the obligation to refer, omitting any details or reasons.[166] Regularly, national courts use the *acte éclairé* to justify an *acte clair* situation, thereby blurring the lines between the two separate instruments;[167]
- The '*equally obvious'* requirement is disregarded on a common basis;[168]

[158] ibid 73
[159] ibid 61
[160] ibid 68
[161] ibid 69
[162] ibid 70
[163] ibid 71
[164] ibid 72
[165] ibid 7
[166] ibid 10
[167] ibid 48, 49
[168] ibid 16

- The linguistic comparison is conducted in many EU Member States, however being usually limited to English, French and German;[169]
- The terminological peculiarities of EU Law[170] are addressed only in a very indirect manner;[171]
- Rarely, national case law refers to the objective and scheme of the EU law in question,[172] without ever applying the CJEU's contextual, schematic, and teleological interpretative methods;[173]
- Occasionally, the courts of Member States construe criteria on their own motion not expressly stemming from *CILFIT,*[174] *e.g.,* the workload of the CJEU (*as not to overburden the CJEU*) as well as the need to avoid delays in the pending proceedings (*cf 3.1.3*).[175]

Overall, the vast majority of Member States lack any structure or a general approach regarding the concept of *reasonable-doubt*[176] and the case-law does not allow to draw a firm conclusion regarding the definition of such.[177] The Directorate concludes that the '*predominantly liberal*' national interpretation results in a '*lax use*' of the reference model, in particular when assessing the *CILFIT criteria*.[178]

3.1.3 Contemplations on the reference discipline

One of the reasons for the differences may be found in some of the Article 267 TFEU inherent unique characteristics, capable of deterring national courts from referring a case in the first place.

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[169] ibid 39
[170] *CILFIT* paras 19
[171] Research Note (n 157) para 41
[172] ibid 44
[173] Research Note (n 157) para 45; *CILFIT* para 20
[174] Research Note (n 157) 46
[175] ibid 56, 57
[176] ibid 1 et seq., 9
[177] ibid 18
[178] ibid 60

For instance, the referring court may consider the long duration of a preliminary reference and its interplay with the principle of 'due process'.[179] Further, the CJEU's shift in detail may also work as deterrent: Originally, the CJEU rendered an answer to a case only vaguely, providing the referring court with a wide discretion of implementation (leading to a very high compliance with EU judgments with an implementation rate over 96 %).[180] The CJEU's increasing inclination of rendering judgments highly fact-specifically however deprives national courts of their 'sovereignty' over the merits of the case, '*degrading them into a subordinate position*'.[181] Also, more fact-specific interpretations dilute or at least vastly narrow down the general effects and thus the precedent nature of CJEU judgments.

The high reluctance of constitutional courts may also be explained by the supranational and superior nature of EU law itself: As the EU legally expanded into legal fields traditionally reserved to constitutional courts (*e.g.,* fundamental rights etc.), they were somewhat gradually displaced from their formerly uncontested position. Hence, it is only natural that especially constitutional courts try to bypass submitting questions to the CJEU in order to fulfill *their* domestic constitutional mandate undisturbed.[182]

Further, not only the 'if' but also the 'how' a question is referred is heavily dependent on the referring court's attitude. Similar to 'leading questions' in a proceeding's (witness) examination, a court may deliberately phrase a question with a certain inclination, if it aims to provoke or affirm a certain – favored – answer. *Donelly* and *De la Mare* differentiate between two kinds of question,

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[179] *Broberg 2008*, 1386 and further cited references
[180] Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 European Union Politics 397, 410
[181] *Broberg 2008*, 1385; see further Rasmussen, *The European Court of Justice* (GadJura, 1998) 152
[182] Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' (2015) 16 GLJ 1331, 1332-1333, 1336, 1341

namely (a) weak/inquisitive or (b) strong/confrontational questions. The first ones pose the grand majority and are often used to comply with supremacy of EU law or set aside hierarchical hindrances. Inquisitive questions are phrased in the manner '*this is how we do it here, does EU law do it like this?*' or '*what does EU law require in this situation*'. In contrast, confrontational questions indicate or rather provoke a favored solution. The question in such cases is phrased rather '*this is how we do it, and you do it like this as well, don't you?*'.[183]

Domestic courts that do not agree with an outcome of a reference may further resort to what *Tridimas* describes as 'protest through co-operation': They may slightly amend the legal and factual merits of the case and refer the same or a similar question again, forcing the CJEU to reconsider its previous assessment to a more favorable one.[184] As it is generally inadmissible for the CJEU to interfere with the merits of the case, this '*monopoly on fact-finding*' as *Davies* described it, vests domestic courts with the capability of constraining the CJEU significantly in its decision. The domestic court may thereby evade the application of the CJEU's finding by amending the merits or may even invoke the CJEU has exceeded its jurisdiction.[185]

Generally, the case law of domestic courts of last instance reveals a general lack of references, questionable interpretations of EU law and the *CILFIT criteria*, indicating a vast misconduct of the conferred discretion of the *acte clair*.[186]

3.1.4 (Prominent) Examples of misuse and abuse of the *CILFIT criteria*

Essentially, the abuse of the preliminary reference dates back before *CILFIT* and the implementation of the *acte clair* into EU law. Early – especially French – case law provides for

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[183] *Donelly & de la Mare 2021*, 250 and further cited references
[184] Compare also *Tridimas 2003*, 39
[185] *Davies 2011*, 84; compare further Nyikos (n 180), Arnull 'Annotation of Arsenal v Reed' (2003), 40 CMLR 753
[186] *Sarmiento 2010*, 196

pertinent examples of breaches of the obligation to refer. AG Capotorti enumerated these examples of the French courts' (mis)conduct in his famous Opinion to *CILFIT* when he proposed rejecting the incorporation of the *acte clair* into EU law:[187] The French courts assessed and considered EU law without engaging with the CJEU in numerous cases.[188] Most famous is the 'Cohn Bendit' case where a French court of last instance refused a reference and single-handedly interpreted Article 189 of the EEC Treaty as well as blatantly denied the direct effects of EU-directives against evidently established case law of the CJEU.[189] Although this case preceded *CILFIT* by years, *Mancini* and *Keeling* considered such a refusal and behavior unjustifiable in any case, no matter how liberally the *CILFIT criteria* were to be construed.[190]

Another example of misconduct can be found in Spanish domestic case law in 1998, where the **Spanish** Supreme Court assessed multiple Articles of the Treaties and despite the apparent complexity and relevance for the uniform application of EU law, found the case to be *acte clair*.[191]

In 2000, in a case about the recognition of a foreign academic degree, the **Greek** Supreme Court interpreted secondary legislation on the mutual recognition of education in the light of Article 126 (1) EC about the domestic autonomy on teaching and the organization of education systems. The Greek court defied the established case law of the CJEU and although many members of the court's panel dissented, concluded the case being *acte clair*.[192]

Sweden had a track history of disregarding the preliminary reference function and the obligation to refer. In 1999, the Swedish Supreme Administrative Court had to consider EU-Directives and

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[187] *Opinion AG Capotorti* para 4
[188] Compare the elaborations on the French abuse of the acte clair doctrine in ibid para 4 and cited case law
[189] Judgment of 22 December 1978 *Cohn-Bendit*, (Recueil Lebon, 1978), p. 524; *Opinion AG Capotorti* para 4
[190] *Cohn-Bendit* (n 189); *Mancini & Keeling 1991*, 4
[191] see *Tridimas 2003*, 44-45 and cited case law
[192] ibid 43 and cited case law

the primary EU law of free movement of capital in a case about the revocation of a nuclear power station license. Despite the legal complexity and ample uncertainties involved, the Swedish court did not refer the case to the CJEU.[193] As this behavior was not a single event, the EC opened prosecution proceedings against Sweden in 2004 for its systematic misuse. Sweden averted being convicted by amending its national legislation to require domestic Swedish courts to reason any denied reference.[194] In that way Sweden had anticipated the legal order of *CIM II* 17 years before it came into effect.

It was however not before 2015 when the CJEU in *Ferreira da Silva* for the very first time in the history of the EU found a Member State guilty of violating the preliminary reference (*cf 2.2.3.2*)[195] and 3 years later the EC for the very first time successfully prosecuted a Member State for failing its obligation to make a preliminary reference in *Commission v France* (*cf 2.2.3.4*): When the French Supreme Court decided to depart from the CJEUs case law without making a preliminary reference,[196] the EC elevated the case to the CJEU which subsequently found that the disputed matter was '*not so obvious as to leave no scope for doubt*' and thus the French court '*failed to make a reference*'.[197]

Another possible pertinent example of deliberate misuse may be found in domestic **Austrian** jurisprudence on the conformity of the domestic Austrian gambling law with EU law: In the initial pending case in 2016, the Austrian Supreme Court examined the Austrian gambling legislation extensively and considered the domestic Austrian gambling legislation not to be in conformity with

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[193] ibid 44 and cited case law
[194] Compare also Bernitz, 'Preliminary Rulings to the CJEU and the Swedish Judiciary: Current Developments' in Derlén, Lindholm (eds.) *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing, 2023) para 19
[195] *Ferreira da Silva e Brito* para 44
[196] *Commission vs France* (n 6) para 114; Turmo (n 121) 340
[197] *Commission vs France* para 114

EU law.[198] However, because the case was considered of purely domestic nature, the parties to the dispute could neither directly invoke the Freedom to provide Services under Article 56 TFEU[199] nor request a preliminary reference under Article 267 TFEU. Hence, the case was not elevated to the CJEU for further and ultimate clarification.

However, in purely domestic cases, violations of EU law generally result in a less favorable treatment of domestic citizens, since these are not directly eligible for invoking EU law before domestic courts.[200] Hence, a violation of EU law leads to an unjustified different treatment of people on the basis of their legal status (EU vs nationals). This imbalance may be challenged under the Austrian constitutional anti-domestic-discrimination mechanism based on the 'principle of equality' ('*Inländerdiskriminierung*').[201] Therefore, the Austrian Supreme Court referred the case to the national Austrian Constitutional Court (VfGH) and requested repealing the ostensibly unlawful limiting sections of the gambling act, *in eventu* the entire law in general.[202]

The Constitutional Court initially held that the Austrian gambling monopoly is basically a restriction of the freedom to provide services under Article 56 TEU[203] and further analyzed the case law of the CJEU.[204] It however concluded that the Austrian gambling legislation and monopoly are in accordance with the law of the EU and thus denied an unequal domestic discrimination under domestic constitutional law.[205]

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[198] Austrian Supreme Court judgment of 30 March 2016 4 Ob 31/16m ECLI:AT:OGH0002:2016:RS0130636 paras 2, 4; Zillner et al *Kommtar zum Glücksspielgesetz* (1st edition, LexisNexis 2021) 48
[199] Austrian Constiutional Court judgment of 15 October 2016 E 945/2016 ECLI:AT:VFGH:2016:E945.2016 paras IV.1.1.; compare also Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR 2009 I-07633, para 51
[200] E 945/2016 (n 199) paras IV.1.1.
[201] Article 7 of the Austrian Constitution; E 945/2016 (n 199) paras 3 et seq.
[202] 4 Ob 31/16m (n 198) initial requests to the Austrian Constitutional Court
[203] E 945/2016 (n 199) paras IV.2.1:1
[204] ibid para III
[205] ibid paras I.1., 2.4.1, 2.4.2., III

The subsequent implementation of this view by the Supreme Court[206] triggered a wave of lawsuits soon after: Austrian users of Maltese gambling service providers started successfully reclaiming their gambling losses on the grounds of such operators lacking a domestic Austrian gambling concession and therefore not being entitled to offer gambling services, rendering the gambling contract null and void.[207] On the basis of the previous decision of the Austrian Constitutional Court, the Supreme Court developed a line of case law[208] in which it formulaically refers to its previous decisions, rejecting any novel arguments or evidence, awarding damages as the gambling contracts were considered – *ex-tunc* – void.[209]

Thus far, no supreme court ruling indicated any form of deviation from this uniform case law.[210] There is ample case law of courts of last instance; From the Authors personal vocational experience in this legal field, there have been however far more cases being litigated before lower courts of first instance.[211] So, despite lower courts are generally more reference friendly and often use the preliminary reference function to liberate themselves from narrowing – EU-violating – lines of

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[206] Austrian Supreme Court judgment of 22 November 2016 4 Ob 31/16m ECLI:AT:OGH0002:2016:0040OB00170.16B.1122.000; Zillner et al. (n 198) 48

[207] Padronus, 'Wie bekommt man sein Geld von Online-Casinos zurück?' <https://www.padronus.at/geld-zur%C3%BCck-online-casinos> accessed 12 February 2023; Proissl, 'Geld zurück vom Online-Casino: So können Sie Verluste zurückfordern' <https://www.trend.at/branchen/rechtsschutz/online-casinos-geld-zurueck> accessed 12 February 2023; Advofin, 'Sie haben bei Online Casinos Geld verloren? Mit AdvoFin holen Sie es sich zurück.kostenlos. Risikofrei. Ohne Aufwand.' <https://www.advofin.at/projekte/online-casinos/> accessed 12 February 2023

[208] Compare also following confirming cases of the Austrian Supreme Court: 6 Ob 200/22p, 7 Ob 168/22i, 9 Ob 84/22a, 1 Ob 171/22m, 6 Ob 152/22d, 2 Ob 171/22v, 6 Ob 226/21k, 9 Ob 25/22z, 6 Ob 8/22b, 4 Ob 223/21d, 3 Ob 200/21i, 5 Ob 30/21d, 9 Ob 20/21p, RS0130636 [T7], accessible under <https://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20161122_OGH0002_0040OB00216_16T0000_000&IncludeSelf=True>

[209] *cf* case law (n 208)

[210] Zillner et al (n 198) 48

[211] Compare also Barnes, 'Austrian gamblers struggle to recoup money lost on 'illegal' betting sites' <https://www.ft.com/content/f74ad08f-46db-4ae5-aa33-e9c708e94057> accessed 6 March 2023

domestic case law (*cf 2.1.2.5*), Austrian lower courts have however abstained from referring a single case on their own motion against the domestic tendency thus far.

This basically creates the following delicate legal situation: Maltese gambling operators, EU entities (!) with an active license under Maltese law,[212] are confronted with endless domestic Austrian case law on the conformity of a domestic legal framework with EU law. However, apart from a secondary question to the many disputes,[213] the CJEU was not consulted in any of the cases. This results in EU entities, eligible for the rights in both Article 56 TEU and Article 267 TFEU, being now bound by exclusively *domestic* case law, stating that the *domestic* legislative framework is in accordance with *EU* law and barring any attempts for a preliminary reference. Hence, as the CJEU was not involved in any of the disputes and questions so far, the litigant parties are therefore deprived of their perhaps only competent appraiser and 'legal judge' in matters of EU law – the CJEU itself.

That this case is anything else but 'clear' is *inter alia* illustrated by the initial request of the Austrian Supreme (!) Court to repeal the entire legal framework, resulting in two domestic courts of last instance (!) having totally opposite and contradicting stances on a question of EU law.[214] Further, voices in the literature vastly deny that the Austrian gambling law is in accordance with EU law, in particular the freedom to provide services and the CJEU's pertinent case law.[215] The bitter taste of that situation becomes even more intense in the light of the (partially) state owned domestic

[212] MGA, Malta Gaming Authority License Register <https://www.mga.org.mt/licences/> accessed 12 February 2023
[213] Case C-920/19 *Fluctus s.r.o. and Others v Landespolizeidirektion Steiermark* [2021] ECLI identifier: ECLI:EU:C:2021:395
[214] Compare 4 Ob 31/16m (n 198); E 945/2016 (n 199)
[215] Barczak, Hartmann 'Zur Unionsrechtswidrigkeit der Glücksspiel- und Wettregulierung in Österreich' (2020) 6 Medien und Recht 330 et seq; Jaeger, Lanser 'Das Bundesmonopol für das Online-Glücksspiel: Alles ausjudiziert?' (2020) 26/2020 ZfV 249, 249 et seq.

gambling provider's rigorous lobbying activities[216] and the fact that the very same provider currently holds all available – federal – concessions.[217] Considering such a situation as clear and free of any *reasonable-doubt* seems rather questionable even under relaxations such as the *Ferreira da Silva* case law (cf *2.2.3.2*).

Because of its complexity, the many flaws of the Austrian gambling law cannot be discussed conclusively in this Thesis. It can nevertheless be concluded that the current legal situation appears severely doubtful in the light of the stringent procedural requirements of EU law, in particular the principle of uniformity and the obligation to refer under Article 267 TFEU.

3.1.5 Conclusion

In conclusion, the *acte clair* doctrine led to a bifurcation of the assessment of EU law: At EU level, the CJEU understood the conditions as a narrow escape clause and rare exception to the rule. At the different domestic levels this 'license' however developed a life on its own.[218] The subsequent further relief and enhancements of the national courts' discretion may serve as further stimulus for the process of bifurcation and may jeopardize the uniformity of EU law.

The individual litigant not being able to force a case to the CJEU contributes vastly to this unsatisfactory situation, as incongruent or settled domestic lines of case law may deter any court in the hierarchy from referring a matter to the CJEU albeit a breach may be apparent.

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[216] Sankholkar, 'Geheimplan: Mit welchen Mitteln Casinos Austria ihr Glücksspielmonopol halten wollen' (2009) <https://www.trend.at/wirtschaft/business/geheimplan-mit-mitteln-casinos-austria-gluecksspielmonopol-246608> accessed 11 February 2023

[217] Compare the current Austrian registered federal licenses <https://www.bmf.gv.at/themen/gluecksspiel-spielerschutz/gluecksspiel-in-oesterreich/konzessionaere-ausspielbewilligte.html>

[218] *Korenzov 2016*, 1317

3.2 The current available countermeasures and remedies

The above-elaborated risk of a case not being referred leads to a highly unsatisfactory situation for the individual litigant. To attenuate such effects, three legal countermeasures apart from the internal appeal mechanism emerged in the past: (i) The EC's monitoring duty and Article 258 TFEU prosecution of a Member State failing to comply with obligations stipulated in the Treaties, (ii) the individual litigant's possibility to file a damage claim against the Member State under the *Frankovich*/*Köbler* regime, and (iii) damages proceedings before the Human Rights Court in case of insufficient or inadequate reasoning. However, as will be elaborated below, none of these available 'remedies' are very convincing and despite promising in theory, they turned out to be rather unfeasible in practice.

3.2.1 Internal domestic appeal mechanism

Apart from the above-enumerated remedies there also in any case exists a 'light' version of a relief, namely the ordinary intra-domestic hierarchical appeal process of the domestic court system (ordinary court instances): A litigant party before a lower court – that *may* refer – being refused of a requested reference may remedy that negative decision, if appealed and thus elevated to a court of last instance, namely a court that *must* refer.[219] However, the litigant might be deferred by the hefty costs, vast delay (also depending on domestic procedural law and efficiency) as well as the uncertain outcome.[220] On top of that, domestic courts of last instance may be reluctant or generally recalcitrant[221] (*cf 3.1*), diluting the internal remedial path entirely. That applies even more if the reason for a refused reference is the settled domestic case law of a court of last instance itself. In

[219] *Davies 2011*, 84
[220] ibid 84, 86
[221] *Mancini & Keeling 1991*, 2

that case the internal appeal process cannot be considered to be a very potential, feasible, and unconditionally available remedy.

3.2.2 Article 258 TFEU Prosecution

The EC may generally prosecute a Member State for breaches of EU law pursuant to Article 258 TFEU (formerly Article 226 TEC). This provision reads as follows:

'*Article 258 (ex Article 226 TEC)*

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

The EC is therefore authorized to prosecute a Member State for failing to comply with EU legal obligations comprising also the obligation in Article 267 (3) TFEU.[222] However possible in theory, the EC in practice has been rather reluctant to resort to this legal instrument to enforce preliminary infringement procedures. Thus far, there exist only two pertinent cases and only one led to a positive conviction.[223]

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[222] Compare *Commission vs France*, Commission docket no 2003/2161 C(2004) 3899 *Reasoned opinion of the European Commission against Sweden* [2004] relating to infringements proceedings 2003/2161
[223] Compare *Korenzov 2016*, 1332

In 2004, the EC filed a reasoned opinion against Sweden because of its systematic failure to adhere to the preliminary reference procedure (*cf 3.1.4*). In its reasoned opinion, the EC found Sweden's legislation being insufficient to fulfill the obligation to refer and *inter alia* demanded reasons to be given in case a reference is denied in order to verify its justification under Article 267 (3) TFEU. However, before the case was further elevated to the CJEU, Sweden averted the trial by adopting its legislation to mandate such reasoning, thereby anticipating *CIM II*'s obligation to state reason.[224]

Almost a decade later, when the EC again pursued a Member State – this time France – for failing to fulfill its obligations under Article 267 (3) TFEU, the CJEU for the very first time found a Member State positively in breach of Article 267 (3) TFEU under the Article 258 TFEU prosecution regime: The CJEU held, that France failed its obligation to refer, because the French supreme court deviated from existing CJEU law without making a preliminary reference in a situation '*not so obvious as to leave no scope for doubt*' and was therefore not entitled to consider a case *acte clair*.[225] Interestingly, the CJEU confirmed a breach on the basis of one single failure to refer rather than mandating evidence of a general systematic breach. Therefore, however such chances are low, a single failure already creates the risk of being successfully pursued by the EC.[226] Given the rather frequent numbers of alleged violations of the preliminary reference of domestic courts (*cf 3.1*), the EC seems however overall rather unmotivated in pursuing such infringement so far.[227]

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[224] Compare Bernitz (n 194); Reasoned opinion (n 222)
[225] *Commission vs France* para 114; Turmo (n 121) 340 et seq.
[226] *Donelly & de la Mare 2021*, 244
[227] Van der Mei 'The "Acte Clair Doctrine": How Much Clarity is Needed?' (2015) <https://www.maastrichtuniversity.nl/blog/2015/05/%E2%80%9Cacte-clair-doctrine%E2%80%9D-how-much-clarity-needed> accessed 4 August 2022

Kornezov roots this reluctance to 3 factors: The first is of diplomatic origin as the EC endeavors to prevent creating an 'European appeal' against a final judgment and thus a Member State's jurisprudential integrity. The second is of procedural nature, in particular to abstain from rescinding final binding judgements (*res judicata*). The third reason is the high standard of evidence the EC must meet when furnishing proof that a domestic court erred in its *subjective conviction* as to whether an *acte clair* situation was justified.[228] The Article 258 TFEU prosecution is further rather slow and due to the warning period, the Member State may avert actions,[229] as the case against Sweden indicates. From the perspective of an individual litigant, the EC has not proven to be any aid enforcing the obligation to refer so far.

Consequently, based on the EC's 2016 Annual Report on '*Monitoring the application of European Union law*',[230] the European Parliament took this highly unsatisfactory stalemate as occasion to adopt the resolution,[231] *inter alia* mandating the EC to monitor the compliance with Article 267 (3) TFEU more thoroughly and prosecute breaches of such more rigorously.[232]

3.2.3 State liability damages

Other than state prosecution, state liability damage claims are not pursued by the EC before the CJEU but by private litigant parties under domestic procedural rules before national courts.[233]

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[228] *Korenzov 2016*, 1333
[229] *Davies 2011*, 85; see further Kapteyn et al. *The Law of the European Union and the European Communities* (4th edition, Kluwer Law International 2009) 441-446
[230] See Secretariat-General of the European Commission, Annual Report on Monitoring the application of European Union law 2016
[231] European Parliament resolution of 14 June 2018 on monitoring the application of EU law 2016 (2017/227(INI)) [2016] OJ C 28, 27.1.2020, 108-120
[232] ibid para 38
[233] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR 2003 I-10239 ('***Köbler***') para 46

Only two provisions in EU law rudimentarily outline the fundament for state liability:[234] Article 19 TEU mandates all Member States to '*provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*'. Further, Article 47 of the Charter of fundamental Rights – to which the CJEU in *CIM II* has now explicitly linked – provides for an effective remedy to a court in case '*rights and freedoms guaranteed by the law of the Union are violated*'.

On this rudimentary basis the CJEU developed pertinent case law for damage compensation of individuals against breaching Member States, most commonly known as the *Francovich* doctrine. Despite state liability was actually first confirmed in *Russo v Aima* in 1976, *Francovich* gave the instrument of State liability sharper '*claws and teeth*'.[235] The state liability principle in Francovich was later refined by cases like *Brasserie du Pêcheur*[236] where the CJEU established the threefold test for state liability:

> '(i) *The rule of law infringed must be intended to confer rights on individuals;* (ii) *the breach must be sufficiently serious; and* (iii) *there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties*.'[237]

[234] Compare also *Craig & Burca 2020*, 262
[235] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR 1991 I-05357; Case 60-75 *Carmine Antonio Russo v Azienda di Stato per gli interventi sul mercato agricolo (AIMA)* [1976] ECR 1976 -00045; *Mancini & Keeling 1991*, 10
[236] *Chalmers et al. 2019*, 316
[237] Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1996] ECR 1996 I-01029 51; Francovich (n 235) para 40

The question of whether judicial acts of national legal institutions could trigger the state liability regime was further outlined in *Köbler*.[238] Therein the Austrian Professor Gerhard Köbler invoked the principle of state liability on the grounds that the Austrian Administrative Court (of last instance) had misapplied EU rules on employment law and refused its obligation to refer the case to the CJEU.[239] In the following Mr. Köbler filed a damage claim against the State of Austria[240] which was elevated to the CJEU. The CJEU found that a national court failing to comply with Article 267 (3) TFEU is in general very well capable of triggering damages pursuant to *Köbler*,[241] however in the specific pending case in question, the erroneous interpretation did not '*have the requisite manifest character for liability under Community law*' and thus did not meet the required threefold test.[242]

So, despite declining a violation in *Köbler*, the CJEU unequivocally extended the *Francovic* state liability principle to decisions of a Member State's judicial body. This may however be only fulfilled in 'exceptional' cases[243] if the threefold test is fulfilled.[244]

State liability is the only general *direct* available remedy to individual litigants for violation of EU law by national courts.[245] But since EU law does not provide for a standalone EU procedural framework, individuals must resort to – the very same (!) – domestic legal system applying the

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[238] Compare also Wattel, 'Köbler, CILFIT and Welthgrove: we can't go on meeting like this' (2004) 41 CML-Rev 177
[239] *Köbler* para 5 et seq., 11
[240] ibid para 12
[241] ibid paras 33 et seq.
[242] ibid paras 59, 124 et seq; Wattel (n 238)
[243] *Köbler* para 53; Komarek, 'Federal Elements in the Community Judicial System' (2005) 42 CML-Rev 9, 4; *Varga 2017*, 51
[244] Francovich (n 235) paras 51 et seq.; Brasserie du Pêcheur (n 237); Wattel (n 238); Komarek (n 243) 13; Varga, 'National remedies in the case of violation of EU law by Member State courts' (2017) 54 CML-Rev 51 ('***Varga 2017***') 51
[245] *Varga 2017*, 52

'decentralized'[246] EU 'procedural' rules such as the *Francovich*/*Köbler*-doctrine. The EU procedural rules explicitly do not mandate a strict framework, rather they remind the Member States to fulfill their community procedural obligations *inter alia* demanding to provide remedies such as restitution, interim reliefs, liability, and damages.[247] A Member State may enable state liability either based directly on the CJEU's case law (*Francovich*, *Köbler*), or provide sufficient 'alternative' remedies as featured in some Member States.[248]

It is well known that the requirements stipulated in *Köbler* are rarely fulfilled:[249] First and foremost (a) the *CILFIT criteria*, the basis for a violation claim evidencing a breach, are not easy to be ascertained and applied in the first place (*cf 2.2.2., 3.1*). Further, the preliminary function does generally (b) not confer rights on the individual. In addition, (c) a direct causal link between the sustained loss and the failure to give adequate reasons and/or refer a case to the CJEU is hardly ever fulfilled (*cf 4.2.2.4*).[250] Finally, (d) the mere fact that a court could not determine sufficiently serious contradictions precluding an *acte clair* and hence refraining from referring the case, does alone not indicate a breach '*sufficiently serious'* enough capable of successfully litigating a state liability case.[251]

In her 2017 study, *Varga* found that the *Köbler* damage model is not frequently used to reimburse damages: From 2003 to 2017, only 35 cases were reported within the entire EU. *Varga* rooted this to numerous domestic difficulties such as refusals or overly strict requirements *e.g.,* often domestic courts do not consider a 'manifest breach of applicable law'.[252] The fact that *Ferreira da Silva* (*cf*

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[246] ibid 53
[247] ibid 55
[248] ibid 54 and further cited references
[249] Van der Mei (n 227); *Varga 2017*, 58; *Mahrer 2022*, 271; *Opinion AG Bobek* para 114 et seq.
[250] Compare also *Mahrer 2022*, 271-272
[251] Compare *Köbler* para 124; *Broberg & Fenger 2021*, 238-239
[252] *Varga 2017*, 58

2.2.3.2) is the only EU-level positive conviction under state liability indicates its rather unfeasible nature.

Other domestic non-*Köbler* remedies are *inter alia* the possibility of a retrial, unique domestic methods of recourse such as the Austrian possibility to claim damages in case of a violation by an official authority ('Amtshaftungsanspruch'), or a constitutional redress in cases of being deprived of the competent 'lawful judge'.[253] However only few Member States incepted such remedies.[254]

3.2.4 Appeal to the European Court of Human Rights

The Human Rights Court poses an alternative to purely domestic/intra-EU litigation in cases of a violation of the preliminary reference obligation of 267 (3) TFEU.[255] The rules on 'Just satisfaction' stipulated in Article 41 of the of the ECHR provides for damages (reparation) in case a fundamental right, such as Article 6 ECHR ('Fair trial'), is breached. The Human Rights Court understands this to also include violations of the preliminary reference under Article 267 (3) TFEU.[256]

The stipulation reads as follows:

> '*Article 6: Right to a fair and public hearing*
>
> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a*

[253] For a full analysis on these alternative remedies see ibid chapters 4.1, 4.2, 4.3
[254] *Chalmers et al. 2019*, 190; *Varga 2017*, 64 et seq.
[255] *X & Van Dijk*, Opinion AG Wahl para 63; *Krommendijk 2017*, 47
[256] See cases in *supra* notes 259-261

reasonable time by an independent and impartial tribunal established by law (…)'

The Human Rights Court considers a refusal of a preliminary reference arbitrarily and in breach of Article 6 (1) ECHR if the reasons for the refusal are either completely absent or insufficiently elaborated.[257] By doing so, the Human Rights Court generally encourages transparency as well as providing grounds for an assessment of an appeal.[258]

In the past the Human Rights Court established a rather expressive amount of case law on the interdependencies between Article 6 (1) ECHR and Article 267 (3) TFEU and conversely to the CJEU, the Human Rights Court considers Article 267 TFEU very well conveying elements of a means of redress to the individual litigant.

In *Dhahbi v Italy* the Human Rights Court found that the Italian High Court had neither drawn any reference to the applicant's request for a preliminary ruling nor had it properly stated reasons why the reference was rejected and thus considered a violation of Article 6 (1) ECHR.[259] Also, in *Schipani v Italy* the Human Rights Court considered the reasoning of the *acte clair* as inexplicable and found a violation of Article 6 (1) ECHR as well.[260] In contrast, the 'duly' and 'demonstrative' reasoning in the cases *Vergauwen v Belgium* and *Ullens de Schooten v Belgium* sufficed to meet the requirements of Article 6 (1) ECHR and the damages actions were dismissed.[261]

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[257] *Korenzov 2016*, 1330
[258] *Krommendijk 2017*, 47 and further cited case law
[259] Dhahbi v Italy App No 17120/09 (ECtHR, 8 April 2014) paras 32-34
[260] Schipani v Italy App No 38369/09 (ECtHR, 21 July 2015) paras 70-73
[261] Vergauwen v Belgium No 4832/04 (ECtHR, 10 April 2012) paras 91-92; Ullens de Schooten v Belgium No 3989/07 (ECtHR, 20 September 2011) paras 65-67

The Human Rights Court appears rather lenient as it seemingly sets only minimal requirements for the obligation to state reasons rather than thorough justifications.[262] The rather opaque case law, the unclear ambit and extent of the requirements, and its general adolescent state do not allow concise general conclusions and principles,[263] however *Krommendijk* observed following commonalities: (i) The necessity of the applicant to substantiate a request for a preliminary ruling, (ii) the general limitation to procedural review under Article 6 ECHR rather than substantive (EU) law, (iii) the necessity of national courts to refer to the CJEU's *acte clair* case law in case of a refusal, and (iv) a general stricter treatment of courts of last instance pursuant to Article 267 (3) TFEU.[264]

The relationship between the CJEU and the Human Rights Court is not of utter harmony: By allowing the Human Rights Court to rule on provisions of EU law – *e.g.,* Article 267 (3) TFEU – the monopoly of the CJEU as sole interpreter at the apex of the EU judicial system may be somehow circumvented, or as the CJEU itself held '*is liable adversely to affect the specific characteristics and the autonomy of EU law*'.[265] However, it shall be noted that the obligation to extensively state reasons for non-references as of *CIM II* may steal the Human Rights Court's thunder as third party appraiser, overseeing jurisprudence in the EU (*cf 4.2.2.3, 0)*.

3.2.5 Conclusion

The available remedies and countermeasures are not particularly effective: (i) The internal appeal mechanism is insufficient especially if settled case law of courts of last instance is the culprit

[262] Compare also *Limante 2016*, 1395
[263] *Krommendijk 2017*, 48
[264] ibid 49-50 and further cited case law
[265] Compare the extensive elaboration of the CJEU in Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECLI identifier: ECLI:EU:C:2014:2454

responsible for references not being made in the first place; (ii) The EC**,** rather than aiding the individual litigant's position, focuses on the bigger political picture of uniformity in general and is by design incapable of directly remedying an accrued disadvantage; (iii) The fact that state liability damage claims are pursued before the same courts being accused of breaching EU law paired with the stringent nature of damage compensation law (*cf 4.2.2.4*) in general render this remedy often unfeasible; (iv) Finally, the Human Rights Court examines the breach on a very technical, formalistic manner and does not consider whether the judgment's substantive core is correct or not.

This results in the preliminary reference obligation of Article 267 (3) TFEU being *de facto* unenforceable for the individual.[266]

4 Assessment

In the following the Author will assess the currently 'valid' *CILFIT criteria* and their interdependencies with the above elaborated status quo. The Author will attempt to establish the current effective *acte clair* principle (*4.1*) and further debates the effects of such in the light of the reference discipline and available countermeasures (*4.2*).

4.1 The current applicable version of the *acte clair* doctrine

As of *CIM II*, the following current effective *CILFIT criteria* may be derived from the *CILFIT* case law. It shall however be duly noted, that due to the sheer amount of CJEU case law present, the Author will in the following focus on the above-elaborated cases, which are generally regarded as the most pertinent *acte clair* case law in literature and practice (*cf 2.2.2*).[267]

[266] *Korenzov 2016*, 1333
[267] See cases (n 6)

The currently cumulative criteria for considering an *acte clair* are currently as follows:

4.1.1 The changes to the original *CILFIT* criteria analyzed and highlighted

For the purpose of distinguishability and clarification, the Author will keep the original number labelling, initially established in paragraphs 16 to 21 of *CILFIT*, affirmed, supplemented, and amended by the following pertinent case law. The method of establishing the current version of the principle in effect is assessing (i) which components were omitted and diluted over time, (ii) which were reiterated, and (iii) which were amended. The subsequent changes will be further clarified by using different colors to ascribe the change to the respective case.

Paragraph 16 of the *CILFIT Criteria*:[268] Reasonable doubt, equally obvious to other Member States and CJEU

- '(…) *the correct ~~application~~ interpretation* (amended in CIM II)[269] *of Community law may be so obvious as to leave no scope for any reasonable/slightest* (established in *AFNE*,[270] however omitted again in *Commission v France* et seq.) *doubt as to the manner in which the question raised is to be resolved.*'[271]

  Reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015), *Commission v France* (2018); Reaffirmed and supplemented in *AFNE* (2016); Base formula reaffirmed in *Commission vs France* (2018), *Belgium v Commission* (2019); Base formula reaffirmed and amended in *CIM II* (2021)

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[268] *CILFIT* para 16
[269] *CIM II* para 33, 39
[270] **Note:** In *AFNE* the CJEU usual refers to reasonable doubt, only in para 51 it held that the national court of last instance must make a preliminary question 'when it has the *slightest* doubt as regards the interpretation or correct application of EU law.
[271] See also *X & Van Dijk* para 55; *Ferreira da Silva e Brito* para 38; *AFNE* para 48, 51; *Commission v France* para 110; Case C-587/17 P (n 123) para 77; *CIM II* para 33, 39

- '*Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of last instance* (amended in CIM II)[272] *of the other Member States and to the Court of Justice.*'[273]

  Not reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015); Reaffirmed in *AFNE* (2016); Not reaffirmed in *Commission vs France* (2018), *Belgium v Commission* (2019); Reaffirmed and amended in *CIM II* (2021)

- *Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.*[274]

  Reaffirmed *literally* only in *AFNE* (2016); However, its (implicit) meaning is conveyed in all *CILFIT* et seq. case law.

Paragraph 17, 21 of the *CILFIT criteria*:[275] Characteristic features of EU law & particular difficulties in interpretation and divergencies in EU law

- '*However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise* (…)'[276]

  Reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015), *AFNE* (2016), *Commission v France* (2018), *Belgium v Commission* (2019), *CIM II* (2021)

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[272] *CIM II* para 22
[273] *AFNE* para 48, 50
[274] *AFNE* para 48
[275] *CILFIT* para 17, para 21
[276] compare *X & Van Dijk* para 55; *Ferreira da Silva e Brito* para 39; *AFNE* para 50; *Commission v France* 110; Case C-587/17 P (n 123) para 77; *CIM II* para 41

- '(…) *and the risk of divergences in judicial decisions within the European Union.*'[277]

  Reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015), *AFNE* (2016), *Commission v France* (2018), *Belgium v Commission* (2019), *CIM II* (2021)

Paragraph 18 of the *CILFIT criteria*:[278] Different language versions

- '*To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. ~~An interpretation of a provision of Community law thus involves a comparison of the different language versions.~~* (Amended in CIM II)[279]
- '*According to the Court's settled case-law, one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union.*' (Amended in CIM II)[280]
- '*While a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.*' (Amended in CIM II)[281]

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[277] see also *X & Van Dijk* para 55; *Ferreira da Silva e Brito* para 39; *AFNE* para 50; *AFNE* para 55; *Commission vs France* 110; *Belgium vs Commission* para 77; CIM II para 41
[278] *CILFIT* para 18
[279] *CIM II* para 42 et seq.
[280] ibid para 43
[281] *CIM II* para 44

Not reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015), *AFNE* (2016), *Commission vs France* (2018), *Belgium v Commission* (2019); Affirmed and amended / attenuated in *CIM II* (2021)

Paragraph 19 of the *CILFIT criteria*:[282] Peculiarity and independency of EU terminology

- '*It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.*'[283]

  Not reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015), *AFNE* (2016), *Commission vs France* (2018), *Belgium v Commission* (2019); Affirmed in *CIM II* (2021)

Paragraph 20 of the *CILFIT criteria*:[284] Interpretation of EU law as a whole, its objectives and evolution

- '*Finally, every provision of Community law including the case law of the CJEU in the relevant area* (established in AFNE,[285] omitted again in CIM II)[286] *must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.*'[287]

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[282] *CILFIT* para 19
[283] *CIM II* para 45; **Note:** CIM II uses a slightly different wording, the inherent meaning remains however identical
[284] *CILFIT* para 20
[285] **Note**: in AFNE the CJEU made it clear, that every provision of EU law includes also the CJEU's caselaw
[286] *CIM II* para 46
[287] *AFNE* para 49

Not reaffirmed in *X & Van Dijk* (2015), *Ferreira da Silva* (2015); Affirmed and supplemented in *AFNE* (2016); Not reaffirmed *Commission vs France* (2018), *Belgium v Commission* (2019); Base formula affirmed in *CIM II* (2021)

4.1.2 Additional requirements and factors concerning the original *CILFIT criteria*

- References of lower courts do not *per se* preclude a court of last instance from finding an *acte clair* (*X & Van Dijk*);[288]
- A court of last instance is not obliged to wait for the CJEU to deliver its response to such lower court's reference (*X & Van Dijk*);[289]
- Contradicting caselaw of lower courts do not *per se* preclude an *acte clair* (*Ferreira da Silva*);[290]
- If a refusal could adversely affect the observance of the principle of the primacy of EU law, the domestic court must establish that there is no reasonable doubt in a more detailed manner (more rigorous standard; *AFNE*);[291]
- A provision of EU law allowing different interpretations does not preclude an *acte clair* if none of these interpretations regarding the context and the purpose of that provision as well as the system of rules of which it forms part, seem sufficiently plausible (*CIM II*);[292]
- Existing diverging lines of both domestic as well as intra-EU case-law require specific awareness when assessing an *acte clair* situation (*CIM II*);[293]

[288] *X & Van Dijk* para 61
[289] ibid para 61
[290] *Ferreira da Silva e Brito* para 42
[291] *AFNE* para 52
[292] *CIM II* para 48
[293] ibid para 49

- The national court must state reasons if it considers one of the *CILFIT scenarios* (hence also an *acte clair*) fulfilled and in the following abstains from a reference (*CIM II*);[294]
- A previous preliminary reference in the same proceeding does not affect the obligation to refer if necessary at a later stage (*CIM II*);[295]
- National procedural rules declaring (a request for a) preliminary reference inadmissible (*e.g., the proper conduct of proceedings such as anti-filibustering*) are *per se* not unlawful and may relief the national court from referring the case to the CJEU if the principles of equivalence (*national and EU law being treated equally without distinction*) and effectiveness (*national procedural rules shall not bar or hamper the exercise of EU-conferred rights*) are complied with (*CIM II*);[296]

4.1.3 Consolidated effective version of the *CILFIT* criteria as of *CIM II*

The changes elaborated above result in the following current consolidated active form:[297]

N°	Consolidation & Supplementation
16	The correct interpretation 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. Before [the domestic court] comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of last instance of the other Member States and to the Court of Justice. (*Only if those conditions are satisfied, may the national court or tribunal refrain*

[294] ibid para 51
[295] *CIM II* para 59
[296] ibid paras 60 – 65
[297] *the respective sources are rendered above in 4.1.1 and 4.1.2*

	from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.)
17, 21	However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union.
18	To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. According to the Court's settled case-law, one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. While a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.
19	It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.
20	Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being

	had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.
+ 1	References of lower courts alone do not preclude a court of last instance from finding an *acte clair.*
+ 2	A court of last instance is not obliged to wait for the CJEU to deliver its response to such lower court's reference.
+ 3	Opposing decisions of lower courts to the favored interpretation of the court of last instance alone do not preclude such from finding an *acte clair*.
+ 4	If a refusal could adversely affect the observance of the principle of the primacy of EU law, the court must establish <u>in detail</u> that there is no reasonable doubt [more rigorous standard]
+ 5	A provision of EU Law allowing different interpretations does not preclude an *acte clair*, if none of these interpretations regarding the context and the purpose of that provision as well as the system of rules of which it forms part, seem sufficiently plausible.
+ 6	Existing diverging lines of – domestic as well as EU-foreign – case-law require specific awareness when assessing an *acte clair* situation.
+ 7	The national court must state reasons for finding an *acte clair* when refraining to make a reference.
+ 8	A previous preliminary reference in the same proceeding does not affect the obligation to refer if necessary in a later stage (Multiple references are possible and mandatory if necessary).

+ 9	National procedural rules declaring (a request for a) preliminary reference inadmissible are *per se* not unlawful and may relief the national court from referring the case to the CJEU if the principles of equivalence and effectiveness are complied with.

4.2 Possible effects from the latest version of the *acte clair* doctrine

Other than in previous case law, the *CILFIT criteria* were not merely formulaically repeated in a random and abstract manner – rather, the CJEU dealt with the entire *CILFIT* case law and principles extensively and in a holistic manner. Generally, the CJEU continues its liberalizing and decentralizing tendencies of the *acte clair* case law in favor of the domestic courts. The novel obligation to state reasons seems to be the only conservative factor aiming to tackle the various forms of renegade case law in domestic jurisprudence. This novelty may however not directly assist the individual litigant, especially when dealing with recalcitrant courts.

The Author will in the following debate the current *acte clair* doctrine with the novel, relevant and pertinent provided contemplations in literature, especially on *CIM II*.[298] Moreover the Author will attempt to anticipate the possible effects of the amendments on the available countermeasures with regard to the general reference behavior of domestic courts.

4.2.1 Reaffirmation rather than revolution

With *CIM II* the CJEU reminds the legal world that the *acte clair* remains very well intact and applicable within its original spirit: Instead of radically overhauling the *CILFIT criteria* (*cf 2.2.3.5*),

[298] *Petric 2021* (n 70); *Mahrer 2022* (n 37); *Cecchetti 2021* (n 127); *Jaeger 2022* (n 129)

the CJEU reaffirmed the *CILFIT criteria* in principle, limiting its updates to – seemingly – rather subtle tweaks.[299]

4.2.2 The obligation to state reasons

With the novel obligation to state reasons the CJEU implements a completely new factor to the game. Despite the CJEU thereby 'merely copies' this already existing principle (*cf Swedish model, Human Rights Court jurisprudence in 3.1.4, 3.2.4*), this minor addition may extensively effect the available countermeasures, as will be elaborated in the following.

4.2.2.1 Mandatory obligation

Before *CIM II*, reasons where not mandatorily required and thus an omission of such *per se* not unlawful. This has changed with *CIM II*: The obligation to state reasons is now a mandated requirement and *e contrario*, if omitted, waived, or insufficiently performed now *per se*[300] poses an unlawful act or at least may indicate bad faith.[301]

4.2.2.2 The details of reasons

The CJEU itself does not explicitly define the extent of the reasoning, instead simply states that a national court's '*statement of reasons for its decision must show*' that one of the CILFIT scenarios is apparent and applicable.[302] The mere phraseology of the judgment does not provide the required level of details.

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[299] *CIM II* paras 39 et seq.; *Mahrer 2022*, 268-270; *Jaeger 2022,* 21
[300] *Mahrer 2022*, 271 et seq.
[301] Crowe, 'Colloquium Report: The Preliminary Reference Procedure: Reflections based on Practical Experiences of the Highest National Courts in Administrative Matters' (2004) 5 ERA Forum 435, 444; *Broberg & Fenger 2021*, 239
[302] *CIM II* para 51

In his Opinion, AG Bobek proposed '*to provide at least a summary explanation as to why*'[303] one of the *CILFIT scenarios* is fulfilled however conceding that there is '*no universal yardstick as to what is an adequate and thus sufficient statement of reasons. It all depends on the nature of the case, its complexity, and above all the arguments brought before the deciding court and those contained in the case file*'[304]

Petric found that the CJEU's link to Article 47 CFR requires a domestic court to autonomously analyze and interpret the textual, contextual and purposive ('spirit-general scheme-wording') aspects of EU law independently of national law: Domestic courts shall interpret (i) the wording of a source of EU law, (ii) possible inconsistencies between (not all but sufficient) equal language versions, (iii) the determined (teleological) meaning within its legal system, and (iv) the lawmaker's intended purpose and goal of that provision *inter alia* comprising moral, political, social, economic, and legal factors.[305] Naturally, this must in any case include the objective of uniformity.[306]

It must however be borne in mind that Article 47 CFR guided the development of the *acte clair* from its outset and hence these considerations – in theory – had to be applied long before *CIM II*. The only factual novelty is the now mandated written 'transcription' of the interpretative elaboration for better verifiability and traceability.

These considerations may however only be derived implicitly. Keeping in mind the renegade caselaw (*cf 3.1*) mutilating the *acte clair* principle into the unrecognizable, the CJEU could have added more coherence and a clearer link to the extent of such reasons. Any recalcitrant domestic

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[303] *Opinion AG Bobek* para 168
[304] ibid para 168
[305] *Petric 2021*, 322-325
[306] *CIM II* para 49; *Mahrer 2022*, 271

court might just as before capitalize this vagueness to bend the outcome of a case to its favored result.

4.2.2.3 The CJEU and the Human Rights Court

Despite the rather close relationship between Article 47 CFR and Article 6 ECHR, the CJEU refrained from referring to the Article 6 ECHR proceedings and case law of the Human Rights Court.[307] One of the prime apparent motives of linking to the 'in-house' fundamental rights regime only, may be the increasing litigation of EU law before the Human Rights Court as a non-EU institution (*cf 3.2.4*). In its famous dismissing opinion 2/13,[308] the CJEU assessed and negated the possibility for the EU to join the ECHR *inter alia* because the Human Rights Court as second equal (!) court would jeopardize the sole and final competency of the CJEU and hence the coherence of EU law in general. In particular, the CJEU held that its (necessary) exclusive competence to deliver binding judgements in EU law precludes any binding external control. The accession to the ECHR as the EU as a whole would have installed the Human Rights Court as an equal partner, limiting the CJEU's exclusive jurisdiction. Such entrustment of a non-EU body to deliver judicial review of EU law is however contrary to EU law and the mandatory sole competence of the CJEU in general.[309]

In the light of this, despite conceding the Human Rights Court's jurisprudence having '*special significance*'[310] for assessing fundamental rights in EU law, it is all the more comprehensible that

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[307] *CIM II* para 51; *Petric 2021*, 323
[308] Opinion 2/13 (n 265)
[309] Opinion 2/13 (n 265) paras 210, 212, 258; Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 GLJ 105, 111
[310] Opinion 2/13 (n 265) para 37

the CJEU in *CIM II* stipulated the obligation to provide reasons exclusively on the basis of its 'in-house' fundamental rights.[311]

It must be though borne in mind, that despite the CJEU ultimately shut down the EU's accession to the ECHR, the Member States of the EU remain part of the ECHR and are thus obliged to abide by both standards.[312] Although not being an official legal equal to the CJEU, the Human Rights Court indirectly achieves jurisdiction over matters of EU law through the back channel. This undisputedly creates competition with the sovereignty on EU law and thereby naturally interferes with the CJEU's sole competence.

By demanding the very same obligation under the EU regime, the CJEU basically provokes two major effects: First, domestic courts will henceforth provide (more or less) extensive reasoning on why a request for a preliminary reference was denied, leading to fewer trials at the Human Rights Court in general. Secondly, if the domestic court fails to meet the – not completely clear – extent of the reasoning, it would not only be a violation of Article 6 ECHR, but it would also *per se* pose a violation of EU law, seemingly facilitating intra-EU remedies. The CJEU in this manner directly challenges the Human Rights Court's homonymic legal institute.

To anticipate the effects of such measures it is crucial to distinguish the subtle differences in both standards: In his study, *Krommendijk* found that the Human Rights Court's standard for reasoning is limited to a very formalistic review: Rather than engaging with the *CILFIT criteria* in detail, the Human Rights Court checks only, whether the national court sufficiently justified an *acte clair* within one of the *CILFIT scenarios*[313] (*cf 3.2.4)*. In a direct comparison between the two separate

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[311] *CIM II* para 51
[312] Spaventa, 'A very fearful Court? The protection of fundamental rights in the European Union after Opinion 2/13.' (2015) 22 Maastricht journal of European and comparative law 35; Halberstam (n 309) 118-119
[313] Compare s*upra* notes 259, 260 and 261; *Krommendijk 2017*, 48-49

standards, it may be well assumed, that the CJEU (indirectly) prescribes a more extensive reasoning on not only whether one of the *CILFIT scenarios* is fulfilled but rather an extensive debate on the respective *CILFIT criteria*. So, by inviting domestic courts to adhere to a more extensive and stringent standard, the domestic courts would thereby in any case meet the Human Rights Court's formalistic requirements as well.

It should however be borne in mind that conversely to the CJEU, the Human Rights Court serves as true appellate body and a means of redress, accessible for the individual litigants on their own motion. In *CIM II* the CJEU may have conceded that the '*correct application and uniform interpretation*' somehow serves '*the protection of individual rights*'.[314] However by the same token, the CJEU also reiterated that Article 267 TFEU does '*not constitute a means of redress*' available to the individual litigants of the pending case.[315] Hence although introducing a stricter standard to intra-EU assessment *substantively*, an effective *procedural* method of invoking such directly before the CJEU remains absent. Therefore, the appeal to the Human Rights Court remains the only accessible remedy for a disgruntled individual litigant outside its domestic jurisdiction.

4.2.2.4 State liability – the crux with compensation

The effects of the obligation to provide reasons on state liability actions also remain limited: First, damages under the *Köbler* doctrine are not easy to be met (*cf 3.2.3*) – even as of *CIM II*. Second, state liability actions, even under *Köbler,* remain primarily of domestic legal nature.

As elaborated above (*cf 3.2.3*), state liability under *Francovich*/*Köbler* requires, that (i) the rule of law infringed must be intended to *confer rights on individuals*; (ii) the breach must be *sufficiently*

[314] *CIM II* para 29
[315] *CIM II* para 54

serious; and (iii) there must be a direct *causal link* between the *breach of the obligation* resting with the Member State and the *damage sustained* by the injured parties.'[316] One shall not think of a violation of the obligation to state reason being a direct key to compensation as there is one major problem, not stemming directly from a legal, but from a logical prerequisite, namely the interdependency between the specific violated obligation and its causality for the accrued damage. In other words, it must be firmly differentiated which violated obligation is causal for an accruing pecuniary disadvantage and which is not. The obligation to provide reasons is independent from the obligation to refer a matter to the CJEU under Article 267 (3) TFEU: If a domestic court does not construe adequate reasons or any reasons at all, it thereby violates the *CIM II*-held obligation to provide reasons. The obligation to provide reasons is – contrarily to the obligation to refer a case[317] – (somehow) intended to confer rights on individuals, as the CJEU's link to Article 47 CFR indicates. Whether the breach is sufficiently serious is irrelevant as the violation of the obligation to provide reasons as such can alone never directly causally link to the damage sustained, if there was a damage at all: Inadequate reasoning despite being unlawful does neither by itself pose a pecuniary disadvantage nor is it (directly) causal for a possible accrued pecuniary disadvantage.

As elaborated above (*cf 3.2.3*), compensation law is generally of domestic nature[318] irrespective of being granted under *Francovich/Köbler* or the domestic damages regimes such as Austria's *'right of compensation and satisfaction*' under § 1293 et seq. of the Austrian General Civil Code. If the CJEU plays any role in a state liability action following a denied reference, it is of the very same nature as in the (initial) preceding disputed trial – that of a remote third-party expert witness on EU

[316] Compare *supra* notes 235, 237
[317] The CJEU links this obligation to the CFR and thereby implicitly renders the obligation to provide reasons as instrument guarding individual's rights.
[318] Francovich (n 235) paras 42-43; Compare also *Varga 2017*, 52 et seq.

law. The CJEU is of no position to award damages. It may only deliver its opinion on questions of EU law if such questions (a) arise and (b) are referred by the domestic court. Neither *Köbler*, nor the obligation to state reasons vest the individual with a right to bring the case to the CJEU. Only if the national court brings the matter to the CJEU, it may rule on either the initial disputed trial or the follow-up damages case.

The problem rests with renegade or recalcitrant courts (*cf the Austrian gambling jurisprudence above in 3.1.4*): If such courts arbitrarily refuse a reference to the CJEU in the initial disputed trial they may by the same token both refuse a reference in the (follow-up) state liability action as well as decline the state liability action itself. In other words – if the domestic court doesn't want the matter to be heard before the CJEU, it may in the same way prevent the follow-up domestic damages lawsuit to be heard before CJEU on what grounds soever.

Further, regardless of a reference on the compensation claim, the application of the damage compensation regime is still in the sole disposition of domestic courts under national law. Hence, for the determination of the actual 'damage' the national court would apply its own domestic damage law regime whether (a pecuniary) damage accrued and regarding the causal test for such.

The common law understanding of punitive damages is in general alien to traditional civil law systems. Damages under civil law without an actual pecuniary disadvantage – so called 'non-material damages' – are, without a specific legal order of such,[319] generally inadmissible ('no compensation without damage'), as the current debate on the trial against the Austrian federal

[319] Compare *e.g.,* the Consolidated version of the General Data Protection Regulation [2016] OJ L 119, 4.5.2016 art. 82.1

postal service ('Post AG') gently reminds of.[320] The traditional Austrian damages law *e.g.,* generally precludes compensation of non-material 'damage' due to its lack of pecuniary nature.[321]

Therein lies the very reason why violations of the preliminary reference model almost never fulfill the strict requirements of state liability damages compensation, and *CIM II*'s obligation to state reasons is not capable of alleviating this disadvantageous situation: The obligation to state reasons is of no pecuniary nature and in case of violating such, one is not automatically vested with an admissible (pecuniary!) damage claim. In case the request for a preliminary reference was refused, the individual litigant was treated – perhaps – unlawfully and thus incurs a non-material damage only. The violation of the reasoning only indicates an unlawful act. However only a materially wrong decision, depriving the individual litigant of his lawful claim may constitute a pecuniary disadvantage, eligible for compensation (*condicio sine qua non)*.[322] This 'wrong' of a judgment is however independent of the reasoning. Therefore, a violation of the obligation to provide reasons under *CIM II* only *indicates* an unlawful act, however, may never represent the pecuniary disadvantage itself. The judgment may still be justifiable under the *acte clair* and the applicable specific substantive EU legal stipulation in question, even if the reasons are insufficient or completely missing.

So, despite breaches of settled case law, such as the ample case law on the *acte clair* and the novel obligation to provide reasons, may *trigger* state liability, a sole procedural failure – such as the obligation to provide reasons – without being causal for the accrued damage does therefore never

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[320] Austrian Supreme Court judgment of 15 April 2021 6 Ob 35/21x ECLI:AT:OGH0002:2022:E131543; Case C-300/21 *UI v Österreichische Post AG* [2022] ECLI identifier: ECLI:EU:C:2022:756, Opinion AG Sánchez-Bordona

[321] Wagner in Schwimann, Kodek (eds.) *ABGB Praxiskommentar* (4th edition, LexisNexis 2016) ad § 1293 ABGB para 24

[322] Compare also Case C-420/11 *Jutta Leth v Republik Österreich, Land Niederösterreich* [2013] ECLI:EU:C:2013:166; Case C-94/10 *Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet* [2011] ECR 2011 I-09963 *Chalmers et al. 2019*, 319

culminate in an admissible compensation claim.[323] Strictly speaking, by the same token, a state liability claim must fail on the grounds of a violation of the obligation to refer under Article 267 (3) TFEU alone, since it is not only not intended to confer rights to the individual,[324] but also itself does not result in a pecuniary disadvantage.

With that in mind, the confirming violation of the preliminary reference in *Ferreira da Silva* must not be overhastily considered as a big valorization of the individual litigant's position: In *Ferreira da Silva* the CJEU found that the national court had violated the *acte clair* principle and the obligation to refer in the preceding trial.[325] Nonetheless the CJEU's role in the post-Article 267 violation state liability lawsuit is of the same nature as in any other civil lawsuit. The CJEU is in no position to assess and confirm the actual damages under the domestic damage compensation regime. It is therefore only consequential that the CJEU in *Ferreira da Silva* only identified a breach of an obligation of EU law and did not elaborate on the actual awarding of the damages.[326]

Therefore, not too much significance should be prematurely ascribed to the extent of the effects of *Ferreira da Silva* and *CIM II* for the sole litigant's position under the state liability compensation regime.

4.2.2.5 State prosecution under Article 258 TFEU

As strict as the requirements sit with state liability, as lenient they seem with state prosecution under Article 258 TFEU. However, other than state liability, state prosecution aims to enforce

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[323] C-429/09; Köbler *Chalmers et al. 2019*, 319
[324] *CILFIT* paras 2, 9; *CIM II* para 54
[325] *Ferreira da Silva e Brito* paras 43, 44
[326] Compare also Turmo (n 121) 351

compliance of the Member States with EU law, especially the obligations deriving from the Treaties (*cf 3.2.2*) and not damage compensation, less the individual litigant's one.

The obligation to refer a matter is stipulated explicitly in the Treaties in Article 267 (3) TFEU. However, the detailed extending duties deriving from this (Treaty) obligation are outlined in the vast case law of the CJEU. The phraseology of Article 258 TFEU suggests, that only violations of an '*obligation under the Treaties*' will be under the scope of state prosecution. Strictly speaking, the novel obligation to provide reasoning in *CIM II* is not expressly a Treaty obligation, but rather stems from case law of the CJEU itself. However, in the prosecution case of France for violating the obligation to refer, the CJEU explicitly referred to the pertinent *CILFIT* case law, *the CILFIT scenarios* and the *reasonable-doubt-test*[327] – all case law principles not enshrined in the Treaties. The CJEU thereby (indirectly) confirms the case law of the CJEU on the *acte clair* principle being a factor in assessing a possible violation of an '*obligation under the Treaties*' within the meaning of Article 258 TFEU. Furthermore, the CJEU renders the obligation to provide reasons as an autonomous EU law duty stemming from Article 47 CFR.[328] A violation of the obligation to provide reasons does therefore not only contradict the *CILFIT* case law, shrouded over the preliminary reference of Article 267 (3) TFEU, but also directly breaches the CFR which is – pursuant to Article 6 TEU – undoubtedly part of the Treaties. It may therefore be very well assumed that there are sufficient grounds for the EC to directly invoke missing or inadequately performed reasoning as standalone violation successfully before the CJEU.

Such engagements are nevertheless also dependent on the EC's active engagement, an element totally absent in the past. However, factors such as (a) a single violation of the obligation already

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[327] *Commission vs France* paras 110, 112, 114
[328] *CIM II* para 51

sufficing for a positive prosecution under Article 258 TFEU (*cf 3.2.2*), (b) insufficient reasoning henceforth *per se* representing a breach (*cf 4.2.2.1*) as well as (c) the European Parliament's 'call for arms' to monitor more effectively whether national courts comply with their obligation to make a reference (*cf 3.2.2*) may support the assumption, that the EC might be far less reluctant to prosecute preliminary reference infringements more frequently in the future.

Even if this may prove true, the EC may never be capable of *directly* enhancing the individual litigant's position by design, as Article 258 TFEU prosecution rather fulfills the role of law enforcement, focusing on public standards, not one's civil claims. However, if the EC pursues such infringements more persistently, domestic courts may naturally comply with the preliminary reference to a higher extent. Hence, individual litigants may somehow benefit from the reflex effects of the EC's deterrent presence.

4.2.3 The paradigm-shift from 'interpretation' to 'application'

By changing the nature from doubts of application to interpretative doubts the CJEU takes another considerable step of relaxation by waiving a fair amount of competence to domestic courts. The CJEU re-balances the separation of duties between the EU and domestic jurisprudential bodies within a more traditional and literal understanding of Article 267 TFEU.[329] By that the CJEU unequivocally aims to reduce the caseload by giving national courts more discretion to decide without priorly involving the CJEU.

The debate on interpretation and application is however of very delicate nature: It should be given due consideration that with this step, the CJEU implements the *acte clair* doctrine as in the original French meaning which it rejected back then both in *Da Costa* and *CILFIT* (*see above 2.2.2,*

[329] *CIM II* para 33; *Jaeger 2022,* 19 et seq.

3.1.4).[330] This clearly entails opening a big window of opportunity for misuse: *Jaeger* correctly held that this change in terminology does not increase the *acte clair*'s scope *de iure*; However as interpretation and application sometimes become blurred, this might *de facto* lead to already recalcitrant supreme courts henceforth masking questions of interpretation as questions of application and refer even less cases in the future.[331]

Before the *acte clair* was implemented in 1982, AG Capotorti condemned the (French) *acte clair* principle in his famous opinion, enumerating the vast misconduct of the French courts which basically used the *acte clair* to escape the preliminary reference of Article 267 (3) TFEU (*cf 2.2.2*). Given the already present renegade case law (cf *3.1*) that sprouted under the current more stringent regime, this step of liberalization is definitely capable of introducing even further arbitrariness and it seems doubtful that the above-elaborated obligation to provide reasons is capable of adequately tackling the inherent drawbacks.

It must further be noted, that strictly speaking, any application inevitably requires an interpretative step: If a legal norm is not understood, it cannot be applied.[332] Even cases so clear that they seemingly do not need to be interpreted *per se* involve an interpretative step. And what is *clair* to one may not-be-so-*clair* to any other person. Also, it shall be noted, that law has reached a – for both the layperson as well as the professional – barely tractable state of complexity and it shall be duly noted, that for the most part no legal rule is that 'clair' to be applied without prior interpretation – more so in the light of often vague and conflicting case law.

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[330] *Da Costa*, Opinion Advocate General Lagrange; *Opinion AG Capotorti*
[331] *Jaeger 2022,* 19 et seq., 21
[332] *Petric 2021*, 313

So, by leaving questions of application to domestic courts, the CJEU somehow also leaves questions of interpretation thereof to such, creating a kind of logical paradox, and inviting for more arbitrariness in the spirit of the early condemned French jurisprudence (*cf 3.1.4*).

4.2.4 Further relaxations

Apart from the above, the CJEU implemented further relaxation measures to the *CILFIT criteria,* namely (i) the requirement of a matter being equally obvious to courts 'of last instance', (ii) lawfully restricting domestic procedural rules, (iii) amendment of the different comparable language versions, (iv) competing possible different interpretations and (v) updates on the jurisprudential divergencies. These are all expressions of the constant trend of further decentralizing the *acte clair* as will be discussed in the following.

4.2.4.1 The requirement of a matter being equally obvious to courts 'of last instance'

The CJEU seems to return the equally obvious criteria to a more original and literal understanding, as Article 267 (3) TFEU is primarily addressed to supreme courts ('*against whose decisions there is no judicial remedy under national law*'). These courts sit at the domestic apex and are generally directly responsible for the uniform interpretation of EU law in the respective Member States.[333] Moreover, the national courts of last instance are mostly engaged in the dialogue with the CJEU both formally (procedurally) and informally via legal conferences and mutual exchange.[334]

This is a (soft) continuation of the recent case law of *Ferreira da Silva* and *X & Van Dijk* in which the CJEU held, that doubts accrued by a lower court *per se* do not preclude the supreme court ('of

[333] ibid para 4.1
[334] Dyevre et al. 'Who refers most' (2020) 27 Journal of European Public Policy 912; Claes, Visser 'Are you networked yet? On Dialogues in European Judicial Networks' (2012) 8 ULR 100; *Petric 2021*, 318

last instance') from finding an *acte clair* as long as the provision is considered clear beyond reasonable doubt.[335]

4.2.4.2 Lawfully restricting domestic procedural rules

By confirming that procedural rules limiting the preliminary reference of Article 267 (3) TFEU are not *per se* incompatible with EU law, the CJEU somehow concedes the presence of admissible external constraints to the obligation to refer. If a national procedural law declares an action inadmissible (*e.g.,* precluded or time barred) and the action would be turned down on *procedural* grounds without *substantive* law being capable of altering the outcome to the sole litigant's benefit, a CJEU's decision may not be 'necessary' and 'relevant' for delivering that judgment.[336]

The CJEU however attached two stringent conditions which must be fulfilled: The indifferent treatment of national and EU Law (principle of equivalence) and the free unhindered effects of the EU legal regime in general (principle of effectiveness).[337] Only if these principles are fulfilled, a national procedural rule may lawfully preclude a request for a preliminary reference under Article 267 (3) TFEU. This is definitely in synchronicity with the CJEU's stance on generally refusing purely academic questions (*cf 2.1.2.2*). The CJEU further referred to the case law of *Aquino*, where it previously held that '*the justification for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute*.'[338] If a question is not necessary or relevant for the outcome of the dispute, it is only logical that a refused reference should not be considered a violation of the obligation to refer.

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[335] *Ferreira das Silva e Brito* paras 41, 42; *X & Van Dijk* paras 60 – 62; *Petric 2021*, 318
[336] *CIM II* paras 64 et seq.; *Cecchetti 2021*
[337] Compare Case C-3/16 (n 139); *Cecchetti 2021*
[338] Case C-3/16 (n 139) para 45

4.2.4.3 Amendment of the different comparable language Versions

The CJEU relaxed the almost impossible to meet requirement of comparing all (official) language versions of the EU to determine whether reasonable doubt exists or not because it could hardly be fulfilled.[339] As no one could have ever met the onerous purely academic requirement of verifying 24 different language versions, the CJEU defused the originally inapplicable requirement to a more realistic hands-on practical approach.[340] The initial unattainable requirement which inevitably led to a 'secession' of domestic interpretation methods is thereby not only reinterpreted to mirror the actual conduct of most domestic courts, but for the very first time since its inception, it has been given a realistic scope of application.

However, if domestic courts primarily resort to the (same familiar) set of languages (*e.g.,* exclusively German, English and French, *cf 3.1.2*), the EU risks fragmenting EU law into self-reflexive linguistic circles. This undoubtfully strengthens the major languages in the EU at the cost of the minority languages, which would be rendered even less relevant. Another feature at risk is the extensive language comparison conducted by the CJEU uncovering incongruent translations of EU legislation.[341] This would be scaled back to a very large degree if far less (language) factors are assessed in a minimalistic manner.

4.2.4.4 Competing possible different interpretations

The CJEU further severely softens interpretative contradictions as mandating factor to refer a case to the CJEU. Several alternative interpretations may not *per se* trigger an obligation to refer as long as the favored one is – 'reasonably' – more plausible than the others.[342] By this means, the CJEU

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[339] *CIM II* para 44
[340] *Mahrer 2022*, 270; *Petric 2021*, 319-320
[341] Resolution 2017/227(INI) (n 231) para 46
[342] *CIM II* para 48; *Cecchetti 2021*

decisively rebalances the uniformity on the one hand and the liberty of domestic courts on the other in favor of the latter.

However, the phraseology promotes a certain loophole for arbitrariness, especially the reference to 'sufficiently plausible' and 'reasonable' or as *Jaeger* held, it enables the domestic court to overrule several *objectively* possible interpretations if it considers one *subjectively* the most reasonable.[343] This somehow also illustrates the interpretation-application paradox: No matter how simple and concise a legal stipulation is, it usually always enables more than one – more or less – reasonable interpretation.

4.2.4.5 Update on jurisprudential divergencies

Just like defusing the unfeasible linguistic comparison, the CJEU decreased the threshold for 'reasonable doubt' raised by contradictious case law. In *CIM II* the CJEU reiterated the *Ferreira* principle, that the existence of diverging lines of case law within one or several Member States alone does not preclude the domestic court from finding an *acte clair*. However, the CJEU mandates the domestic courts to '*be particularly vigilant*' in such circumstances with regard to the uniformity of EU law. The attenuation of both the linguistic comparison and jurisprudential divergencies can be seen as further development of the *Ferreira da Silva* and *X & Van Dijk* case law.[344]

[343] *Jaeger 2022,* 20
[344] *CIM II* para 49; *Ferreira da Silva e Brito* para 41; *X & Van Dijk* para 60; *Cecchetti 2021*; *Jaeger 2022,* 21

5 Remarks and conclusion

It follows from the analysis above (*cf 4.2*), that the CJEU contrasts the almost exclusive further liberalizing and decentralizing measures with only a single conservative doorstop, namely the obligation to provide reasons. Apparently, the CJEU does not only consider the obligation to provide reasons capable of countering the vast misconduct on the domestic levels in the past, but also sufficiently warrants even further decentralization measures of the *CILFIT criteria* in favor of domestic courts.

By prescribing domestic courts to reason their refusal, the CJEU basically demands those courts to provide appellate grounds for the individual litigant, facilitating their chances of successfully remedying a borne violation of their rights. The calculation is clear: A stricter control mechanism allows more leniency for domestic courts. In shifting a good portion of the CJEU's compliance monopoly under Article 267 TFEU to the individual litigants, the CJEU creates external third-party pressure on domestic courts to comply with EU law.[345] The *ex-ante* reference heavy 'inspection' is thereby remodeled to an *ex-post* control mechanism comprising not only a single but many inspecting actors. Just like body cameras remind law enforcement officers to abide by all procedural duties, the domestic courts may in the future exert more stringent self-control leading to an increased respect for EU law and more accurate judgments.

However promising on paper, the novel mandated reasoning is everything else but a panacea: As elaborated above, the requirements for an individual to pursue damages under the state liability regime are strict and rarely ever fulfilled. On top of that, such are trialed within the same jurisdiction if not identical courts that – putatively – violated the individual litigant's rights in the

[345] *Donelly & de la Mare 2021*, 245; *Krommendijk 2017*

first place (*cf 4.2.2.4*). The Article 258 TFEU prosecution, regardless of being enhanced by *CIM II*, can *by design* not be considered a 'remedy' available to the individual litigant (*cf 4.2.2.5*). So even as of *CIM II*, the Human Rights Court remains the only true 'appellate' mechanism that may be seized out of the litigant's own motion at any time.

But unlike other remedies, the Human Rights Court appeal is weakened by *CIM II*, as a matter of fact even further than previously conceded above (*cf 4.2.2.3*). With *CIM II* the CJEU enlarges the small but brutal loophole for recalcitrant courts to 'limbo' cases under the radar of the Human Rights Court: The reason for that lies in the scope and assessment standard of the Article 6 ECHR proceedings. As extensively elaborated above (*cf 4.2.2.3*), the Human Rights Court's assessment is of purely formalistic, procedural nature. That means the Human Rights Court will not engage into the *substantive* reasoning of the domestic court. From that follows, that if a domestic court blatantly defies the obligation to provide reasons *e.g.,* by abstaining from providing any reasons at all, the individual litigant may successfully invoke the violation of Article 6 ECHR before the Human Rights Court. But as *CIM II* demands and encourages domestic courts to provide reasons if they refuse a reference, naturally fewer domestic courts will blatantly refuse a reference. Instead, they will elaborate on the reasons in a more detailed manner, not least to pacify the EC and prevent Article 258 TFEU prosecutions. However, a recalcitrant court will manage to cloak its 'bogus' argumentation in seemingly sound reasoning and may thereby circumvent the Human Rights Court's limited formalistic check. As the reasoning of a domestic court may suffice formalistically the standard of Article 6 ECHR despite it may be substantively completely wrong, the domestic court could fly a well-reasoned but substantively wrong judgment under the radar of the Human Rights Court, completely unhinging such as available remedy. So, despite well-intentioned, *CIM II*'s obligation to provide reasons might in some cases reach the opposite and even further limit the

individual litigants access to an effective remedy, perhaps even depriving such of the only true appellate function available.

The original unfeasible and over-stringent *CILFIT criteria* (*cf 2.2.2*) paired with the CJEU's nearly arbitrary inconsistency in applying such (*cf 2.2.3*) did not contribute to the domestic discipline, almost inviting domestic courts to bend the *CILFIT criteria* to their will and needs. Rather, history (*cf 3.1*) suggests that domestic courts may seize any vagueness to frame a judgment within their certain intended proclivity. This is especially germane in highly politicized topics of vast political or social extent especially when *e.g.,* one party is a foreign company doing business in a rather scorned sector. In such scenarios the close proximity of a court to its Member State and thus its nationals may render the domestic court rather inappropriate to meet its judicial guarantees.

The Austrian gambling jurisprudence serves as perfect example (*cf 3.1.4*): The reasoning of the constitutional court, despite generally substantially contested, is very extensively elaborated. It remains greatly questionable that if a case so well and extensively reasoned is elevated to the Human Rights Court it would be ultimately considered to have violated Article 6 ECHR. That way, the Austrian jurisprudence could limbo under the threshold of the Human Rights Court's formalistic scanner and further, due to the domestic nature of damage compensation law, bar the CJEU without subjecting the State of Austria to direct repercussions of disgruntled individual litigants. Also, the case further indicates that lower courts may unconditionally subordinate to the domestic protectionist lines of case law instead using their discretion to challenge questionable practices before the CJEU (*cf 2.1.2.5*).

The state liability's protection mandate cannot be considered 'effective' if the same courts in that jurisdiction are commissioned to assess and rectify domestic 'manifest infringements', especially when domestic lines of case law and thus the entire jurisdiction as such is responsible for the

situation in the first place.[346] In such scenarios it makes sense to conduct the respective trial before a structurally independent judicial body. The idea of an arbitral tribunal is to provide a neutral, objective, and impartial third-party dispute resolution body completely disconnected from either one of the parties' affiliation or interests.[347] Such an independent body already does exist within the EU, namely the CJEU itself. It seems somehow systematically contradictious that the CJEU is not competent to *directly* hear and perhaps even *award* damages while at the same time being very well capable of deciding on disputes under Article 258 TFEU.

So, although *CIM II* may – on paper – further enhance the abidance with (the uniformity of) EU law and thus the individual litigant's legal position on a soft, deterrent level, it also at the same time magnifies the window of abuse. The further liberalization measures – especially the change from application to interpretation – can only be considered a further extension of the Member State's 'jester's license to kill uniformity'. Without a proper functioning and direct available remedy for the individual litigant to directly elevate a case to the CJEU, any fudged attempt to improve the badly aging *CILFIT criteria* may in general be ultimately rendered futile.

With regard to the thesis established above (*cf 1.3*), the Author can hence confirm that the upgrades to the *acte clair* doctrine implemented by *CIM II* not only unsuccessfully attempt to refurbish the old insufficient approach, but moreover create novel unprecedented leeway for misuse and abuse, and hence promoting further fragmentation.

Since its inception, the *acte clair* doctrine was flawed with severe structural problems. Attempting to cover those with minor half-hearted tweaks shifts the busting weld only to a different spot,

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[346] Wattel (n 238) 180
[347] Born (2021) *International Arbitration: Law and Practice* (3rd edition, Wolters Kluwer) 10

chiefly at the costs of the individual litigant's legal position, or as *Moltisanti* appropriately found:

'*There is no chemical solution to a spiritual problem.*'[348]

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[348] Moltisanti in 'In Camelot' *The Sopranos*, created by David Chase, season 5, episode 7, HBO, 2004.

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