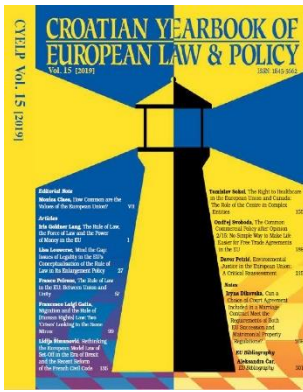




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HOW TO MAKE A UNICORN OR ‘THERE NEVER WAS AN “ACTE CLAIR” IN EU LAW’: SOME REMARKS ABOUT CASE C-561/19 CONSORZIO ITALIAN MANAGEMENT

Davor Petrić*

Abstract: In its judgment in Consorzio Italian Management, the Court of Justice has gone some way to solving the riddle that since the beginning of European integration has remained one of the most important and widely discussed doctrines of EU law: one that concerns the obligation of national courts of last instance to refer questions of interpretation of EU law for a preliminary ruling to the Court. The doctrine in question concerns exceptions to this obligation, solidified four decades ago in the landmark CILFIT ruling. More specifically, one exception to the obligation of national courts of last instance to make a reference is found in situations where the meaning of a provision of EU law is clear beyond reasonable doubt. This contribution discusses whether and how the Court’s ruling in Consorzio Italian Management adjusts and recalibrates this particular exception, which despite the name it was usually referred to – ‘acte clair’ – still remains unclear. To explain what, if anything, changes after Consorzio Italian Management, the discussion will go back to the origins of the doctrine of ‘acte clair’, initially pronounced in CILFIT.

Keywords: preliminary ruling procedure, Article 267(3) TFEU, national courts of last instance, obligation to refer, exceptions, CILFIT, ‘acte clair’.

1 Introduction

On 6 October 2021, the Grand Chamber of the Court of Justice of the European Union delivered its judgment in *Consorzio Italian Management*.¹ In it, the Court dealt with one of the exceptions to the obligation of national courts of last instance to refer preliminary questions under Article 267 TFEU. These exceptions were originally pronounced in its famous *CILFIT* ruling,² decided on the very same date exactly 39 years ago. *Consorzio Italian Management* was thus aptly dubbed ‘*CILFIT due*’.

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¹ Case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799.

² Case 283/81 *CILFIT* ECLI:EU:C:1982:335.

It will undoubtedly see extensive coverage in EU legal scholarship in the years to come.³

Although it has remained good law for so many years, *CILFIT* has never stopped receiving criticism on different accounts, be it conceptual, normative, or practical. I expect that *Conorzio Italian Management* will mostly be assessed in the light of this dominant perception of *CILFIT*. Nevertheless, some lawyers have tried to draw attention to several rather trivial points related to *CILFIT*, peculiar (mis)understanding of which has often fuelled the criticism. Nevertheless, the voices of these lawyers have remained distant.

In this contribution, I will first restate this alternative reading of *CILFIT*. Then, I will discuss what *Conorzio Italian Management* changes – or better, clarifies – with respect to the interpretation of paragraph 3 of Article 267 TFEU. In particular, I will show how this one exception to the duty of national courts to refer preliminary questions was imprecisely conceptualised based on the doctrine of 'acte clair'. I will argue that what was all the time referred to as 'acte clair' is instead a simple interpretive directive. And *Conorzio Italian Management* in important respects makes this point even more obvious.

2 The origin and shape of the 'motionless Titan'

Under Article 267(3) TFEU, national courts against whose decisions no judicial remedy exists under national law have the obligation to refer questions of the interpretation of provisions of EU law to the Court of Justice. This provision has remained unchanged from the beginning of EU integration. The ruling in *CILFIT* established three exceptions to this obligation of national courts of last instance. As is well known, these exceptions are the following: one, the question of interpretation of a provision of EU law is irrelevant for a dispute pending before a national court;⁴ two, the meaning of a provision of EU law, which is relevant for a dispute pending before a national court, has already been clarified by the Court – the so-called 'acte éclairé';⁵ and three, the meaning of a provision of EU law is 'so obvious as to leave no scope for any reasonable doubt', so that that provision does not have to be interpreted at all but can simply be

³ For an immediate reaction, see Jesse Claassen, 'In the Courts the CJEU Does Not Trust? The National Courts' Obligation to Refer Preliminary Questions to the CJEU after *Conorzio Italian Management*' (*Verfassungsblog*, 12 October 2021) <verfassungsblog.de/in-the-courts-the-cjeu-does-not-trust/> accessed 15 December 2021.

⁴ *CILFIT* (n 2) para 10.

⁵ *ibid.*, paras 13–14.

applied to the dispute pending before the national court – the so-called ‘*acte clair*’.⁶

The ruling in *Conorzio Italian Management* confirms the first two exceptions, that is, irrelevance and ‘*acte éclairé*’, simply and without any dilemma.⁷ But these two exceptions were never really a problem. The first is merely an expression of the discretion of any national court to decide which provisions of EU law are applicable to the dispute in the main proceedings. The second is the consequence of the *erga omnes* effect of the judgments of the Court, which basically have the value of precedent in EU law. The real problem was the third exception, ‘*acte clair*’, referred to as ‘the motionless Titan of a long bygone era’ by Advocate General Michal Bobek in his Opinion in *Conorzio Italian Management*.⁸

The origins of the idea of ‘*acte clair*’ in EU law go back long before *CILFIT*. It was Advocate General Maurice Lagrange who first proposed it to the Court in his opinions in *Fédération Charbonnière de Belgique*⁹ and *Da Costa*.¹⁰ In his view, when the meaning of a provision of EU law is

perfectly clear, there is no longer any need for interpretation but only for application, which belongs to the jurisdiction of the national court whose very task it is to apply the law. This is what is sometimes described, not perhaps very accurately and in a way which is often misunderstood, as the theory of the ‘*acte clair*’ (a measure whose meaning is self-evident) [...].¹¹

This ‘*acte clair*’ theory originated with the French high courts. In France, the executive has the exclusive right to interpret international treaties, whereas courts can merely apply those interpretations to individual cases. So, by claiming that the meaning of a provision of a treaty is clear and unambiguous, hence does not require interpretation but can immediately be applied, French courts were escaping the grip of the executive.¹² Similar doctrines concerning referrals of questions of constitutionality by ordinary courts to constitutional courts existed in other European countries.

⁶ *ibid*, para 16.

⁷ *Conorzio Italian Management* (n 1) paras 33–38.

⁸ Case C-561/19 *Conorzio Italian Management* ECLI:EU:C:2021:291, Opinion of Advocate General Bobek, para 123.

⁹ Case 8/55 *Fédération Charbonnière de Belgique* and Case 9/55 *Société des Charbonnages de Beeringen and Others* ECLI:EU:C:1956:6, Joined Opinion of Advocate General Lagrange.

¹⁰ Joined Cases 28 to 30/62 *Da Costa* ECLI:EU:C:1963:2, Opinion of Advocate General Lagrange.

¹¹ Opinion of AG Lagrange (n 10) 45.

¹² For a discussion, see Opinion of AG Bobek in *Conorzio Italian Management* (n 8) para 95.

The Court in *Da Costa* did not endorse the idea of 'acte clair' proposed by Advocate General Lagrange as one of the exceptions to the obligation of national courts of last instance to refer questions of interpretation of EU law for a preliminary ruling.¹³ However, it did permit the aforementioned 'acte éclairé' exception, for the first time instituting what is, in essence, the doctrine of precedent in EU law.¹⁴

Despite being rejected by the Court in *Da Costa*, national courts, especially the French Conseil d'État, kept relying on 'acte clair' to circumvent their obligation to send references to Luxembourg. Soon the issue resurfaced in *CILFIT*. However, Advocate General Francesco Capotorti again rejected the idea of 'acte clair', exposing its conceptual flaws in his famous opinion.¹⁵ Advocate General Capotorti's view can be restated as the 'no application without interpretation' thesis. Before or along with applying provisions of EU law, national courts must determine their meaning, that is, interpret them. In his words:

[b]efore a provision can be applied to a specific case, it is always necessary, from a logical and practical point of view, to determine its meaning and scope, failing which it is impossible to establish whether it is applicable to the case in question or to infer from its terms all the implications for that case. It may tentatively be stated that when a provision is applied its interpretation and application are interwoven and merge, but it is inconceivable for a provision to be applied without there being any need to interpret it, unless the meaning of the word 'interpretation' is distorted in such a way as to suggest that some difficulty is necessarily involved. In the final analysis, the oft-repeated [L]atin maxim '*in claris non fit interpretatio*' should be abandoned, since it is through the interpretation of a provision that it is possible to ascertain whether its meaning is clear or obscure.¹⁶

But the Court this time felt prepared to give away a bit more to national courts. It accepted that in some situations, 'the correct application of [EU] 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'.¹⁷

¹³ Joined Cases 28 to 30/62 *Da Costa* ECLI:EU:C:1963:6.

¹⁴ *Da Costa* (n 13) 38: 'Although the third paragraph of Article [267 TFEU] 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 [267 TFEU] 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' (emphasis added).

¹⁵ Case 283/81 *CILFIT* ECLI:EU:C:1982:267, Opinion of Advocate General Capotorti.

¹⁶ Opinion of AG Capotorti (n 15) para 4.

¹⁷ *CILFIT* (n 2) para 16.

However, for this situation to obtain, that is, to encounter a provision of EU law whose meaning is clear beyond reasonable doubt, a national court must claim to have satisfied a number of conditions. Most importantly, the national court 'must be convinced that the matter is equally obvious' to, on the one hand, courts in other Member States and, on the other hand, the Court of Justice itself.¹⁸ Only then could that national court 'refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it'.¹⁹

But how to establish that the meaning of EU law is perfectly obvious to everyone, so that it can be instantly applied? Before coming to that conclusion, the national court must take into account 'the characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise'.²⁰ First is the fact that Union 'legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions'.²¹ Second is the fact that 'even where the different language versions are entirely in accord with one another, [EU] law uses terminology which is peculiar to it'.²² A related point is that 'legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States'.²³ Third is the necessity of placing 'every provision of [EU] law [...] in its context and interpret[ing] [it] in the light of the provisions of [EU] 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'.²⁴

It was these interpretive criteria that national courts must satisfy before being able to conclude that the meaning of EU law is clear beyond reasonable doubt, and that this is equally obvious to other courts in the EU – before, in other words, encountering the '*acte clair*' provision – that drew the most criticism.

3 Is the unicorn found or created?

The most elaborate criticism came from within the Court of Justice, that is from its Advocates General. In *Gaston Schul*, Advocate General Dámaso Ruiz-Jarabo Colomer, with the passing of time, considered the

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ *ibid.*, para 17.

²¹ *ibid.*, para 18.

²² *ibid.*, para 19.

²³ *ibid.*

²⁴ *ibid.*, para 20.

'*acte clair*' criteria established in *CILFIT* to be 'unviable' and 'preposterous'.²⁵ Before him, Advocate General Sir Francis Jacobs in *Wiener* more specifically spoke against the requirement to perform a comparison of all linguistic versions of a relevant provision of EU law.²⁶ The same scepticism of linguistic comparison in the interpretation of EU law was echoed later by Advocate General Antonio Tizzano in *Lyckeskog*.²⁷ Besides linguistic comparison, a comparison of the case law of all Member States, for national courts to be convinced that the meaning of EU law was equally clear to all, was similarly disregarded as an elusive inquiry. In any event, if pressed too strictly, the *CILFIT* formula for finding an '*acte clair*' in EU law would be considered a task achievable only by the Dworkinian Judge Hercules.²⁸ For a national judge, it would be more likely to 'encounter a unicorn' than to 'com[er] across a "true" *acte clair* situation', as Advocate General Nils Wahl put it in *X and van Dijk*.²⁹

So much ado about the *CILFIT* criteria would be perfectly understandable had the Court of Justice in that judgment ever accepted the idea of '*acte clair*' in EU law as, say, Advocate General Lagrange proposed, or in the sense originally conceived in the French legal tradition. When the meaning of a provision of EU law is perfectly clear and self-evident, that provision does not need to be interpreted at all, but merely applied. Clear things need no interpretation; interpretation does not happen when things are clear.³⁰

But the Court never did that. In *CILFIT*, it is more probable that the Court followed Advocate General Capotorti's view. Indeed, a fairer reading of that judgment would be that the Court thereby only stated Capotorti's 'no application without interpretation' thesis in different terms. To find that the meaning of a provision of EU law is clear beyond reasonable doubt so that it can be merely applied, without the need to refer a preliminary question to Luxembourg, the national court must first interpret that provision, ie determine its meaning and explain why that meaning is 'clear'.³¹ So, '*acte clair*' in EU law does not exist and waits to be encoun-

²⁵ Case C-461/03 *Gaston Schul* ECLI:EU:C:2005:415, Opinion of Advocate General Ruiz-Jarabo Colomer, para 52.

²⁶ Case C-338/95 *Wiener* ECLI:EU:C:1997:352, Opinion of Advocate General Jacobs, para 65.

²⁷ Case C-99/00 *Lyckeskog* ECLI:EU:C:2002:108, Opinion of Advocate General Tizzano, para 75.

²⁸ Opinion of AG Bobek (n 8) para 104.

²⁹ Joined Cases C-72/14 and C-197/14 *X and van Dijk* ECLI:EU:C:2015:319, Opinion of Advocate General Wahl, para 62.

³⁰ As classic civil law maxims state, '*clara non sunt interpretanda*', '*interpretatio cessat in claris*' or '*in claris non fit interpretatio*'.

³¹ cf Case C-495/03 *Intermodal Transports* ECLI:EU:C:2005:215, Opinion of Advocate General Stix-Hackl, paras 88–89: 'The application of a provision is therefore, ultimately, directly

tered. It is constructed by the courts through the process of interpretation. In other words, there never was an '*acte clair*' proper in EU law. As Sir David Edward, former judge at the Court of Justice, noted in *CILFIT*:

the Court rejected the doctrine of *acte clair*, as it had already done in *da Costa* 20 years before. So it is deeply regrettable that the expression '*acte clair*' has entered the vocabulary of [EU] law [...].³²

Although regrettable, it did happen, for whatever reason – be it 'linguistic snobbery' or because it is 'a useful legal shorthand',³³ or perhaps it is a legal term peculiar to the EU legal order or a legal concept that does not 'necessarily have the same meaning in EU law and in the law of the various Member States'.³⁴ In reality, this expression was, and still is, 'seriously misleading' and 'oversimplified'.³⁵ It is misleading mostly because it is read as some kind of exceptional situation. If the obligation to refer a preliminary question is a rule, the situation in which that obligation disappears must be exceptional. But there is nothing exceptional in the judicial interpretation of EU law. So, when saying '*acte clair*', the Court is not referring to a provision that can be applied without the need to be interpreted – a provision that would be discoverable to the passive mind of the judge. It is actually referring to the conclusion of the process of interpretation; a conclusion that needs to be justified by the active mind of the judge. The unicorn is hence not encountered but created. And this is done in the same way that the meaning or scope of any provision of law, including EU law, is determined.

When you think about it, *CILFIT* criteria are nothing more than the *van Gend and Loos* criteria for the interpretation of EU law,³⁶ only a bit more elaborate and adjusted to reflect the nature of EU law. As the Court famously declared in this foundational ruling, when determining the meaning and effects of the provisions of EU law, 'it is necessary to

linked to its interpretation, and references by the Court of Justice in its judgment in *Cilfit* to the "correct application" must always be read, in this context, as meaning the "correct interpretation" giving rise to the correct application. After all, the judgment in *Cilfit* is specifically concerned with the scope of the obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 [TFEU] in relation to questions concerning the interpretation of [EU] law. [...] Consequently, in its judgment in *Cilfit*, the Court did not draw a dividing line between [Union] acts which require interpretation and those which do not, but rather gave national courts of last instance the right, to some extent, to "take upon [themselves] the responsibility" for interpreting [EU] law'.

³² David Edward, '*CILFIT* and *Foto-Frost* in their Historical and Procedural Context' in Miguel Poiares Maduro and Loïc 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) 173, 179.

³³ *ibid.*

³⁴ *CILFIT* (n 2) para 19.

³⁵ Edward (n 32) 179.

³⁶ Case 26/62 *van Gend en Loos* ECLI:EU:C:1963:1.

consider the spirit, the general scheme and the wording of those provisions'.³⁷ The same criteria are found in the general rule of interpretation of international law found in Article 31(1) of the Vienna Convention on the Law of Treaties.³⁸ This 'spirit-general scheme-wording' interpretive directive also corresponds to what we find in *CILFIT*. First, the national court must consider the linguistic or textual criteria ('the wording'). One is the ordinary meaning. But as in every multilingual legal regime, national or international,³⁹ that criterion requires a linguistic comparison.⁴⁰ This is 'a perfectly normal method of interpretation in the case of any legislation drafted in several languages'.⁴¹ Another is the technical meaning. Here, we distinguish between technical language in general, legal language as one category of technical language, and EU legal language as its subcategory.⁴² Again, a perfectly normal textual criterion of interpretation of legal texts. Second, the national court must consider different systemic or contextual criteria ('the general scheme').⁴³ And, third, the national court must consider different purposive or teleological criteria ('the spirit').⁴⁴

To borrow once again from Sir David Edward, what the Court said in *CILFIT* was 'no more than common sense' in the interpretation of any legal text.⁴⁵ So, to find that the meaning of a provision of EU law raises no reasonable doubts for the interpreters, the national court must interpret that provision by taking into account all relevant interpretive criteria, and not only some to which they are accustomed to give priority or

³⁷ *van Gend en Loos* (n 36) 12–13. Nowadays, the phrase the Court would use when interpreting a provision of EU law is 'it is necessary to consider not only the *wording* of that provision, but also its *context* and the *objectives* of the legislation of which it forms part'. See Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* ECLI:EU:C:2020:566, para 38 (emphasis added).

³⁸ Article 31(1) VCLT states that '[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*' (emphasis added).

³⁹ See Article 33 VCLT ('Interpretation of treaties authenticated in two or more languages'): '(1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. [...] (3) The terms of the treaty are presumed to have the same meaning in each authentic text. (4) Except where a particular text prevails in accordance with paragraph 1, *when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*' (emphasis added).

⁴⁰ *CILFIT* (n 2) para 18.

⁴¹ Opinion of AG Tizzano (n 27) para 75.

⁴² *CILFIT* (n 2) para 19.

⁴³ *ibid*, para 20.

⁴⁴ *ibid*.

⁴⁵ Edward (n 32) 179; referred to and endorsed in Opinion of AG Wahl (n 29) para 67.

the strongest justificatory force. In that sense, there is nothing specific in the *CILFIT* interpretive formula.

Now, one may ask the following question: fine, if not '*acte clair*', then what is the real point of *CILFIT*? The real point in my opinion is the 'but' that in paragraph 16 of *CILFIT* followed what was wrongly considered as '*acte clair*'.⁴⁶ The requirement is that the national court must be convinced that the purported meaning of EU law is equally obvious to other national courts and the Court of Justice. This is the only thing that is specific about the *CILFIT* formula. What the Court is saying is that, when interpreting EU law, national courts must 'wear their EU hat'.⁴⁷ In other words, they must interpret EU law as EU courts, not as national courts. Therefore, they must bear in mind the characteristic features of EU legal texts and how they differ from national legal texts. They must use the interpretive criteria in the way the Court of Justice would use them, and not in the way their domestic legal culture and doctrine would require when interpreting domestic law.⁴⁸ It is as simple as that.

The same point has been so eloquently noted by national judges and Advocates General at the Court. Their remarks merit recall here. From English judges even before *CILFIT*,⁴⁹ to German judges in a recent (in)fa-

⁴⁶ To reproduce it in full, with 'but' being the italicised part: 'Finally, the correct application of [EU] 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*' (*CILFIT* (n 2) para 16).

⁴⁷ This phrase in its different iterations – 'wearing an EU hat/cap/wig' – has been used by EU law scholars who made their names writing about the role of national courts in enforcing EU law. See, among others, Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 27–38, who in turn referred to Lord Slynn of Hadley's account of national judges 'wearing a Community law wig', from Lord Slynn of Hadley, 'What Is a European Community Law Judge?' (1993) 52 *Cambridge Law Journal* 234; and, for a similar account, Tamara Čapeta, *Sudovi Evropske unije. Nacionalni sudovi kao europski sudovi* (Institut za međunarodne odnose 2002) 92 ff.

⁴⁸ Another historical fact should be added here: while pronouncing this, the Court was actually responding to the submissions made during the hearings in *CILFIT* by the parties, Member State governments, and the Commission, who all agreed 'that [EU] texts are not monolingual and cannot be interpreted according to purely national canons of interpretation'. See Edward (n 32) 179; and Opinion of AG Stix-Hackl (n 31) para 86 (fn 44).

⁴⁹ See Lord Diplock in *R v Henn* (1980) 2 All ER 166, 196–197, who recognised 'the danger of an English court applying English canons of statutory construction to the interpretation of the [EU] Treaty or, for that matter, of regulations and directives', and warned 'English judges not to be too ready to hold that because the meaning of the English text (which is one of [then] six of equal authority) seems plain to them no question of interpretation can be involved'; and Lord Denning in *Bulmer v Bollinger* (1974) 2 All ER 1226, who noted that when facing a problem of interpretation of EU law, English courts 'must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent.

mous ruling in *PSPP*,⁵⁰ to Advocates General writing in their official⁵¹ and academic capacity,⁵² their point was, in the words of Lord Denning, that national courts must interpret EU law in accordance with 'the European pattern', in a way the Court of Justice would do. As Miguel Maduro puts it, in the EU legal order,

it is as important for national courts to know EU rules as it is for them to understand the particular methods of interpretation of EU rules. National courts when acting as EU courts have also to have a different institutional understanding of their role. They are obliged to reason and justify its decisions in the context of a coherent and integrated European legal order. In fact, the European legal order integrates both the decisions of national and European courts interpreting and applying EU law. In this context, any judicial body must justify their decisions in a universal manner by reference to the EU context. The decisions of national courts applying EU law must be grounded in an interpretation that could be applied by any other national court in similar situations. This is the core of the *CILFIT* doctrine. It requires national courts to decide as European courts and to internalise in their decisions the consequences to the European legal order as a whole.⁵³

Indeed, this is and always has been the core of *CILFIT*.

To quote the words of the European Court in the *Da Costa* case [...] "they must deduce from the wording and the spirit of the Treaty the meaning of the Community rules". They must not confine themselves to the English text. They must consider, if need be, all the authentic texts [...] They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can. They must do what the framers of the instrument would have done if they had thought about it. So we must do the same. Those are the principles, as I understand it, on which the European Court acts'.

⁵⁰ BVerfG, 2 BvR 859/15, Judgment of the Second Senate of 5 May 2020 (*PSPP*) DE:BVerfG:2020:rs20200505.2bvr085915, para 112, in which the German Federal Constitutional Court noted that 'the particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation'.

⁵¹ See Opinion of AG Jacobs (n 26) para 65, and Opinion of AG Tizzano (n 27) para 75, referring to the former opinion, who both understood *CILFIT* as an instruction to the national court to 'exercise particular caution before deciding that there is no reasonable doubt [...] before assuming that an interpretation is correct' and to make 'sure that it is not doing so merely for reasons associated with the wording of the provision'; or 'as an essential caution' to national court 'against taking too literal an approach to the interpretation of [EU] provisions and as reinforcing the point that they must be interpreted in the light of their context and of their purposes as stated in the preamble rather than on the basis of the text alone'.

⁵² Miguel Póiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 137.

⁵³ *ibid.*, 150.

4 How to make a unicorn?

If we read *CILFIT* not as establishing ‘*acte clair*’ but only as adding another piece to the EU mandate of national courts⁵⁴ – ‘interpret EU law as EU courts, not as national courts’ – what does *Conorzio Italian Management* bring that is new?

Granted, the Court of Justice reiterates, in *CILFIT* vocabulary, that in some situations

a national court or tribunal against whose decisions there is no judicial remedy under national law may also refrain from referring to the Court a question concerning the interpretation of EU law and take upon itself the responsibility for resolving it where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.⁵⁵

The statement ‘application is so obvious and there is no need for interpretation hence referral’ might be read by some as another endorsement of ‘*acte clair*’. However, several important things that follow this statement in my view only confirm the aforementioned reading of *CILFIT* as being a rejection of ‘*acte clair*’ in EU law. These things concern: one, the emphasis on national courts of last instance as having a share in ensuring the uniformity of EU law. Two, the realistic restatement of the linguistic and case law comparison that national courts of last instance are expected to perform. And three, the obligation of national courts of last instance to justify the conclusion that a provision of EU law raises no problems of interpretation that would merit referral to the Court.

4.1 A club of few

First, let us consider the requirement that the national court must be convinced that the meaning of EU law would be equally obvious to other EU and national courts. The Court here adjusts *CILFIT* vocabulary and now speaks of the need to be convinced that the matter would be equally obvious to itself and to the national courts ‘of last instance’.⁵⁶ Why are now only courts of last instance singled out? On the one hand, it is a continuation of recent case law, where the Court emphasised that doubts about the meaning of a provision of EU law entertained by lower courts do not in and of themselves prevent last instance courts from deciding that the meaning of that same provision is clear beyond rea-

⁵⁴ For a classic account of EU mandate of national courts, see Claes (n 47). See also John Temple Lang, ‘The Duties of National Courts under Community Constitutional Law’ (1997) 22 *European Law Review* 3, 16–17.

⁵⁵ *Conorzio Italian Management* (n 1) para 39.

⁵⁶ *ibid.*, para 40.

sonable doubt.⁵⁷ On the other hand, national courts of last instance are primarily responsible for the uniform interpretation of EU law in the Member States and for taking care that divergences in interpretation of EU law in different Member States do not occur. For that reason, Article 267 TFEU imposes only on them the duty to refer questions of interpretation of EU law to the Court. These courts are in general responsible for ensuring the uniformity of the law under their domestic constitutional arrangement.⁵⁸ Since EU law is a source of law in the Member States and not a foreign law,⁵⁹ they naturally have the duty to ensure

⁵⁷ See Case C-160/14 *Ferreira da Silva e Brito* ECLI:EU:C:2015:565, paras 41–42: 'In itself, the fact that other national courts or tribunals have given contradictory decisions is not a conclusive factor capable of triggering the obligation set out in the third paragraph of Article 267 TFEU [...] A court or tribunal adjudicating at last instance may take the view that, although the lower courts have interpreted a provision of EU law in a particular way, the interpretation that it proposes to give of that provision, which is different from the interpretation espoused by the lower courts, is so obvious that there is no reasonable doubt'; and Joined Cases C-72/14 and C-197/14 *X and van Dijk* ECLI:EU:C:2015:564, paras 60–62: 'Thus, although in a situation such as that at issue in the main proceedings a supreme court of a Member State must bear in mind in its assessment that a case is pending in which a lower court has referred a question to the Court of Justice for a preliminary ruling, that fact alone does not preclude the supreme court of a Member State from concluding, from its examination of the case and in keeping with the criteria laid down in the judgment in *Cilfit* [...], that the case before it involves an 'acte clair'. [...] Lastly, since the fact that a lower court has made a reference to the Court for a preliminary ruling on the same legal issue as that raised before the national court ruling at final instance does not in and of itself preclude the criteria laid down in the judgment in *Cilfit* [...] from being met, with the result that the latter court might decide to refrain from making a reference to the Court and resolve the question raised before it on its own, nor is the supreme national court required to wait until the Court of Justice has given an answer to the question referred for a preliminary ruling by the lower court. [...] This conclusion is moreover confirmed by the Court's case-law, according to which Article 267 TFEU does not preclude decisions of courts or tribunals against whose decisions there is a judicial remedy under national law and who have referred a matter to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law, which allows the higher court to adjudicate the dispute which was the subject-matter of the reference, thereby assuming responsibility for ensuring compliance with EU law [...].'

⁵⁸ cf Article 116 of Croatian Constitution (Official Gazette 5/14) and Article 20 of Croatian Law on Courts (Official Gazette 130/20), which both mandate the Supreme Court of Croatia, being the highest national courts, to 'ensure[] uniform application of the law and equality of everyone in its application'.

⁵⁹ cf Article 145 of Croatian Constitution (entitled 'European Union Law'), which in its first paragraph declares that 'the enforcement of rights derived from the European Union *acquis communautaire* is equal to the enforcement of rights guaranteed by the Croatian legal order'; in its second paragraph it adds that 'legal acts and decisions accepted by the Republic of Croatia in the European Union institutions are applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*'; and in its third paragraph it confirms that 'Croatian courts protect subjective rights derived from the European Union *acquis communautaire*'; and Articles 3(1) and 5 of Croatian Law on Courts, which prescribe that Croatian courts protect the national legal order which is founded on the Constitution, the EU *acquis*, international law and domestic laws, as well as guarantee uniform application of the law and equality before the law; and that in exercising their tasks, Croatian courts adjudicate on the basis of the Constitution, the EU *acquis*, international law, do-

that that law is uniformly interpreted as well. This obligation obviously stems directly from EU law, irrespective of whether it exists under national law too. These courts, again, are primarily those that jointly share with the Court the mandate under Article 19 TEU 'of ensuring that in the interpretation and application of the Treaties the law is observed'.⁶⁰ Moreover, it is national courts of last instance that are mostly engaged in the dialogue with the Court of Justice in the framework of the preliminary ruling procedure.⁶¹ And with national courts of last instance, the Court of Justice maintains the closest informal contact, through judicial networks, mutual visits and conferences.⁶² So, it makes sense that the Court would clarify that, before reaching a conclusion that the meaning of EU law is clear beyond reasonable doubt, one must think in the same way as other courts that are responsible for ensuring the uniformity of EU law, ie the Court of Justice and national courts of last instance.

4.2 Linguistic and jurisprudential divergences

Second, in *Consorzio Italian Management*, the Court of Justice also reiterated that EU law has characteristic features that must always be borne in mind by national courts of last instance when interpreting EU law.⁶³ Following this, the Court confirmed the *CILFIT* interpretive formula, with which it essentially rejects '*acte clair*', as argued before: to find that the meaning of a provision of EU law is sufficiently clear so that it can be merely applied, a national court of last instance must first interpret that provision, ie determine its meaning. In doing so, that national court must use proper criteria for the interpretation of EU law established by the Court of Justice.⁶⁴

In this respect, the Court finally dispelled doubts about the true nature of the *CILFIT* interpretive criteria. The Court confirmed that na-

mestic laws, and other existing sources of law. cf also Koen Lenaerts, 'No Member State Is More Equal Than Others: The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (*Verfassungsblog*, 8 October 2020) <verfassungsblog.de/no-member-state-is-more-equal-than-others/> accessed 15 December 2021.

⁶⁰ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, paras 32–33.

⁶¹ See Arthur Dyeve, Monika Glavina and Angelina Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' (2020) 27 *Journal of European Public Policy* 912 (reporting that although first instance courts were originally the most active users of the preliminary ruling mechanism, over time appellate and peak courts slowly took over).

⁶² cf Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 *Utrecht Law Review* 100.

⁶³ *Consorzio Italian Management* (n 1) paras 41 ff.

⁶⁴ *ibid.*, paras 42–47.

tional courts of last instance are not required to perform a comparison of all linguistic versions of EU law.⁶⁵ Rather, these courts only have to be aware of the multilingual nature of EU law and not be overly confident in their 'own' language version. Especially, they must pay close attention to language versions of EU law that they are familiar with, and take into account arguments of the parties pointing to possible divergences among different language versions.⁶⁶ As already explained, there is nothing Herculean about this interpretive directive. This is just another perfectly normal way of interpreting any multilingual (legal) text, familiar to every lawyer working in a multilingual (national or international) legal system, and not a senseless or impossible order from the Court. In any event, this confirms even more that the original *CILFIT* interpretive formula was a rather simple one, at the same time calming critics who were perplexed by the alleged duty to read 24 official language versions of EU law every time a question of interpretation was raised.

After clarifying the issue regarding the linguistic comparison, which was often read too literally, the Court of Justice did the same thing regarding the comparison of case law in all Member States, another allegedly elusive and unfeasible task placed upon national courts of last instance. In *Consorzio Italian Management*, the Court explained that the existence of diverging lines of case law within a single Member State or between several Member States does not prevent the national court of last instance from concluding that the meaning of a provision of EU law is clear and unambiguous. With this, the Court has readjusted this point as it followed from *Ferreira da Silva e Brito*.⁶⁷ Now, that national court must 'be particularly vigilant' in its own assessment of the meaning of that provision, bearing in mind the purpose of the preliminary ruling procedure.⁶⁸

In other words, with these several small but significant clarifications of *CILFIT*, in *Consorzio Italian Management* we again have the Court of Justice enjoining national courts to 'wear their EU hat' when interpreting EU law. In essence, the Court is saying to them: interpret EU law as EU courts, not as national courts; use EU law interpretive criteria, not

⁶⁵ *ibid*, para 44.

⁶⁶ *ibid*.

⁶⁷ *Ferreira da Silva e Brito* (n 57) para 44: '[I]n circumstances such as those of the case before the referring court, which are characterised both by conflicting lines of case-law at national level [...] and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law'.

⁶⁸ *Consorzio Italian Management* (n 1) para 49.

national ones; be mindful of the specific characteristics of EU law, which are different from those of national law; think and act like a member of an exclusive judicial club composed of other high courts and the Court of Justice; but do not be discouraged from determining the meaning of EU law when other national courts have done so differently; rather, it is your responsibility as an apex court to correct interpretations of lower courts and to engage in respectful dialogue with other high courts over the correct interpretations of EU law; and always consider whether it is desirable to engage with the Court of Justice, which has the final say over all matters of interpretation of EU law, and leave it to that Court to settle the question of interpretation that will bind all other courts in the EU, thereby ensuring uniformity.

4.3 It all comes down to arguments

The third, final, and most important thing that the Court of Justice introduced in *Consortio Italian Management* concerns the way in which national courts of last instance should go about ‘creating a unicorn’, ie concluding that the meaning of EU law is sufficiently clear and unambiguous so that their duty to refer under Article 267(3) TFEU is not triggered.

To start off, the Court made several remarks about the indeterminacy of (EU) law:

the mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision.⁶⁹

What the Court is saying here can be restated in the following terms. First, a provision of EU law may have several possible meanings. The national court of last instance can conclude that one meaning is the most convincing or the most plausible. The existence of other competing meanings does not prevent it from making that conclusion. Neither does it immediately trigger its obligation to refer. However, the idea of ‘*acte clair*’ is that there exists only one meaning of a provision, which can be discovered by a court. So, that provision does not have to be ‘interpreted’ but can only be ‘applied’. On the contrary, the Court is saying that to find the ‘correct’ meaning of a provision of EU law, the national court of last instance must interpret it, ie determine which of the several possible meanings is

⁶⁹ *ibid.*, para 48.

the right one. Just this one sentence should be enough to reject 'acte clair' in EU law for good, if any doubts about its existence still remain.

Following this, the Court added another important point. When determining one meaning and discarding other competing meanings of EU law, national courts of last instance must offer proper justification for such a decision.⁷⁰ This hits home on two levels.

First, in theoretical or conceptual terms, it pictures the process of interpretation as one of 'decision' and not of 'discovery'. Under the former, there are several possible meanings of a legal text. The judge chooses one of those meanings as the right one. He or she makes a decision about the right meaning and needs to justify this decision with proper arguments. Under the latter, there is only one true correct meaning of a legal text. And the judge needs only to discover it. The judge makes no decisions in this respect but merely recognises the correct meaning by following the rules of interpretation, something all judges are trained to do. Since no decision takes place, there is no need for a detailed justification of the process of discovery. The judge has the knowledge and authority to make discovery possible and to make it believable. Now, by establishing the duty to justify decisions on the meaning of EU law in *Consorzio Italian Management*, the Court implied that judicial interpretation is a matter of decision and not of discovery. From this, it follows that such a decision – like any exercise of public authority that requires a choice to be made – must be properly justified.

Second, in practical terms, this point again confirms that the *CILFIT* interpretive directive is about national courts being EU courts. When national courts of last instance determine the meaning of EU law and decide not to refer the matter to the Court of Justice because there is no reasonable doubt about that meaning, they have to state proper reasons that justify such a finding and their decision not to refer. What are those reasons? Unsurprisingly, they are the same interpretive criteria the Court of Justice itself endorses as admissible justifications for the interpretation of any source of EU law. In other words, national courts have to explain their understanding of the 'spirit-general scheme-wording' of a provision of EU law that is being interpreted, or their understanding of the Court's case law from which the meaning of that provision becomes clear, or how the meaning of that provision does not extend to the factual situation at hand, hence making that provision 'irrelevant' for the pending dispute.⁷¹ As the Court of Justice explains, this duty to provide reasons that justify the determination of the meaning of EU law is grounded

⁷⁰ *ibid*, paras 50–51.

⁷¹ *ibid*, para 51.

in EU law itself, namely in the system established by Article 267 TFEU read in conjunction with Article 47(2) of the Charter.⁷² It does not matter that the same duty was previously also based on Article 6 ECHR as interpreted by the Strasbourg Court⁷³ or the national constitutions and case law of constitutional courts in Member States.⁷⁴ The Court finally confirms that this is an autonomous EU law duty.⁷⁵

Why is this new or important? First of all, national courts of last instance have, over time, like many commentators, misunderstood the *CILFIT* criteria and misused them when trying to escape their obligation to refer.⁷⁶ They have either looked into considerations not endorsed by the Court in *CILFIT* and its progeny, or summarily raised the ‘*acte clair*’ banner to claim that the meaning of EU law is clear beyond reasonable doubt. Some national courts of last instance may even have a long record of misapplying *CILFIT* criteria. In *Conorzio Italian Management*, the Court settles this matter. If a national court wants to decide a question of interpretation of EU law on its own, thereby taking all the responsibility (and eventual blame) for this decision,⁷⁷ it has to offer good justification

⁷² *ibid.* For an earlier indication of the Court’s view on this, see Case C-160/14 *Ferreira da Silva e Brito* ECLI:EU:C:2015:390, Opinion of Advocate General Bot, paras 90 and 94: ‘The judgment in *Cilfit and Others* places on national courts and tribunals adjudicating at last instance an *enhanced duty to state reasons* where they refrain from referring questions to the Court. [...] In this regard, it must be pointed out that national courts and tribunals against whose decisions there is no judicial remedy under national law must exercise particular caution before ruling out the existence of any reasonable doubt. They are *required to set out the reasons why they are certain that EU law is being applied correctly*’ (emphasis added); and Case C-379/15 *Association France Nature Environnement* ECLI:EU:C:2016:603, paras 52–53: the ‘national court could be relieved of the obligation to make a reference to the Court for a preliminary ruling only if it is convinced that the exercise of that exceptional power does not give rise to any reasonable doubt. In addition, *it must be established in detail* that there is no such doubt. [...] That national court is relieved of that obligation only when it is convinced, *which it must establish in detail*, that no reasonable doubt exists as to the interpretation and application of [the conditions set out in the [relevant case law]] [...]’ (emphasis added).

⁷³ For the first time in ECtHR, *Dhahbi v Italy*, App no 17120/09, judgment of 8 April 2014.

⁷⁴ For an earlier discussion, see Case C-173/09 *Elchinov* ECLI:EU:C:2010:336, Opinion of Advocate General Cruz Villalón, para 25; for a more recent discussion, see Opinion of AG Bobek (n 8) paras 106–109.

⁷⁵ cf Jasper Krommendijk, ‘“Open Sesame!”: Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer’ (2017) 42 *European Law Review* 46.

⁷⁶ For a recent study that shows a troubled record of high national courts in all Member States when it comes to (non)compliance with the *CILFIT* interpretive requirements, see CJEU, 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) <curia.europa.eu/jcms/jcms/p1_2170124/en/> accessed 15 December 2021.

⁷⁷ Opinion of AG Wahl (n 29) para 69: ‘[I]f a national court of last instance is sure enough of its own interpretation to take upon itself the responsibility (and possibly the blame) for resolving a point of EU law without the aid of the Court of Justice, it ought to be legally

for it. Just stating that 'CILFIT applies' or 'there are no reasonable doubts about the meaning of EU law' does not suffice, as it never did. It is true that national courts in some Member States may be accustomed to justifying their interpretations of law in a rather terse and opaque manner. Their style of reasoning is magisterial and deductive, resembling syllogism. They cite only a limited number of strictly formal reasons, like provisions of law, judicial precedents, or general principles of law. They refuse to acknowledge the existence of issues of interpretation and claim that there exists only one possible answer to every legal question. And they hide any evaluative role in adjudication while appearing engaged only in the application of law.⁷⁸

Now, French or Austrian or Danish or Irish or Croatian or whatever judge of a court of last instance cannot escape the obligation to make a reference to the Court of Justice by citing the text of an article of some EU regulation or directive or by invoking a judgment of the Court, without elaborating how that judgment or text of the article in question dispels all doubt about the meaning of that provision. After *Conorzio Italian Management*, if that was left unclear in *CILFIT*, they have to engage in substance with the Court's jurisprudence. They have to: cite not only the wording of a provision, but explain whether any linguistic discrepancies exist between the language versions that they can read and understand; explain how the meaning of the provision they determined fits into the system in which that provision is placed, be it narrower (eg in the legal act of which it makes part) or wider (eg in relation to other legal acts, ie horizontally, or in relation to primary EU law, ie vertically); and explain how the meaning that they have determined corresponds to the purpose of that provision or area of law, which the EU legislator intended to achieve. In other words, notwithstanding the interpretive practices in individual Member States or the style of reasoning their courts are accustomed to,⁷⁹ when interpreting EU law national courts must follow

entitled to do so. But, in such a situation, there is a fly in the ointment: the prospect that legal action might be taken against the Member State of the court of last instance for failure to refer and/or incorrect application of EU law. That is a risk which that court must assume alone'.

⁷⁸ A seminal work on comparative judicial reasoning and interpretation is Neil MacCormick and Robert Summers (eds), *Interpreting Statutes: A Comparative Study* (Ashgate Publishing 1991, republished by Routledge 2016).

⁷⁹ In the EU, we usually distinguish between five legal traditions around which interpretive practices of courts in Member States have consolidated: French, German, Nordic, common law, and former socialist legal traditions. See Anna Wallerman, 'Can Two Walk Together, Except They be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy' (2019) 44 *European Law Review* 159, 162–163, whose classification follows the one proposed in Angela Huyue Zhang, Jingchen Liu and Nuno Garoupa, 'Judging in Europe: Do Legal Traditions Matter?' (2018) 14 *Journal of Competition Law and Economics* 144.

the EU way. The EU way means more argumentative reasoning,⁸⁰ open acknowledgment of the existence of issues of interpretation,⁸¹ and acceptance, explicit or implicit, that there is more than one possible answer to legal questions.⁸² Given the great weight attached to the teleological or purposive criteria of interpretation, the EU way also means increased engagement with independent substantive reasons, such as moral, political, social, economic, and policy ones – at least indirectly, when they can be expressed in the form of a legal argument.⁸³ Ultimately, it also means greater recognition of the evaluative role of courts, which reveals creative law-making and not merely the mechanical application of law.⁸⁴

⁸⁰ The reasoning of the Court has itself become more argumentative over time, especially if compared to original judgments rendered during the first decades of EU integration. A shift from the early 'terse' and 'rigid' judgments typical of French courts to a more elaborate and discursive style of reasoning occurred due to the regained repute of German legal thinking after WWII and 'common law-isation' of EU law and EU legal scholarship, which brought a decline in the influence of French legal culture. cf Giulio Itzcovich, 'The European Court of Justice' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017) 277, 307–309.

⁸¹ In this respect, the preliminary ruling procedure is premised on the existence of issues of interpretation of EU law, concerning which national courts request clarification from the Court of Justice.

⁸² One may push back against this by saying that the Court of Justice itself often has the practice of presenting its decisions in the form of the deduction of one single correct answer to questions of interpretation of EU law. In that sense, Mitchel Lasser has famously remarked how the Court's judgments 'demonstrate tremendous interpretive confidence and suggest a certain logical compulsion'. See Mitchel de S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009) 112. While this may be true in many cases, one should not forget that in the larger picture, the Court's form of discourse is 'dual and bifurcated', as again Mitchel Lasser referred to it. Two argumentative modes coexist in the Court of Justice: on the one hand is 'the more formal, deductive, magisterial, and univocal discourse of its judicial decisions'; and on the other there is 'the more personal, open-ended, insecure, and explicitly controverted discourse' of the opinions of its Advocates General. See *ibid*, 293. Such bifurcated judicial discourse to a great extent legitimises the Court's reasoning overall. Hence, the opinions of Advocates General are there to introduce in the Court's reasoning this element of multiplicity of possible answers to questions of interpretation.

⁸³ This is important, since the Court of Justice in general employs argument from substantive reasons only indirectly in its judgments, ie after tracing these values back to some formal positive source of law. cf Case C-159/90 *Grogan* ECLI:EU:C:1991:378, para 20; and Case C-34/10 *Brüstle* ECLI:EU:C:2011:669, para 30. As an example, in *Defrenne* the Court appeared willing to accept economic interests as a reason to limit the temporal effects of its ruling. Nevertheless, the argument it put forward was the principle of legal certainty. See Case 43/75 *Defrenne* ECLI:EU:C:1976:56, paras 69–70 and 74. Likewise, some values, like human dignity or equality, can be linked to respective provisions of the Charter of Fundamental Rights of the EU. By keeping such a distance from independent substantive reasons, the Court of Justice strongly professes legal positivism, with the strict separation of law from non-law.

⁸⁴ Another seminal work on this topic is Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989).

This duty to provide reasons when interpreting EU law is the essential point of *Consortio Italian Management*, and the one on which the Court and AG Bobek agreed. At first reading, one will probably be left with the impression that the Court did not follow the proposal of its Advocate General to readjust the *CILFIT* criteria to give more discretion to national courts as an acknowledgment of their maturity as EU courts.⁸⁵ And that may be true and important. But this is another mainstream reading of *CILFIT* as being primarily about judicial politics, the workload of the Court, strategic behaviour, trust between the judicial actors in the EU, etc. However, under the reading proposed here, there are not many big differences between the Grand Chamber and AG Bobek in this case. The Court, as already discussed, speaks about the obligation of national courts of last instance to justify the decision not to refer. This decision should be based on the arguments from the case law of the Court or from the *CILFIT* interpretive criteria, namely textual, contextual, and purposive ones. AG Bobek, on the other hand, mentions the type of questions which ought to be referred. These questions should concern interpretation rather than the application of a provision of EU law,⁸⁶ and moreover they should be important and generalisable; they should admit of several reasonably plausible interpretations of that provision; and the answer to these questions should not be readily apparent from the established case law of the Court.⁸⁷ For questions that do not satisfy these three cumulative conditions, there would be no obligation to refer, AG Bobek suggested. However, for national courts of last instance to claim that the question of interpretation of EU law is such that it does not trigger the obligation to refer, there is the duty to provide adequate justification on which of the three conditions is not met and why. How would they do that? Again, by offering arguments based on the case law of the Court or the established criteria –textual, contextual, and purposive – for the interpretation of EU law, and the criteria for solving the conflicts of different interpretive criteria. On this point, the Court and its Advocate General agree. Either way, national courts of last instance would be required to interpret EU law and justify their interpretations. What is more, the Court and its Advocate General agree that this obligation to provide adequate reasons exists under EU law, namely Article 47(2) of the Charter and Article 267 TFEU. The Grand Chamber follows this proposal from AG Bobek without reservation.

⁸⁵ Classen (n 3).

⁸⁶ For a recent attempt to draw a clearer line between questions of interpretation and questions of application of EU law, and by extension between the jurisdiction of the Court and of the national courts in the preliminary ruling procedure, see Case C-923/19 *Van Ameyde España* ECLI:EU:C:2021:125, Opinion of Advocate General Bobek.

⁸⁷ Opinion of AG Bobek (n 8) paras 131–165.

Interpretation of EU law, perhaps different from what we find in some Member States, is argumentative practice. This is what the above-mentioned 'EU way' stands for. This way of interpreting law is a part of the EU mandate of national courts. Furthermore, interpretation-cum-argumentation has several important functions in a complex legal system inhabited by a plurality of judicial actors. It enables genuine judicial dialogue between national and EU courts. It enables the review of judgments that determine the meaning of EU law, be it by high national courts over lower national courts, or by the Court of Justice over national courts of last instance. Likewise, it may be considered a requirement of the rule of law that binds not only national courts but the Court of Justice itself,⁸⁸ as well as the exercise of judicial authority that is most in line with the human dignity of individuals as moral agents.⁸⁹ And it likely increases the transparency of the process of interpretation in which judges make important normative choices, thus reinforcing the judicial accountability and democratic credentials of their law-making.⁹⁰ Ultimately, an argumentative approach to the interpretation of EU law legitimises the authority of the Union in relation to its Member States, as well as reasonable objections from the national level to the misuse of that authority. By interpreting EU law as EU courts, national courts position themselves as co-equal co-interpreters of EU law,⁹¹ which only then becomes a genuinely shared, common affair, *res publica*.

5 Conclusion

Interpreting EU law in this manner is no easy task for any national court given the specificities of EU law and the difficulties its interpretation brings. But it is a part of the national courts' mandate. When interpreting EU law, national courts must 'wear their EU hat'. The interpretation and application of EU law may not be an insignificant challenge for national judiciaries.⁹² Nevertheless, dealing with all kinds of law is

⁸⁸ cf Nika Bačić Selanec and Tamara Čapeta, 'The Rule of Law and Adjudication of the Court of Justice of the EU' in Tamara Čapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union: A Critical View on the Role of Law and the Courts* (Hart Publishing, forthcoming in 2022).

⁸⁹ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2010) *Working Paper No 10-73*, New York University School of Law, Public Law & Legal Theory Research Paper Series.

⁹⁰ Maduro (n 52) 144.

⁹¹ cf Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) 24 *European Law Journal* 358.

⁹² Some would surely be sceptical about how realistic and feasible this mandate of national courts is, and for good reason. See eg Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say?"' (2008) 10 *Cambridge Yearbook of European Legal Studies* 1, 18: 'It is only a slight exaggeration to say that, sim-

their judicial daily bread and butter. This is why we have courts. If they encounter difficulties when interpreting EU law that they cannot reasonably handle, they always have the Court of Justice to turn to.

So far, the preliminary ruling procedure seems to have worked fine most of the time, with very few glitches.⁹³ From here, it becomes even clearer: national courts must justify their decisions not to refer questions of interpretation of EU law to the Court of Justice and to decide them on their own. A proper justification cannot consist of formal reference to the provision in question or to some judgment of the Court. Instead, elaborate reasoning must be provided. In other words, the case must be made in favour of such a decision of the national court. It cannot indifferently claim to have stumbled upon a clear and obvious meaning of EU law, without a good explanation. This meaning must be supported with persuasive arguments. The meaning of EU law is created in an argumentative process. Remember, unicorns are made, not found. Perhaps legal provisions exist that do not have to be interpreted but can immediately be applied. One may think of ‘Turn left’ or ‘No smoking’. But these rarely reach the court, let alone second or third instance ones in the appellate system.

Now, after *Conorzio Italian Management* has dispelled every reasonable doubt about the proper reading of *CILFIT*, may we stop talking about ‘acte clair’ in EU law? I like to believe that at least Francesco Capotorti and Christine Stix-Hackl, late great Advocates General, as well as Sir David Edward, former judge of the Court, would agree to put their signatures under this plea. Others are invited.



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ply, there is no European Community of courts: there are just 27 national clusters, each rooted in their national system and methodology’.

⁹³ By this I mean instances such as the Czech Constitutional Court, Pl ÚS 5/12, judgment of 31 January 2012 (*Slovak Pensions*), or the Danish Supreme Court, Case No 15/2014, judgment of 6 December 2016 (*Ajos*), or *PSPP* (n 50).