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Alert | Litigation

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Preliminary Ruling and Court of Last Instance: Do the EU's 'CILFIT' Criteria Need to be Revisited?

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1. Introduction

1.1 Overview

On April 15, 2021, European Court of Justice (CJEU) Advocate General (AG) Michal Bobek presented his Opinion on the case *Consorzio Italian Management and Catania Multiservizi*[1], proposing that the CJEU revisit its "*CILFIT*" criteria[2] – particularly the *acte clair* doctrine – and replace them with three new cumulative requirements, which, he argued, would better achieve the purpose and scope of Article 267 of the Treaty on the Functioning of the European Union (TFEU).

[1] Opinion of AG Bobek, delivered 15 April 2021, case C-561/19, *Consorzio Italian Management e Catania Multiservizi c. Rete Ferroviaria Italiana SpA*.

[2] See judgment *CILFIT v. Ministero della Sanità*, 6 October 1982, 283/81, EU:C:1982:335.

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1.2 The proceeding before the Italian Council of State (*Consiglio di Stato*)

By judgment no. 1297, delivered March 22, 2017, the Italian Council of State (*Consiglio di Stato*) referred a first request for preliminary ruling to the CJEU, pursuant to Article 267 TFEU, concerning both the interpretation and validity of certain EU Law provisions[3]. The particular feature of the proceeding consisted in the fact that the Council of State had *already* made a preliminary ruling on the same case, defined by the CJEU in its judgment dated April 19, 2018[4].

In that ruling, the CJEU stated that EU law did not preclude the interpretation provided by Italian law on procurement[5]. The applicants, however, argued that the CJEU had not taken into account certain aspects of the case in point and argued, for that reason, that the judgment was "*unusable for the definition of the case*". The Council of State was therefore asked to make a *new* referral for preliminary ruling, presenting five "*further*" questions to the CJEU for examination[6].

The Administrative Judge noted that three of these questions (two and in part, another) should be declared **clearly unfounded**, as they had **already been resolved** by the judgment issued by the CJEU on April 19, 2018. However, since the two remaining questions raised **new issues of contrast with EU Law**, they must be qualified as "***new***" issues, according to the Administrative Judge.

Thus, with its judgment released on July 15, 2019, the Council of State deemed it necessary to refer **a second request for preliminary ruling limited to the two new questions**, pursuant to the established EU case law that imposes on the Court of last instance the obligation to refer the case back. Before submitting the two questions on the merits, however, the Council of State asked the CJEU a **first** and **preliminary question** regarding the actual scope of the provision under art. 267(3) TFEU[7].

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[3] This alert exclusively concerns the request for preliminary ruling regarding the *interpretation* (and not also that of *validity*), since CJEU's established case law places the two cases on a different plane as regards the duty to make a reference for a preliminary ruling. As explained by the Advocate General in paragraphs 44-46, validity and interpretation questions, pursuant to CJEU case law, operates on a different and separate track. Indeed, with regard to validity, the duty to make a reference for a preliminary ruling applies to all national courts, *regardless* of whether the court or tribunal is a court of last instance. It follows that the exceptions set out in the CILFIT judgment do not apply to the obligation to refer a question of validity.

[4] Judgment of April 19, 2018, *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana*, case C-152/17, EU:C:2018:264. For a recent case of a "double" referral for a preliminary ruling, see the Italian Council of State ("*Consiglio di Stato*") Order No. 2327/2021. The case concerned a sanction imposed by the Italian Competition Authority ("*Autorità Garante della Concorrenza e del Mercato*" or "*AGCM*"), which found a violation of Article 101 TFEU; the Italian Council of State then decided to refer to the Court of Justice a (*first*) preliminary reference, defined by the CJEU's judgment of January 23, 2018 (C-179/16, EU:C:2018:25). The Italian Competition Authority, in light of the CJEU's ruling, rejected the appeals of the parties. The latter, however, sought the revocation of the Administrative Judge's ruling, invoking the misapplication of the principles expressed by the CJEU. The Council of State, therefore, by order of March 18, 2021, decided to refer, *once again*, a question for a preliminary ruling before the CJEU.

[5] In the context of the main proceedings, the parties asked the Italian Council of State to refer the issue to the Court of Justice, pursuant to Article 267 TFEU, and to ask whether the interpretation of Domestic Law excluding prices review in procurement agreement relating to the so-called "special sectors" was compatible with EU Law and with the Directive no. 17/2004.

[6] As shown in point 8.2 of the judgment of the Council of State, published July 15, 2019, the applicants considered that the Court of Justice' judgment had not taken a position on the instrumental character of the cleaning services, qualified as a "special sector" under European and domestic law. The parties noted how the judgment assumed that the contractual relationship had been carried out without any extension, even if this was not the case. Moreover, the applicants pointed out that the price review is required also by a change in the European and National Regulatory Framework.

[7] The Council of State asks the CJEU to clarify whether: "*in accordance with Article 267 TFEU, is a national court whose decisions are not amenable to appeal required, in principle, to make a reference for a preliminary ruling on a question concerning the interpretation of EU law* ***even where the question is submitted to it by one of the parties to the proceedings after that party has lodged its initial pleading, or even after the case has been set down for judgment for the first time****, or indeed even after a reference has already been made to the Court of Justice of the European Union for a preliminary ruling*" (emphasis added), Opinion of the Advocate General Bobek, cited, point 16.

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The Council of State stated that the **mandatory nature of the preliminary ruling could not be separated from a regime of "*procedural preclusions*"**, considering that a "chain" of preliminary questions would have generated the risk of abuse of trial, making the right to judicial protection and to a swift conclusion of the trial elusive[8].

Now, this first and preliminary question regarding the boundaries of the duty provided for by Article 267(3) TFEU, constitutes the heart of Bobek's Opinion: in fact, the AG does not consider the merits of the two "*new*" questions, but focuses his attention only on the first question, ranging as far as the identification of a "*deeper layer*", with the declared aim of questioning the criteria of the CILFIT case law.

2. Boundaries of the duty of referral under article 267, third paragraph, TFEU

2.1 A broader issue

According to the AG, a broader issue emerges from the preliminary question raised by the Council of State. It must be asked, in fact, whether:

i. **any and all cases in which there are lingering doubts as to the correct application of EU Law in that particular case** are covered by the duty of referral for a preliminary ruling, regardless of whether or not a previous request for a preliminary ruling in the same case has already been made; and, in particular

ii. the precise scope of the duty to refer a question for a preliminary ruling and the exceptions to such obligation.

After an initial reading, argues AG Bobek, the answer is easily found in established CJEU case law, which Bobek himself summarized with the principle: "*it is always for the national court to decide*". In fact, although the referring court may, in principle, give relevance to the views of the parties regarding the opportunity to refer a question for a preliminary ruling, Article 267 TFEU instituted a direct cooperation between the CJEU and the national courts by means of a procedure, which is completely **independent** of any initiative by the parties; while on the other hand, even though the wish of the CJEU is to assist the referring court in the broadest possible way, the national court remains the body that can better determine whether a preliminary ruling is necessary.

Thus, a request for preliminary ruling **could**, in principle, be made **at any stage** of the proceedings and **irrespective** of the existence of an earlier preliminary ruling by the CJEU in the same proceedings.

Conversely, the CJEU, on numerous occasions has relied on its own interpretive authority in the context of one of its judgments and claimed that such authority may deprive a court of last instance of the duty to refer the matter. However, on the other hand, the Council of State, in its order of July 15, 2019, clarified that some of the questions proposed by the parties constituted *new* questions and, therefore, as such, said it would be unlikely to violate CJEU precedent.

Thus, in the opinion of the AG, the complexity underlying the question posed by the Italian Administrative Judge calls for a **broader reflection** on the **nature** and **scope** of the duty to raise a preliminary question: the core of the problem would lie in the inadequacy of the criteria identified by CILFIT case law, the exception of the *acte clair* in particular.

[8] Italian Council of State's judgment, cited, point 9.4.2.

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2.2 The position of the governments involved in the case. Some outline notes.

The governments of the Member States involved have adopted diverse positions.

Firstly, while the Italian and French Governments identified certain aspects of the CILFIT criteria which could be improved, the German Government, in line with the Commission, believed that there was no particular reason to revisit CILFIT in any way, since such exceptions had already been in place for 40 years.

The Italian Government stressed the need to better balance the obligation of preliminary ruling and the principle of the proper administration of justice, arguing that there would be a breach of the third paragraph of Article 267 TFEU only where the referring court failed to state reasons for its decision not to make a ruling.

Lastly, the French Government suggested that the CILFIT criteria be revisited in light of the overall purpose of Article 267 TFEU and in consideration of the current state of EU Law, by ensuring that the criterion focus on issues that may give rise to divergent interpretations within the Union, rather than on individual cases within Member States.

2.3 The duty of referral for preliminary ruling under article 267, third paragraph, TFEU. The case law exceptions: CILFIT judgment

Before exploring the heart of the matter, following is a brief review of the content of Article 267 TFEU, which establishes the CJEU's jurisdiction to give preliminary rulings on the interpretation and validity of the Treaties, and the criteria developed by the CILFIT judgment.

Article 267, third paragraph, specifies that if a question is raised before a court or tribunal of a Member State "*against whose decisions there is no judicial remedy under national law*", that court or tribunal has not only the "*possibility*" but the "***duty***" to bring the matter before the CJEU. The rationale behind this provision is to establish a duty to make a reference for a preliminary ruling, whenever the context in which the exception is raised represents the last chance to clarify a certain question of interpretation[9].

The Treaty, therefore, outlines a **categorical duty** on the courts of last resort **without exception**.

With the CILFIT judgment, however, such duty provided for in Article 267 has less clear contours: the CJEU identified **three exceptions** to this obligation. The judge is not required to refer the case when:

i. the question raised is irrelevant, as it can in no way affect the outcome of the case; or

ii. the community provision in question has *already* been interpreted by the CJEU (doctrine of the *acte éclairé*); or

[9] The principle can be inferred from the CJEU's case law, as stated, among others, in *Aquino*, judgment of March 15, 2017, case C-3/16, EU:C:2017:209, point 34: "*a court adjudicating at last instance is by definition the* ***last judicial body*** *before which individuals may assert the rights conferred on them by EU law*" (emphasis added).

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iii. the correct application of Community Law is so ***obvious*** as to leave no room for any ***reasonable doubt*** as to the manner in which the question raised is to be resolved (doctrine of *acte clair*).

With reference to the latter criterion, the CJEU has specified that, before reaching this conclusion, 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 CJEU. Furthermore, the interpretation of a provision of Community Law also compares the different language versions and diverse legal concepts adopted by the Member States; moreover, a provision must be placed in its context and interpreted in the light of the European law as a whole.

As an initial step, it is **fundamental** to distinguish the two levels on which the obligation and the exceptions to this obligation stand: (a) on the one hand, the duty of referral for the court of last instance is provided for within the Treaty; and (b) on the other hand, the exceptions to this duty represent a case law creation.

3. The limitations of the CILFIT criteria according to AG Bobek

3.1 The three dichotomies highlighted by AG Bobek

What is the exact scope of the obligation to make a request for a preliminary ruling and the exceptions to this obligation? In this regard, the AG highlights three dichotomies:

1) between "**objective"** and "**subjective**", between **structural**/**systematic** reasoning and attention to the case in question;

2) between **interpretation** and **application** of European Union law; and

3) the contrast between differences in interpretation within a **Member State** and within the **European Union**.

3.2 First dichotomy: *Hoffmann-La Roche* versus the *CILFIT* judgment

Bobek argues that the exceptions established in the CILFIT case are conceptually problematic and inconsistent with the obligation provided for in Art. 267(3) TFEU, with which they should comply. In other words, the CILFIT criteria lack clarity as to whether they are **subjective** or **objective** in nature with regard to the existence of a ***'reasonable doubt'***: is it a doubt which arises in the individual judge with specific reference to the case in question (*subjective doubt*) or, conversely, must it be interpreted as a doubt which takes account of objective circumstances (*objective doubt*)?

According to AG Bobek, this contrast is particularly evident when comparing *CILFIT* with the *Hoffmann-La Roche* judgment[10]. In the latter, the CJEU stated that the underlying structural reason for the obligation contained in Art. 267(3) TFEU is to prevent the establishment of national case law in a Member State which is in conflict with EU law. The rationale of the provision, therefore, is to avoid divergences of case law within the EU. Obviously, this assumption is objective in nature, since it focuses on case law in general and not on the case at hand.

[10] Judgment of May 24, 1977, *Hoffmann-La Roche*, 107/76, EU:C:1977:89.

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On the contrary, the logic dictated by the CILFIT exceptions, and in particular the *acte clair* criterion, would be focused on the **individual case** and on **subjective doubts** within the same procedure: regarding the alleged lack of feasibility of the criteria, AG Bobek argues that they are affected by "a good dose of subjectivism that cannot be ascertained and cannot be reviewed", since they require judges to "develop the belief" that the evidence of reasonable doubt is also imposed on the courts of other Member States and on the CJEU[11].

3.3 Second dichotomy: interpretation and application of EU Law

From the first dichotomy comes the dividing line between **interpretation and application of EU law**. If the obligation under Art. 267(3) TFEU concerned the application of EU law rather than its interpretation, it would be difficult to identify the boundary between the CJEU's duty and that of the national courts.

If, on the other hand, the objectives specified in *Hoffmann-La Roche* were indeed pursued, the emphasis would be on **uniform interpretation**, not **correct application**. The two aspects differ, since the interpretation of an EU provision is related to its **scope** and **purpose**; in contrast, its application consists in the subsumption of **specific facts** within a **definition**. In other words, interpretation aims at extending within the EU an unambiguous interpretation of its rules by case law; while application, on the other hand, is related to the correctness of the outcome of the individual case.

3.4 Third dichotomy: differences in interpretation within a Member State and within the European Union

The practice following the *CILFIT* judgment regarding the application of the criteria, continues the AG, is inconsistent: differences in interpretation can be found both within a Member State and across the EU. This variation in the criteria's application results in different outcomes. Such differences, **within a Member State** and, even further, **throughout the European Union**, should be avoided: this reason alone would justify an intervention of the CJEU's Grand Chamber.

Analysis of the three dichotomies shows that the emphasis with respect to the referral obligation should change: from there being "*no subjective reasonable doubt as to the correct application of EU law in respect of the outcome of the specific case*" to "*an objective divergence detected in the case law at national level thereby threating the uniform interpretation of EU law within the European Union*"[12].

3.5 The alleged lack of feasibility of the *acte clair* doctrine with reference to its objective elements

AG Bobek not only criticizes the *acte clair* doctrine with regard to its subjective elements but also challenges its objective components, in particular insofar as it requires the comparison of the different language versions of EU provisions.

Bobek observes that this requirement lacks feasibility and has also been previously criticized by other Advocates General, in that it demands from the national judge a disproportionate amount of effort (rarely made by the CJEU itself). In particular, Bobek argues that, while the *acte clair* doctrine suffers from

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[11] KORNEZOV, *The new format of the acte clair doctrine and its consequences*, 2016 *CMLR*, 1317 – 1342, affirmed that what is important for the purposes of compliance with the criterion referred above is precisely the personal and subjective belief of the judge regarding the possibility that such reasonable doubt arises in the minds of other judges.

[12] Opinion of Advocate General Bobek, cited, point 133.

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heavy subjectivism, even the elements enunciated in objective terms are tricky, as they are simply "*unattainable*" [13].

3.6 No specific EU law remedy available to the parties to enforce a violation of Article 267, (3) TFEU

The AG also argued that there is no specific EU Law remedy available to the parties if they believe that their right to have a matter submitted to the CJEU under Article 267 (3) TFEU has been infringed. However, two potential remedies include:

(i) invoking the civil liability of a Member State where the breach of EU law derives from a decision of a court of last instance (as stated in *Köbler*),[14] or

(ii) the opening by the Commission, possibly as a result of a complaint, of an infringement procedure under Article 258 TFEU.

Neither option is without issues.

With regard to the former, the *Köbler* judgment makes the compensation of damages resulting from a decision of a court of last instance subject to three conditions: (a) the rule of Community Law infringed is intended to confer rights on individuals; (b) the breach is sufficiently serious; and (c) there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious, as required by criterion (b), the breach must be a "manifest infringement".

As for the remedy provided by Article 258 TFEU, the CJEU has occasionally found a Member State in breach of EU law specifically for the failure of a last instance court to make a reference to the CJEU[15]. However, AG Bobek argues that the decision whether to initiate an infringement proceeding is entrusted to the complete discretion of the Commission, and the parties do not have any role nor power in this regard[16].

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[13] Opinion of AG Bobek, cited, point 104. The *acte clair* doctrine has received criticism also from other Advocates General. The concept is taken up in AG Jacobs' Opinion in *Wiener SI* case, C-338/95, EU:C:1997:352, delivered on July 10, 1997, whereas at point 65 affirms "*[…] I do not think that the CILFIT judgment should be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages […]. That would involve in many cases a disproportionate effort on the part of the national courts; moreover reference to all the language versions of Community provisions is a method which appears rarely to be 'applied by the Court of Justice itself, although it is far better placed to do so than the national courts"*. *See also* Advocate General Stix-Hackl's Opinion in *Intermodal Transports BV*, case C-495/03, EU:C:2005:552, who at point 99 states: "*Accordingly, I take the view that the judgment in Cilfit cannot be intended to mean that the national court is required, for example, to examine a provision of Community law in every one of the official Community languages*. *That would place a practically intolerable burden on the national courts and would de facto reduce the - albeit limited - delegation to national courts of last instance of questions of Community law which can be answered 'unequivocally' in accordance with the judgment in Cilfit to a lip service or a 'tactical move'*". Some scholars (KORNEZOV, cited, page 1329) interpreted both Opinions as an attempt to reduce the scope of the *acte clair* doctrine, allegedly affected by excessive rigidity. For BROBERG-FENGER, in *Preliminary references to the European Court of Justice*, Oxford, 2010, page 243, AGs Jacobs and Stix-Hackl "*argued that CILFIT should not be regarded as requiring the national courts to examine a Community act in every one of the official Community languages, but rather as an essential caution against taking too literal an approach to the interpretation of Community provisions*".

[14] *Köbler v. Austrian Republic* judgment, September 30, 2003, case C-224/01, ECLI:EU:C:2003:513.

[15] *Commission v. France*, C-416/17, EU:C:2018:811, October 4, 2018, whereby the CJEU found that the French Republic had failed to fulfil its duty under the third paragraph of Article 267 TFEU because the French Conseil d'Etat had failed to make a reference for a preliminary ruling. *See also Commission v. Italy,* December 9, 2003, case C-129/00, EU:C:2003:656, and *Commission v. Spain*, November 12, 2009, case C-154/08, not published, EU:C:2009:695.

[16] KORNEZOV, *The New Format of the Acte Clair Doctrine and its Consequences*, cited., point. 1318; see also WATTEL, *Köbler, CILFIT and Welthgrove: we can't go on meeting like this*, *CMLR*, volume 41, 2004, page 190.

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4. AG Bobek's proposal

To conclude, according to the AG, the **public purpose** of the reference for a preliminary ruling should be enhanced, as a form of guarantee for the **uniform interpretation** and further development of EU law. Focus should shift from the private sphere to the public one and to a systematic approach. This objective can be achieved by reaffirming the scope and the purpose of Article 267(3) TFEU, as set out in the judgment *Hoffmann-La Roche*. In practice, this would mean replacing the "*obsolete*" CILFIT criteria with new, **cumulative** conditions which take into account the needs outlined above. The obligation of the court of last instance would therefore only arise when:

i. the case raises a *general* issue of interpretation of EU law (as opposed to its application);

ii. to which there is *objectively* more than one reasonably possible interpretation; and

iii. for which the answer cannot be inferred from the existing case law of the CJEU (or with regard to which the referring court wishes to depart from that case law).

On the first criterion, Bobek argues that the preliminary proceedings often focus on factual and specific issues and that providing detailed solutions to individual questions does not always help promote uniform application of EU law.

The interpretation, formulated in an abstract way, is linked to the scope and purpose of a certain provision; the application, on the contrary, consists in subsuming a case within a definition. Interpretation, therefore, shall have a **general** or **generalizable** scope: and in so doing would contribute to the elimination of very specific, particular cases, which, while potentially raising a question of interpretation of EU law, are "*simply of no general, structural impact*"[17].

The second criterion concerns the dichotomy between the structural-objective method and subjective reasoning: rather than emphasizing the reasonable doubt of the individual judge with respect to the case at hand, one should search for the existence of **plausible alternatives**. The duty of referral would become stricter where the question raised by the parties highlights the presence of **two or more potential interpretations of a certain provision**, regardless of whether this divergence of views is within the same Member State or concerns several Member States. Moreover, such divergences would be relevant only with reference to the final decisions of the judges of last instance, and not with regard to contradictory interpretations within a single proceeding: the latter are not necessarily a symptom of different interpretations of the same rule but could be caused by an error of the lower body.

As regards the third criterion, AG Bobek points out that a national court of last instance is not obliged to refer a question of interpretation of EU law if the same provision has already been interpreted by the CJEU and that these guidelines facilitate resolution of the question submitted to it "*with confidence*"; established case law could also mean a single precedent, provided that the latter is clear and well-formulated.

As mentioned, these are **cumulative** criteria: the lack of just one of these requirements relieves national courts of last instance from the duty of referral.

[17] Opinion of AG Michal Bobek, point 148.

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Finally, if a national court decides not to submit a request, they should provide **adequate reasons** with regard to the non-existence of one of the three requirements, with particular reference to the interpretative problems submitted to its examination by the parties.

5. Concluding remarks

A first reflection concerns the alleged increase in references for preliminary rulings by the courts of last instance. In fact, one of the considerations that prompted AG Bobek to revisit CILFIT criteria is precisely the fear of an excessive increase in the number of proceedings brought before the CJEU[18]. If true that requests for preliminary rulings increased over the last five years, from 436 in 2015 to 641 in 2019[19], such data does not distinguish between requests for preliminary rulings made by courts of last instance and requests made by lower-level bodies. In the absence of specific statistics on this point, one has no choice but to rely on the data concerning the overall evolution of the Court's judicial activity.[20]

According to this data, the total number of preliminary ruling cases raised by **bodies of last instance** represent only 35% of the overall preliminary ruling cases[21].

A second point concerns the feasibility of the criteria proposed by AG Bobek. Evidently, in 40 years, there has been no shortage of criticism of the requirements outlined in CILFIT case law: in the past, scholars and Advocates General have highlighted certain contradictions inherent in such requirements. Yet, probably thanks to their **flexibility**, which sets them apart, CILFIT criteria have survived for 40 years. After all, AG Bobek himself says: "*I am certainly not suggesting that we get rid of one unicorn in order for it to be replaced immediately by another*"[22]. In other words, even though the CILFIT case law has certain limitations, the criteria replacing it must ensure a better application of Article 267 TFEU.

Moreover, some of the newly proposed requirements have been found difficult to implement in practice. For instance, it may be difficult to draw a strict line between "interpretation" and "application". Furthermore, regarding the third criterion, Bobek states: "*there is likely to be no shortage of (heated) discussion about what exactly, in a specific scenario, is 'established case-law*"[23].

Lastly, the observation that Article 267(3) TFEU is not endowed with any real direct effect is worthy of support. However, limiting the scope of the preliminary ruling procedure may not be the right way to best pursue the objective of procedural protection for private parties.

It now remains to be seen what position the CJEU will adopt: whether it will pave the way for a potential modification of the CILFIT criteria or whether, instead, it will opt to confirm its established case law.

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[18] Regarding the evolution of EU law and the judicial system, at point 122 of his Opinion, Bobek affirms there is a "*staggering number of new requests for a preliminary ruling*".

[19] See the Court of Justice's 2019 Annual Report, page 163.

[20] See the Court of Justice's 2019 Annual Report, which, on page 183, provides an overview of the general trend in the work of the Court from 1952 to 2019 as regards preliminary rulings referred, distinguishing by Member States and by jurisdictional bodies.

[21] Ibid. For instance, Italy has an overall 1583 references for a preliminary ruling, 1205 were derived from judicial bodies other than the Constitutional Court, the Court of Cassation and the Council of State. The same applies to Germany where, against a total of 2641 applications, 1785 came from judicial bodies that were not of last instance.

[22] AG Bobek, at point 149, refers to AG Wahl's statement in X and van Dijk, joined cases C-72/14 and C-197/14, EU:C:2015:319, which affirms (point 67): "*If one were to adhere to a rigid reading of the case law, coming across a 'true' acte clair situation would, at best, seem just as likely as encountering a unicorn.*"

[23] Opinion of AG Bobek, cited, point 158.

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