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RESEARCH NOTE

Application of the *Cilfit* case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law

[…]

Subject: Examination of how the *Cilfit* case-law (judgment of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335) is applied by national courts or tribunals against whose decisions there is no judicial remedy under national law and, in particular, how they interpret the concept of 'any reasonable doubt'.

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SUMMARY

I. INTRODUCTION

1. The purpose of this research note is to answer the question of how the national courts or tribunals of the 28 Member States against whose decisions there is no judicial remedy under national law apply the '*Cilfit* case-law', which is to say that arising from the judgment of 6 October 1982, *Cilfit and Others*, 283/81 ('the judgment in *Cilfit*') and, in particular, how they interpret the concept of 'any reasonable doubt'.

2. In that case-law, [1] the Court established several exceptions to the obligation to refer currently laid down in the third paragraph of Article 267 TFEU. [2] More particularly, it held that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court, unless it has established:

   – that the question raised is irrelevant; or

   – that the provision of EU law in question has already been interpreted by the court; or

   – that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

3. In the more than 36 years that have passed since the judgment in *Cilfit* was delivered, the courts of the vast majority of Member States, in particular those against whose decisions there is no judicial remedy under national law ('the courts adjudicating at last instance' [3]), have regularly and frequently referred to that judgment [4] in order to justify

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1 See judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 55; of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 38; and of 4 October 2018, *Commission* v *France* (advance payment of tax), C-416/17, EU:C:2018:811, paragraph 110.

2 In accordance with which, 'where any such [question requesting an interpretation or assessment of validity] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court'. It will be noted that the judgment in *Cilfit* was given in relation to one of the precursors to that provision, namely the third paragraph of Article 177 of the EEC Treaty.

3 To quote the form of words used by the Court: see, for example, the judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 34.

4 Or, as the case may be, the criteria flowing from it, without actually referring to it expressly: this is

their decision either to bring a matter before the Court or indeed not to bring a matter before it.

4. However, it is also true that, in an admittedly small number of Member States, the judgment in *Cilfit* and the criteria it lays down appear to be cited in a relatively low number of cases, and these are not only Member States which joined the European Union in the recent rounds of accessions, such as **Croatia** and **Malta**, but also States which are long-standing EU members, such as **Luxembourg**. It goes without saying that, in those Member States as in others, the absence of any explicit reference to the judgment in *Cilfit* or to the criteria it lays down does not necessarily mean that those criteria are not used implicitly by the national courts. Their silence nonetheless makes it more difficult to assess how they apply the *Cilfit* case-law, including the 'any reasonable doubt' test.

5. The research for this note has focused mainly on the case-law of the supreme court(s) of each Member State. Nevertheless, to the extent that the lower courts are to be regarded as courts adjudicating at last instance, their case-law too has been taken into account, in particular where it is useful for examining the concept of 'any reasonable doubt'. Where appropriate, the research has also looked at decisions in which a constitutional or supreme court has given a ruling on whether or not a court adjudicating at last instance has complied with the obligations arising from the *Cilfit* case-law. In some Member States, after all, the legal interpretation given in that judgment has also been used as a benchmark for reviewing the legality, or indeed the constitutionality, of decisions given by courts adjudicating at last instance.

6. As stated above, the exceptions to the obligation to refer established by the Court in the judgment in *Cilfit* are threefold: (i) the irrelevance of the question raised; [5] (ii) the existence of an 'acte éclairé'; [6] and (iii) the existence of an 'acte clair', which arises where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

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true, in particular, of the Conseil d'État (Council of State) and the Cour de cassation (Court of Cassation, **France**).

[5] See also judgment of 6 October 1982, *Cilfit and Others* 283/81, EU:C:1982:335, paragraph 10.

[6] See also judgment of 6 October 1982, *Cilfit and Others* 283/81, EU:C:1982:335, paragraphs 13 and 14.

7. In many Member States, the first two exceptions are employed far more frequently than the third. Nevertheless, this research note will concentrate on how the courts adjudicating at last instance apply the latter exception. In that regard, this note will set out the interpretation which those courts have had occasion to give to the concept of 'any reasonable doubt' (part II) and of the conditions attached to that test under the *Cilfit* case-law (part III). Next, it will identify some of the additional criteria employed by those courts, which is to say criteria that do not expressly flow from the judgment in *Cilfit* as conditions attached to the 'any reasonable doubt' test (part IV), and these too will provide a basis for offering some reflections on the discretion available to those courts in the implementation of the *Cilfit* case-law (part V). Finally, it will analyse the impact on the interpretation of the concept of 'any reasonable doubt' of the review by constitutional courts of the way in which ordinary courts adjudicating at last instance fulfil their obligations under Article 267 TFEU (part VI).

II. INTERPRETATION OF THE CONCEPT OF 'ANY REASONABLE DOUBT'

8. As regards the third exception to the obligation to refer laid down in the third paragraph of Article 267 TFEU, whereby courts adjudicating at last instance are relieved of their obligation to bring a matter before the Court where they find that 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt', the courts in most Member States have struggled to come up with any precise or explicit criteria by which to circumscribe or define the scope of the concept of 'any reasonable doubt'.

9. Indeed, the vast majority of the legal systems are characterised by the absence of any structured, generic or principled approach to the reasonable doubt test. There is no generic definition or clear and unambiguous interpretation of the concept of 'any reasonable doubt' or of its counterpart, the 'acte clair'. Rather, these concepts are applied on a case-by-case basis, not to say in a mechanical, simplistic or stereotypical fashion. It seems useful to note here that, although the national courts normally use the two concepts interchangeably, the case-law examined for the purposes of this research note shows that they refer to 'acte clair' far more often than they do to 'any reasonable doubt'. That preference for the 'acte clair' concept, which is more concise and, therefore,

not necessarily in need of definition, may also go some way towards explaining why there is no definition of the concept of 'any reasonable doubt', which is less easy to clarify or pin down.

10. Thus, the national courts will often simply find that they are not obliged to make a reference to the Court provided that the provision of EU law in question is clear and/or its interpretation or application in the case concerned leaves no scope for any reasonable doubt, [7] without for that matter specifying in any further detail the reasons for their finding to that effect, in particular with respect to the conditions laid down by the Court in the judgment in *Cilfit* (examined in part III below). In some Member States, such as **Estonia** and **Malta**, the concept of 'any reasonable doubt' is not even referred to in the case-law of the courts adjudicating at last instance. [8]

11. However, in several Member States, there is evidence, in some decisions at least, of an attempt to define or delimit the concept of 'any reasonable doubt', in particular by mitigating the impact of the 'reasonableness' of the doubt.

12. In the **United Kingdom**, for example, the House of Lords and the Supreme Court, which replaced the House of Lords in 2009, have ruled out the need to make a reference to the Court where a particular interpretation is 'clear beyond the bounds of reasonable argument' or where it is 'beyond reasonable dispute'. The Anotato Dikastirio Kyprou (Supreme Court, **Cyprus**), referring to the UK case-law (applicable in Cyprus as a common-law system), was able to hold that a reference is justified where the question of EU law raised is not 'free from doubt'). [9] Still within the context of common law, it is clear from certain judgments of the Supreme Court (**Ireland**) that a reference is no longer necessary where the application of EU law is so obvious as to leave no scope for doubt.

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7 Thus, in a not insignificant number of Member States, the judgment in *Cilfit* and, more particularly, the concepts of 'any reasonable doubt' and 'acte clair' are cited in many cases but as a basis for concluding, in most of them, that there is no obligation to refer: this is true in particular of **Bulgaria** (in particular the Varhoven administrativen sad (Supreme Administrative Court)), the **Czech Republic** (in particular, the Nejvyšší soud (Supreme Court) and the Nejvyšší správní soud (Supreme Administrative Court)), **Ireland, Spain, Lithuania**, **Hungary**, **Portugal**, **Slovenia** and **Finland**.

8 While it does not necessarily mean that the principle underlying that concept is not applied in case-law, this absence of any reference (to the concept of 'any reasonable doubt') nevertheless makes it difficult to reach any clear conclusions as to the way in which that concept is interpreted and applied.

9 Still with reference to the case-law of the Court of Appeal (England and Wales, **United Kingdom**), the Anotato Dikastirio Kyprou (Supreme Court, **Cyprus**) also ruled that the courts of first instance have a duty to make a reference to the Court unless they can resolve the question raised 'with complete confidence'.

13. The Supremo Tribunal de Justiça (Supreme Court, **Portugal**) has occasionally held that there is no obligation to refer where the interpretation of the rules in question cannot be any other than that which it has given, while the Supremo Tribunal Administrativo (Supreme Administrative Court, **Portugal**) has relied on the 'complete clarity' of the rule in question and the fact that its 'meaning is so clear as to eliminate any difficulty of interpretation or application' in order to refrain from referring a matter to the Court. [10] Similarly, the Consiglio di Stato (Council of State, **Italy**) sometimes refers to the fact that the interpretation given is 'clear, unambiguous and obvious'. Occasionally, albeit fairly exceptionally, the Conseil d'État (Council of State, **Belgium**) uses the phrase 'any doubt', omitting the adjective 'reasonable'. However, that omission seems to be more common in **Poland**, particularly in the case of the Naczelny Sąd Administracyjny (Supreme Administrative Court). Finally, the Tribunal Constitucional (Constitutional Court, **Spain**) has held that, where a court adjudicating at last instance has in mind not to apply national legislation which it considers to be incompatible with EU law, it may refrain from referring the matter to the Court only where it considers that the interpretation of that law is beyond not any reasonable doubt but, objectively clearly and conclusively, 'any doubt' at all.

14. Thus, the interpretation adopted by some courts adjudicating at last instance appears to be that they are relieved of their obligation to refer only in the absence of any kind of doubt, rather than in the absence of any reasonable doubt. The fact nonetheless remains that, in several Member States where this interpretation has been adopted, the courts in question do not always apply it consistently or systematically.

15. Other decisions opt instead for a light reformulation of the phrase 'any reasonable doubt', although there is no conclusive evidence that such a reformulation is capable of altering or clarifying the meaning of that phrase. In that regard, the Supremo Tribunal de Justiça (Supreme Court, **Portugal**) has occasionally referred to the absence of any 'justified' doubt as to the interpretation to be adopted. The Cour de cassation (Court of Cassation, **Belgium**) sometimes cites the 'manifest' nature of a rule of EU law as grounds for not making a reference for a preliminary ruling. For its part, the

[10] The Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, **Portugal**), on the other hand, which can also be considered to be a court adjudicating at last instance, held that it is possible to refrain from referring a matter to the Court 'where, in a situation in which several interpretations are possible, any lawyer, even an ill-informed one, would opt for the solution adopted by the national court', which appears to be tantamount to a test of reasonable doubt.

administrative chamber of the Riigikohus (Supreme Court, **Estonia**) has invoked 'serious' doubts as grounds for its obligation to refer a matter to the Court; however, it has never used this as justification for a refusal to refer a matter to the Court.

16. In **France**, the Conseil d'État (Council of State) and the Cour de cassation (Court of Cassation) frequently refer, among other turns of phrase, to the 'serious difficulty' of interpreting or assessing the validity of a rule of EU law, or the 'serious controversy' raised by the dispute. As regards 'serious difficulty', while those courts use that phrase as grounds for both referring a matter to the Court [11] and refusing to do so, [12] the latter scenario could be interpreted as going somewhat beyond the threshold of doubt behind the concept of 'any reasonable doubt' within the meaning of the *Cilfit* case-law.

17. The degree of complexity of the question raised is sometimes taken into account too, although in support of different conclusions. While, for the House of Lords (**United Kingdom**), there is no 'acte clair' where the interpretation of a provision requires extensive reasoning, the Verwaltungsgerichtshof (Administrative Court, **Austria**) has stated on several occasions that the need to resolve complex points of law does not in itself entail an obligation to refer a case to the Court.

18. Unfortunately, the foregoing overview of national case-law does not appear to allow any firm conclusions to be drawn as to how to interpret the concept of 'any reasonable doubt' as such. It does, however, highlight the piecemeal nature of both the attempts to define or reformulate that concept and the use of any such definitions or reformulations. In any event, the courts adjudicating at last instance, whether using the 'any reasonable doubt' test or some other benchmark, be it similar or otherwise, often merely refer to it without specifying in any further detail the criteria against which it is to be applied on a case-by-case basis.

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11 Almost always in the case of the Conseil d'État (Council of State) and along with other forms of words in the case of the Cour de cassation (Court of Cassation).

12 Only in matters involving an assessment as to the validity of a provision of EU law, in the case of the Conseil d'État (Council of State), and more broadly in the case of the Cour de cassation (Court of Cassation).

III. THE CONDITIONS ATTACHED TO THE 'ANY REASONABLE DOUBT' TEST ESTABLISHED BY THE JUDGMENT IN *CILFIT*

19. It should be recalled that the exception to the obligation to refer on account of the absence of reasonable doubt is one that is framed by a number of conditions. The Court set out some of those conditions in the judgment in *Cilfit* itself when it noted, in the concluding paragraph of that judgment (paragraph 21), that 'the existence of such a possibility must be assessed in the light of the specific characteristics of [EU] law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the [European Union]'.

20. Those conditions were further spelled out in paragraphs 16 to 20 of that judgment.

21. In the first place, the Court noted that, before concluding that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, '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' (paragraph 16).

22. The Court went on to state that, 'however, the existence of such a possibility must be assessed on the basis of the characteristic features of [EU] law and the particular difficulties to which its interpretation gives rise' (paragraph 17).

23. Thus, 'to begin with, it must be borne in mind that [EU] 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' (paragraph 18).

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

25. 'Finally, every provision of [EU] law must be placed in its context and interpreted 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' (paragraph 20).

26. Thus, it is clear from the judgment in *Cilfit* that the Court sought to circumscribe the discretion available to courts adjudicating at last instance in establishing the existence of a situation in which it may be concluded that the correct application of EU law is so obvious as to leave no scope for 'any reasonable doubt'.

27. It would seem, however, that none of the Member States subject the application of the exception based on the absence of reasonable doubt to a prior systematic analysis of all, or even some, of the conditions laid down by the Court in the judgment in *Cilfit*. The approach adopted by the courts adjudicating at last instance is, on the contrary, more case-based or pragmatic, inasmuch as they often analyse the conditions obtaining in each case that will support the conclusion they intend to reach with respect to the existence or absence of reasonable doubt.

28. As an example of this, it may be noted that, in the **Czech Republic**, the Ústavní soud (Constitutional Court), after finding that the Nejvyšší soud (Supreme Court) had failed to satisfy some of the conditions arising from the judgment in *Cilfit* by not comparing language versions or taking into account the specific features of EU law in terms of its terminology and interpretative methods, held that such an omission was excusable, in particular in the light of the fact that the *Cilfit* criteria cannot be construed absolutely. In **Slovenia**, on the other hand, the Ustavno sodišče (Constitutional Court) held that the ordinary courts must apply all the criteria arising from the judgment in *Cilfit*; the Vrhovno sodišče (Supreme Court), however, does not appear to fulfil that obligation often.

A. THE NEED FOR THE MATTER TO BE EQUALLY OBVIOUS TO THE COURTS OF THE OTHER MEMBER STATES AND TO THE COURT

29. The general condition laid down in paragraph 16 of the judgment in *Cilfit*, namely that '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', is not often the subject of specific consideration or analysis in the case-law of the Member States. It is true that that condition is sometimes restated in the national courts' reasoning but, in most cases,

this appears to be little more than a reiteration of the wording of the judgment in *Cilfit*, with the obligation laid down by that condition never actually being addressed.

30. However, it may be noted that the Supreme Court (**United Kingdom**) has had the opportunity to temper the scope of that condition, in particular as regards the need for the matter to be obvious to the courts of the other Member States. In one case, it held that the national courts may set aside the obligation to refer where, having carried out an in-depth examination of every argument running counter to the interpretation they intend to adopt, they conclude that such arguments could not be accepted by the courts of the other Member States 'on any conventional basis of reasoning', In another case, it held that the fact that a question of interpretation relates solely to EU law, without requiring account to be taken of national law, allowed the conclusion that the matter was equally obvious to the courts of the other Member States.

31. Moreover, that condition is to some extent linked to the guidance provided by the Court in the judgment in *Ferreira da Silva e Brito and Others*. [13] The Court held that, in circumstances which are characterised both by conflicting lines of case-law at national level regarding a particular concept of EU law 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 (paragraph 44). In doing so, the Court indicated that the fact that a concept gives rise to a great deal of uncertainty on the part of many national courts and tribunals in various Member States is relevant to the examination of the obligations arising from the third paragraph of Article 267 TFEU (paragraph 43).

32. In that regard, it appears that it is in only a limited number of Member States that the case-law established by the courts of the other Member States is examined with a view to confirming or ruling out the existence of any reasonable doubt as to the interpretation of EU law. Thus, some courts have held that the case-law of other Member States served — usually in conjunction with other factors — to demonstrate the absence of reasonable doubt, thus enabling them to refrain from referring a matter to the Court. [14]

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[13] Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* C-160/14, EU:C:2015:565.

[14] The Nejvyšší soud (Supreme Court, **Czech Republic**), the Nejvyšší správní soud (Supreme

Conversely, other courts have dismissed the obligation to refer a matter to the Court even though courts in other Member States have given rulings at odds with those which they have given themselves. [15]

33. Moreover, the existence of a case pending before the Court concerning the issue being examined by a national court may occasionally be taken into consideration in support of the conclusion that there is an obligation to refer the matter to the Court, in particular in the light of the risk of divergences in judicial decisions within the European Union. [16] However, other courts adjudicating at last instance have preferred to refrain from making a reference and to dispose of the dispute without waiting for the Court's response in the pending case, [17] as, moreover, the Court has itself authorised them to do. [18] On the subject not of pending cases but of judgments handed down by the Court after a national court has refrained from referring a matter to it, the risk of divergences in judicial decisions has sometimes been used as an *ex post* criterion for setting aside the judgment delivered by the national court, with an acknowledgement that EU law was not sufficiently clear and that the matter should have been referred. [19]

34. Finally, in the judgment in *Ferreira da Silva e Brito and Others*, [20] the Court also noted that the fact that the courts or tribunals of a Member State have given contradictory decisions is not in itself a conclusive factor capable of requiring a court adjudicating at last instance in the same Member State to fulfil the obligation set out in the third paragraph of Article 267 TFEU. The court adjudicating at last instance may consider, notwithstanding that the lower courts have interpreted a provision of EU law in a particular way, that the interpretation it intends to give to that provision, which differs from that adopted by the former courts, is clear beyond any reasonable doubt.

Administrative Court, **Czech Republic**), the Supreme Court (**Ireland**), the Tribunal Supremo (Supreme Court, **Spain**) and the Oberster Gerichtshof (Supreme Court, **Austria**).

15 The House of Lords (**United Kingdom**).

16 The Verwaltungsgerichtshof (Administrative Court, **Austria**).

17 The Conseil d'État (Council of State, **Belgium**), the Lietuvos apeliacinis teismas (Court of Appeal of **Lithuania**) and the Supreme Court (**United Kingdom**), the latter having justified doing so on grounds of the need for the dispute to be disposed of rapidly, despite having expressly acknowledged that the provision of EU law in question was not, in its view, an 'acte clair'.

18 Judgment of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 61.

19 The Korkein hallinto-oikeus (Supreme Administrative Court, **Finland**).

20 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* C-160/14, EU:C:2015:565, paragraphs 41 and 42.

35. So far as is relevant, it may be noted that the existence of contradictory decisions given by lower courts in the same Member State has been used to justify the obligation on the part of the courts adjudicating at last instance to refer a matter to the Court; however, this has occurred in only a small number of cases, the majority of which, moreover, predate the judgment in *Ferreira da Silva e Brito and Others*. [21]

B. COMPARAISON OF THE LANGUAGE VERSIONS

36. The general condition examined in the preceding section is later clarified in the conditions laid down in paragraphs 18 to 20 of the judgment in *Cilfit*.

37. In paragraph 18 of that judgment, the Court recalled the obligation incumbent on courts adjudicating at last instance to take account of the fact that, since EU legislation is drafted in several languages, the interpretation of a provision of EU law involves a comparison of the language versions.

38. In that regard, the courts of the Member States adjudicating at last instance do not appear to fulfil that obligation systematically or even regularly.

39. It is true that examples of decisions in which such a linguistic comparison is carried out can be found in several Member States, namely **Austria**, [22] **Belgium**, [23] **Spain**, [24] **Estonia**, [25] **Greece**, [26] **Lithuania**, [27] the **Netherlands**, [28] **Poland**, [29] the **Czech**

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21 The Nejvyšší správní soud (Supreme Administrative Court, **Czech Republic**; more recently, however, the relevance of that criterion has been rejected by the Ústavní soud (Constitutional Court, **Czech Republic**), in the light particular of the judgment in *Ferreira da Silva e Brito and Others*), the Bundesverfassungsgericht (Federal Constitutional Court, **Germany**) and the House of Lords (**United Kingdom**). The only recent case identified comes from the College van beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, **Netherlands**); however, it appears to be an isolated case.

22 In one case, the Oberster Gerichtshof (Supreme Court) referred to the English and French versions of the legislation in question.

23 Only the Cour de cassation (Court of Cassation) appears to carry out such a comparison, in connection in particular with the versions in the three official national languages (Dutch, French and German) and the English version, as well as, occasionally, the Italian and Spanish versions.

24 The Tribunal Supremo (Supreme Court) has on occasion taken account of the English and French versions; more exceptionally, the German, Italian, Portuguese and Dutch versions too.

25 The Riigikohus (Supreme Court) sometimes examines the English, French, German and Finnish versions.

26 The Areios Pagos (Court of Cassation) and the Symvoulio tis Epikrateias (Council of State) sometimes compare the English, French and German versions.

27 In one judgment, the Lietuvos Aukščiausiasis Teismas (Supreme Court) took into account all the language versions other than Hungarian and Irish. However, it will be noted that the point of uncertainty concerned a single conjunction (where the Lithuanian version had used ‘and’, all the

Republic, [30] the **United Kingdom** [31] and **Slovenia**. [32] However, even in those Member States, language versions do not appear to be compared as a matter of course and, where the courts adjudicating at last instance do carry out such a comparison, they usually do so in relation to a limited number of language versions, quite often English, French and German.

C. THE TERMINOLOGICAL PECULIARITIES OF EU LAW

40. In paragraph 19 of the judgment in *Cilfit*, the Court noted that EU law uses terminology which is peculiar to it, with the result that it contains legal concepts which do not necessarily have the same meaning in the various national legal systems.

41. None of the decisions consulted for the purposes of the present research note appear to address matters of terminology, at least not directly. These are analysed, at most, indirectly, as part of the comparison of language versions, in the form of a classification of the interpreted term as simple (Supreme Court (**United Kingdom**)) or technical (Lietuvos Aukščiausiasis Teismas (Supreme Court, **Lithuania**)).

D. THE CONTEXTUAL, SCHEMATIC, TELEOLOGICAL AND DYNAMIC INTERPRETATION OF EU LAW

42. Finally, in paragraph 20 of the judgment in *Cilfit*, the Court held that every provision of EU law must be placed in its context and interpreted 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.

43. As with the other conditions, the case-law of the Member States does not routinely make

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other versions had used 'or'), which probably explains the large number of versions compared. As a general rule, it is more usually the English and French versions that are compared.

28 There are examples from several Netherlands courts adjudicating at last instance. Such a comparison, which does not appear to be common, usually takes account of the English and French versions.

29 This has been true of the ordinary (i.e. non-administrative) courts, such as the Sąd Najwyższy (Supreme Court), which have taken into account the English, French, German, Italian, and Czech versions, and the Sąd Apelacyjny Katowice (Court of Appeal, Katowice), which is the only court to say that it has taken account of all the language versions.

30 The versions most commonly examined by the Nejvyšší správní soud (Supreme Administrative Court) and the Nejvyšší soud (Supreme Court) appear to be English, French, German, Slovakian and, where appropriate, Spanish.

31 The Supreme Court has occasionally compared the French, German, Spanish and Dutch versions.

32 The Vrhovno sodišče (Supreme Court) has compared, inter alia, the English, French and German versions.

reference to the interpretative methods set out in the judgment in *Cilfit*. Moreover, the courts adjudicating at last instance that use those methods do not do so as a matter of course.

44. Thus, references are sometimes made to the objective and scheme of the act of EU law in question, [33] to the other provisions of that act and/or to other acts of EU law, [34] including the preparatory texts or other soft law measures, [35] and even to previous versions of the legislation at issue. [36]

45. However, and as is also true of the other conditions relating to 'any reasonable doubt' laid down in the judgment in *Cilfit*, the case-law analysed shows that the courts adjudicating at last instance do not use the interpretative methods referred to by the Court as a matter of course. At most, they rely on one or other of those methods, depending on the particular circumstances of each case, sometimes in combination with other criteria relating to the 'any reasonable doubt' test established in the judgment in *Cilfit*, or even in conjunction with additional, more extensive criteria.

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[33] This is true of the Cour de cassation (Court of Cassation, **Belgium**); the Tribunal Supremo (Supreme Court, **Spain**); the Conseil d'État (Council of State, **France**); the Areios Pagos (Court of Cassation, **Greece**) and the Symvoulio tis Epikrateias (Council of State, **Greece**); the Lietuvos Aukščiausiasis Teismas (Supreme Court, **Lithuania**); several **Netherlands** courts adjudicating at last instance; the Vrhovno sodišče (Supreme Court, **Slovenia**); in the **Czech Republic**, the Nejvyšší soud (Supreme Court) and the Nejvyšší správní soud (Supreme Administrative Court); and, in **Romania**, the Curtea de Apel (Court of Appeal), Bucharest.

[34] An approach taken by the Cour constitutionnelle (Constitutional Court) and the Cour de cassation (Court of Cassation, **Belgium**), the Riigikohus (Supreme Court, **Estonia**), the Latvijas Republikas Satversmes tiesa (Constitutional Court, **Latvia**) and the Areios Pagos (Court of Cassation, **Greece**).

[35] This is true, for example of the Cour constitutionnelle (Constitutional Court) and the Cour de cassation (Court of Cassation, **Belgium**), when referring, respectively, to the calculation methods established by the European Banking Authority and in the Virgós-Schmit report; the Tribunal Supremo (Supreme Court, **Spain**), when referring to a Commission report on the implementation of a framework decision; the Supreme Court (**Ireland**), when citing the Schlosser report; the Najvyšší súd Slovenskej republiky (Supreme Court of the **Slovak Republic**), when referring to the Commission's evaluation of the transposition of the directive in question in Slovakian law; the Nejvyšší správní soud (Supreme Administrative Court, **Czech Republic**), when citing the explanatory notes of the Commission and the World Customs Organisation on the combined nomenclature; and the Vrhovno sodišče (Supreme Court, **Slovenia**), when referring to a Commission communication.

[36] The Raad van State (Council of State, **Netherlands**) and the Nejvyšší správní soud (Supreme Administrative Court, **Czech Republic**).

IV. ADDITIONAL CRITERIA IN EVIDENCE IN THE CASE-LAW OF THE MEMBER STATES

46. In order to determine whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, the courts adjudicating at last instance occasionally examine criteria which do not expressly flow from the judgment in *Cilfit*. These may be described as additional criteria, inasmuch as they may be taken into account, in most cases in combination with some of the conditions relating to the 'any reasonable doubt' test established in the judgment in *Cilfit*, in support of a conclusion as to the existence or absence of any reasonable doubt, or, more generally, in order to decide whether a reference to the Court would be justified or even appropriate. The approach taken by the courts adjudicating at last instance in such cases therefore appears to be to compile a body of evidence on the basis of which to resolve not only the question as to whether or not there are any reasonable doubts — in the light, if necessary, of factors which go beyond those indicated by the Court in the judgment in *Cilfit* — but also the question as to whether, in the circumstances of the case in question, it is desirable or appropriate to refer the matter to the Court. Most of those criteria are linked, albeit indirectly, to the *Cilfit* criteria or to the rationale underpinning them. However, other criteria, which will be set out at the end of this note, appear to concern factors that are further removed from that rationale.

47. A prime example is a criterion which, although originating from the judgment in *Cilfit*, is not, technically, one of the conditions under the 'any reasonable doubt' test: namely the existence of an 'acte éclairé'.

48. Thus, the second exception to the obligation to refer under the third paragraph of Article 267 TFEU, as established in paragraph 21 of the judgment in *Cilfit*, arises where a court adjudicating at last instance finds that the provision of EU law in question has already been interpreted by the Court. That exception is, technically, independent of the exception based on the absence of any reasonable doubt. Common in the case-law of a number of Member States, however, is a failure to distinguish, not to say a degree of confusion, between the 'acte clair' and 'acte éclairé' doctrines, with the result that it is not unusual for the existence of an 'acte éclairé' to be considered to be one of the criteria supporting the conclusion that the provision under examination is clear and/or beyond

any reasonable doubt. [37]

49. Some courts, like the Supreme Court (**United Kingdom**) and the Supreme Court (**Ireland**), have also been known to rest their conclusion as to the absence of any reasonable doubt on the fact that, while the interpretation adopted is not confirmed by the case-law of the Court, it is not called into question by it either, that is to say in the absence of any case-law of the Court that casts doubt on that interpretation.

50. Another factor taken into account by some courts adjudicating at last instance is whether the interpretation of EU law which they intend to adopt enjoys unanimous support within the panel of judges or the court in question. Thus, while some courts consider that the absence of such unanimity prevents them, in principle, from taking the view that there is no reasonable doubt and therefore obliges them to refer a question to the Court for a preliminary ruling, [38] these are outnumbered by those who have dismissed the obligation to refer notwithstanding that the intended interpretation was not unanimous within the panel of judges or the court in question. [39]

51. Moreover, some national courts justify the obligation to refer a matter to the Court by reference to works of legal literature, both national and international, that support the conclusion that there are doubts as to the interpretation of the provision in question. [40] The absence of any reasonable doubt has also been established on the basis of the opinions of expert witnesses, invited by the court in question, who have concluded that the provisions of EU law at issue are clear and explicit. [41]

52. Somewhat less commonly, it is the national legislation which is relied on in support of

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37 That is the case in **Belgium**, **Denmark**, **Ireland**, **Greece** (Areios Pagos (Court of Cassation) and Symvoulio tis Epikrateias (Council of State)), **Spain** (Tribunal Supremo (Supreme Court)), **Italy**, **Latvia** (Latvijas Republikas Satversmes tiesa (Constitutional Court)), **Hungary, Poland** (Sąd Najwyższy (Supreme Court)), **Romania** (Curtea de Apel (Court of Appeal), Cluj), **Slovenia** and **Finland**.

38 For example, in **Greece** (Areios Pagos (Court of Cassation) and Symvoulio tis Epikrateias (Council of State)) and the **United Kingdom** (House of Lords, later Supreme Court). While it is true that some decisions in those two Member States have done the opposite, courts taking this approach appear to be in the minority.

39 For example, in the **Czech Republic** (Nejvyšší soud (Supreme Court)), **Estonia, Spain** (Tribunal Supremo (Supreme Court)), **Cyprus** and **Sweden** (Högsta domstolen (Supreme Court)).

40 The Nejvyšší soud (Supreme Court, **Czech Republic**), the Bundesverfassungsgericht (Federal Constitutional Court, **Germany**), the Hoge Raad der Nederlanden (Supreme Court of the **Netherlands**) and the Verfassungsgerichtshof (Constitutional Court, **Austria**).

41 Latvijas Republikas Satversmes tiesa (Constitutional Court, **Latvia**).

the absence of any need to make a reference in connection with EU law: for example, because the interpretation of a provision of a directive is clear in the light of the national legislation, [42] or because the provision of national law at issue is an 'acte clair'. [43]

53. The objectives of the reference for a preliminary ruling procedure itself are sometimes relied on in support of certain additional criteria used by the national courts. Thus, in the light of the fact that the purpose of the preliminary ruling procedure is to guarantee the uniform application of EU law, the Anotato Dikastirio Kyprou (Supreme Court, **Cyprus**) considered it necessary to make a reference to the Court whenever the case raised questions of interpretation of general interest. Also taking as its basis the objective as to the uniform application of EU law, the Ústavní soud (Constitutional Court, **Czech Republic**) established the criterion of the 'importance of the point of law in terms of the unity, coherence and development of EU law', whereby a reference to the Court could be dismissed in 'unique situations' having no general implications for the legal system of the European Union. Similarly, in **France**, the Cour de cassation (Court of Cassation) has occasionally been able to justify a reference for a preliminary ruling seeking an interpretation of a provision of EU law on the further ground that a uniform interpretation of the provision at issue was required.

54. According to the wording of some decisions adopted by the courts adjudicating at last instance in **Portugal**, the brevity or concision of a rule of EU law is a factor to be taken into account in the assessment of the obligation to refer. In that regard, although the case-law does not expressly say as much, that criterion appears to be based on the rationale that a concise rule is clearer and easier to interpret.

55. A refusal to refer a matter to the Court may also be based on the division of jurisdiction between the Court and the national courts. Thus, by relying on the proposition that it falls to the former to interpret EU law and to the latter to apply it in any particular case, some courts have taken the view that there is no need to make a reference to the Court where the question which arises relates not to the interpretation of EU law, but to its

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[42] Be it the national legislation transposing the directive (Varhoven administrativen sad (Supreme Administrative Court, **Bulgaria**)) or a national law in the area covered by the directive (Naczelny Sąd Administracyjny (Supreme Administrative Court, **Poland**)).

[43] The Cour administrative (Higher Administrative Court, **Luxembourg**) justified such a classification of a national provision as an 'acte clair' on the basis not only of the wording thereof, but also, and above all, by reference to the requirements of, inter alia, the '*wirtschaftliche Betrachtungsweise*', which corresponds to the principles of economic realism.

application. [44]

56. In some Member States, the courts adjudicating at last instance may refrain from making a reference because of the way in which the parties have formulated the proposed question for a preliminary ruling, for example where the question is imprecise with respect to the provisions of which an interpretation would be sought, [45] where it is liable to infringe the national rules of procedure, [46] or where it seeks to obtain an assessment of the compatibility of a national law with EU law, [47] which is also linked to the idea of the division of jurisdiction between the Court and the national courts.

57. Finally, a number of courts justify their decision not to refer a matter to the Court on grounds of the need to avoid delays to the proceedings pending at national level. [48] This argument, however, is usually relied on for the sake of completeness. Moreover, the desire not to overburden the Court is also sometimes cited as a reason for not referring a matter to the Court for a preliminary ruling. [49]

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[44] Such as the Symvoulio tis Epikrateias (Council of State, **Greece**), the Qorti tal-Appell (Court of Appeal, **Malta**) and the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, **Romania**).

[45] This practice has been adopted by the Ústavní soud (Constitutional Court, **Czech Republic**), the Tribunal Supremo (Supreme Court, **Spain**) and the Ústavný súd Slovenskej republiky (Constitutional Court of the **Slovak Republic**).

[46] For example, the Cour de cassation (Court of Cassation, **Luxembourg**) turned down a proposal for a question to be referred for a preliminary ruling because it sought to challenge the assessment of the facts, which assessment falls to the courts hearing the substance of the case. The Qorti tal-Appell (Court of Appeal, **Malta**), meanwhile, turned down a proposal for a question to be referred for a preliminary ruling because the reference should have been made at the time when the contested provision was interpreted, that is to say at second instance. Since it was acting at third instance, it was bound, under the national legislation, to adopt the same interpretation as that given at second instance. Finally, in **Romania**, the Curtea de Apel (Court of Appeal) of Constanța cited the impossibility of making a reference for a preliminary ruling after the hearing had come to an end and at the deliberation stage.

[47] The Anotato Dikastirio Kyprou (Supreme Court, **Cyprus**) and the Curtea Constituțională (Constitutional Court, **Romania**).

[48] The Ústavní soud (Constitutional Court, **Czech Republic**), the Supreme Court (**Ireland**), the Legfelsőbb Bíróság (Supreme Court, **Hungary**), the Qorti tal- Appell (Court of Appeal, **Malta**) and the Supreme Court (**United Kingdom**).

[49] The Ústavní soud (Constitutional Court, **Czech Republic**), the Lietuvos Aukščiausiasis Teismas (Supreme Court, **Lithuania**) and the Cour administrative (Higher Administrative Court, **Luxembourg**).

V. THE DISCRETION ENJOYED BY THE NATIONAL COURTS IN IMLPEMENTING THE *CILFIT* CASE-LAW

58. The Court has had occasion to make it clear, in relation to the *Cilfit* case-law, that it is for the national court or tribunal alone to determine whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and to decide, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it [50] and to take upon itself the responsibility for resolving it. [51] It follows therefrom that it is for the national courts alone against whose decisions there is no judicial remedy under national law to take upon themselves independently the responsibility for determining whether the case before them involves an 'acte clair'. [52]

59. In the light of that case-law, some national courts adjudicating at last instance have said that the Court's intention was to confer on them a relatively broad discretion to assess the existence or absence of any reasonable doubt. For example, the Ústavní soud (Constitutional Court, **Czech Republic**) has expressly stated that, according to many legal commentators, it is almost impossible to meet the requirements of the 'acte clair' theory established in the judgment in *Cilfit* and that, in the light of the Court's case-law, the courts adjudicating at last instance have a broad discretion in that regard. The Court's approach to the obligations arising from the third paragraph of Article 267 TFEU has also been dubbed 'liberal' by the Naczelny Sąd Administracyjny (Supreme Administrative Court, **Poland**).

60. Be the views expressed by the national courts themselves what they may, an examination of the case-law of the courts adjudicating at last instance (in particular the examination carried out by legal commentators) supports the conclusion that a significant number of Member States are resistant to, or hesitant about, the prospect of making a reference to the Court, or, in any event, that the obligation to refer is the subject of a predominantly liberal interpretation which sometimes leads to a lax use of

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50 Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others* C-160/14, EU:C:2015:565, paragraph 40 and the case-law cited.

51 Judgment of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 58.

52 Judgment of 9 September 2015, *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:564, paragraph 59.

the *Cilfit* criteria, in particular 'the absence of any reasonable doubt' test, [53] or, when they *are* used, to an insufficient analysis of those criteria. [54] While some legislatures have approved legislative provisions on the obligations which the *Cilfit* case-law imposes on their national courts, the latter do not appear to view such a legislative framework as having any impact on their discretion in that regard. [55]

61. In any event, the case-law examined for the purposes of the present research note appears to confirm that the discretion which the Court has conferred on the courts adjudicating at last instance has often been interpreted by those courts as meaning that they are not necessarily bound to analyse, as a matter of course, each of the conditions referred to by the Court in the judgment in *Cilfit*. Moreover, that very discretion probably explains the additional criteria which those courts have been able to take into account in their case-law in deciding, on a case-by-case and in the light of all the circumstances of each case, whether or not they are, ultimately, obliged to refer a question to the Court for a preliminary ruling.

VI. CONSTITUTIONAL REVIEW OF COMPLIANCE WITH THE OBLIGATIONS ARISING FROM THE THIRD PARAGRAPH OF ARTICLE 267 TFUE

62. The courts adjudicating at last instance are not always the only ones to rule on their own obligations under the third paragraph of Article 267 TFEU. In some Member States, the constitutional courts examine whether or not the courts adjudicating at last instance have fulfilled those obligations, where appropriate in the light of the *Cilfit* case-law and any

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53 That is the case in **Belgium** (Cour de cassation (Court of Cassation)), **Bulgaria**, the **Czech Republic** **Denmark**, **Estonia**, **Ireland**, **Italy**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovenia, Slovakia**, **Sweden** and the **United Kingdom**.

54 As is clear, for example, from a study published by the case-law analysis group of the Kúria (Supreme Court, **Hungary**).

55 In **Bulgaria**, Article 629(3) of the Grazhdanski protsesualen kodeks (Code of civil procedure) and Article 486(3) of the Nakazatelno protsesualen kodeks (Code of criminal procedure) essentially reproduce the exceptions to the obligation to refer on grounds of an 'acte clair' and an 'acte éclairé'. Indeed, some legal commentators take the view that the recognition in legislation of the option available to the courts adjudicating at last instance of relying on those exceptions has bolstered their inclination not to bring matters before the Court. In **Sweden**, the lag (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol (Law (2006:502) setting out certain provisions on references to the Court of Justice of the European Union for a preliminary ruling), which lays down the obligation to give reasons for refusing to make a reference for a preliminary ruling where this has been requested by one of the parties, was adopted, in particular, in response to criticism that the Högsta domstolen (Supreme Court) was systematically failing to fulfil its obligation to refer matters to the Court. However, the legal literature shows that, notwithstanding that legislative provision, the Swedish courts still exhibit some reluctance to make references for a preliminary ruling and to give their reasons for refusing to do so.

link between the obligations under Article 267 TFEU and national constitutional law. Thus, for the purposes of this research note, consideration was given to the case-law of those constitutional courts too, in order to determine whether, in so far as it relates to their reviewing of the activities of the ordinary courts adjudicating at last instance, it contributes to the interpretation of the concept of 'any reasonable doubt'.

63. In Member States which have a constitutional court, [56] that court does not always have, or has never had, jurisdiction to review the decisions of the ordinary courts. In those Member States, therefore, the case-law of the constitutional court does not always clarify the concept of 'any reasonable doubt', or, more generally, the obligations laid down by the third paragraph of Article 267 TFEU, [57] except, possibly, in cases where the constitutional court considers itself to be a court adjudicating at last instance and thus gives a ruling on its own obligations under that provision [58] or where, when ruling on its own obligations, it does so so extensively that its case-law may be regarded as binding the ordinary courts too. [59]

64. In almost all of the Member States the constitutional courts of which examine the way in which the ordinary courts adjudicating at last instance fulfil their obligations regarding references to the Court, that examination does not relate directly to the concept of 'any reasonable doubt', but is more concerned with the reasons given for refusing to refer a matter to the Court. Thus, a refusal to refer which is arbitrary or insufficiently reasoned, in particular one based on the assertion of the existence of an 'acte clair' or 'acte éclairé', may be considered to be an infringement of the rights guaranteed by the national constitution, in particular the right to be heard by a court or tribunal established in accordance with the law, the right to an effective remedy and/or the right to a fair trial. [60] Such an infringement may also exist, in a number of those Member States, where

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56 The Member States which do not have a constitutional court are **Denmark**, **Ireland**, **Greece**, **Cyprus**, the **Netherlands**, **Finland**, **Sweden** and the **United Kingdom**.

57 This is the case with **Belgium**, **Bulgaria**, **Estonia** (where the Constitutional Review Chamber of the Riigikohus (Supreme Court) acts as constitutional court), **France**, **Italy**, **Latvia**, **Luxembourg**, **Malta**, **Poland** and **Romania**.

58 The case-law relating to the latter scenario is analysed in parts II to IV above, in so far as those sections include the case-law of the constitutional courts.

59 For example, in **Lithuania**.

60 That is the case in **Austria** (more particularly in the case-law of the Oberster Gerichtshof (Supreme Court), which, as a supreme court the decisions of which are not subject to constitutional review by the Verfassungsgerichtshof (Constitutional Court), is bound to ensure observance of the rights guaranteed by the constitution in its particular area of jurisdiction), the **Czech Republic**, **Germany**, **Spain, Croatia**, **Hungary**, **Portugal**, **Slovenia** and **Slovakia**. Of course, the obligation to state the reasons for a refusal to refer a matter to the Court may also be provided for, in legislation, in Member

there has been a conscious or inadequately reasoned deviation from the interpretation of the provision of EU law given by the Court.

65. Consequently, case-law established by the constitutional courts in relation to compliance by the ordinary courts with the constitutional requirements attached to the concept of 'any reasonable doubt' within the meaning of the *Cilfit* case-law appears to be somewhat exceptional. One such exception is **Spain**, where the Tribunal Constitucional (Constitutional Court) has interpreted the right to a fair trial as meaning that, where a court adjudicating at last instance intends not to apply a national rule which it considers to be incompatible with EU law, it may refrain from referring the matter to the Court where it considers that the interpretation of that law 'objectively, clearly and conclusively' raises 'no doubts'.

66. Finally, it may be noted that a constitutional court's review of the way in which the ordinary courts adjudicating at last instance fulfil their obligations under the third paragraph of Article 267 TFEU has occasionally prompted the constitutional court to ask, or even direct, an ordinary court to refer a matter to the Court for a preliminary ruling. [61]

67. Consequently, it seems possible to conclude that the constitutional review of the way in which the ordinary courts adjudicating at last instance fulfil their obligations under Article 267 TFEU, as interpreted by the *Cilfit* case-law, has a relatively limited impact on the interpretation of the concept of 'any reasonable doubt'.

VII. CONCLUSION

68. It may be concluded from the analysis of the case-law of courts adjudicating at last instance that, generally speaking, in most Member States, the *Cilfit* case-law is frequently cited to justify either referring a matter to the Court or not referring a matter to the Court.

States which do not have a constitutional court (such as **Sweden**) or in which that court does not review the decisions of the ordinary courts (such as **Lithuania**).

61 This has been done by the Tribunal Constitucional (Constitutional Court, **Spain**), the Ustavno sodišče (Constitutional Court, **Slovenia**) and the Ústavný súd Slovenskej republiky (Constitutional Court of the **Slovak Republic**).

69. As regards, more particularly, the exception to the obligation to refer linked to the existence of an ‘acte clair’, the case-law of the vast majority of the Member States has not established any criteria by which to circumscribe or define the scope of the concept of ‘any reasonable doubt’. Instead, the approach taken by the courts adjudicating at last instance in this regard is simply to find that the provision of EU law in question is clear and/or its interpretation or application in the case in question leaves no scope for any reasonable doubt, without specifying in any further detail the reasons for that finding.

70. It is true that, in several Member States, there are decisions which appear to make some attempt to clarify the concept of ‘any reasonable doubt’. Where that approach does exist, however, it is heavily case-based and does not therefore support any conclusion as to the existence in a particular Member State of an interpretation having general application.

71. The same conclusion applies to the conditions attached to the ‘any reasonable doubt’ test which the Court set out in the judgment in *Cilfit*. First, those conditions are not analysed as a matter of course, some of them seeming to be taken into account only in very exceptional situations. Other conditions, such as, for example, a comparison of the language versions and the schematic or teleological interpretation of EU law, are analysed more often but, once again, not to such an extent as to warrant the view that they are commonly and routinely addressed by the courts adjudicating at last instance.

72. Moreover, the case-law of some Member States contains evidence of additional criteria which do not expressly flow from the *Cilfit* case-law but are taken into account, often in combination with conditions linked to the ‘any reasonable doubt’ test, as the basis for concluding whether or not there is any reasonable doubt or, more generally, for deciding whether a reference should be made to the Court. Moreover, other decisions use additional criteria which flow from the judgment in *Cilfit* but do not relate to the conditions attached to the ‘any reasonable doubt’ test. That is the case, in particular, with the ‘acte éclairé’ criterion, which, in several Member States, is often used interchangeably with the condition as to the existence of an ‘acte clair’.

73. In the light of all the foregoing, it seems possible to conclude that many courts adjudicating at last instance make generous use of the discretion which they enjoy under the *Cilfit* case-law as regards the obligation to refer imposed on them, in principle, by

the third paragraph of Article 267.

[…]