



## THE *CILFIT* CRITERIA CLARIFIED AND EXTENDED FOR NATIONAL COURTS OF LAST RESORT UNDER ART. 267 TFEU

IMELDA MAHER\*

**ABSTRACT:** A significant judgment of the Grand Chamber of the CJEU was handed down in case C-561/19 *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi* ECLI:EU:C:2021:799 (*CIM*) in October 2021 on the scope of discretion of national courts of last resort when deciding to make a preliminary reference under art. 267 TFEU. Despite the invitation of the Advocate General, the Court shored up the (almost) 40-year-old *CILFIT* (case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335) test, giving clarification as to the aims of art. 267 TFEU and setting down an obligation to give reasons when not referring as a means of containing national court discretion by increasing transparency. The Court, by retaining the *CILFIT* test while tweaking it and adding a requirement to give reasons for refusal to refer, chose partnership and judicial cooperation with national apex courts while increasing transparency for decision-making thereby favouring the existing vision of the relationship with courts of last resort as one of direct cooperation.

**KEYWORDS:** preliminary reference – national courts of last resort – *CILFIT* – *acte clair* – giving reasons – obligation to refer.

### I. INTRODUCTION

In the *CIM* case<sup>1</sup> a significant judgment was handed down on 6 October 2021 by the Grand Chamber of the Court of Justice of the EU (CJEU). This was the second preliminary reference in the case from the Italian *Consiglio di Stato*, a court of last resort. A second reference from an apex court is unusual and the Advocate General suggested it provided the CJEU with a chance to review the scope of discretion of national courts of last resort<sup>2</sup> when deciding to make a preliminary reference under art. 267 TFEU. Despite the invitation of the Advocate General, the Court shored up the (almost) 40-year-old *CILFIT* test,<sup>3</sup> while adding a requirement that a national court of last resort must give reasons for not referring.

\* Full Professor in European Law, UCD Sutherland School of Law, imelda.maher@ucd.ie. Thanks to Suzanne Kingston and Rónán Riordan for comments.

<sup>1</sup> Case C-561/19 *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi* ECLI:EU:C:2021:799 (*CIM*).

<sup>2</sup> Hereinafter any mention of national courts can be assumed to include tribunals as per art. 267 TFEU.

<sup>3</sup> Case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335.



This *Insight* first briefly outlines the substantive issue in the case to provide context before turning to how the CJEU analysed the nature and scope of the preliminary reference procedure. It concludes that the CJEU by retaining the CILFT test, while tweaking it and adding a requirement to give reasons for refusal to refer, chose partnership and judicial cooperation with national apex courts while increasing transparency for decision-making.

## II. CONTEXT: TWO PRELIMINARY REFERENCES AND THE NEED TO PROVE RELEVANCE

In this case a contractor for cleaning services for national railway infrastructure sought to rely on a public procurement Directive<sup>4</sup> to override a limited price review provision in the contract and to have the Italian legislation implementing the Directive which allowed for the exclusion of price reviews to be found contrary to various provisions of EU Law. This argument was rejected at first instance and the matter was referred to the CJEU on appeal by the *Consiglio di Stato*, the highest administrative court in Italy. The CJEU found that one of the questions posed was partially inadmissible.<sup>5</sup> The national court had asked if the national law was compatible with a range of Treaty provisions: but had failed to explain how an interpretation of those provisions was relevant to the resolution of the case.<sup>6</sup> The CJEU did find that the contract fell within the Directive but that it did not preclude national laws that do not provide for periodic price review.

When the case returned to the *Consiglio di Stato* after the first preliminary reference, the applicant for the first time raised further questions as to the compatibility of the Italian law with a range of additional EU Treaty provisions and the Social Charter and asked the *Consiglio* to make another reference. The *Consiglio* felt obliged to make the reference but also made it clear it was concerned about abuse of process where matters were raised so late in proceedings.

The CJEU held that the very broad questions asking if the national law was inconsistent with another long list of EU treaty provisions were inadmissible.<sup>7</sup> National courts had to “observe scrupulously”<sup>8</sup> the requirements concerning the content of a request for

<sup>4</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors 1.

<sup>5</sup> Case C-152/17 *Consorzio Italian Management e Catania Multiservizi* ECLI:EU:C:2018:264. The second question became hypothetical given the answer to the first question and was not answered.

<sup>6</sup> See Rules of Procedure of the Court of Justice of 29 September 2012, art. 94. The provisions were art. 3(1) TEU, arts 26, 56 to 58 and 101 TFEU, and art. 16 of the Charter of Fundamental Rights. Art. 56 was relevant but only insofar as it related to the EU principles of equality, non-discrimination and the obligation of transparency. The Charter was not relevant as the national law was not implementing EU law for the purposes of art. 52(1) of the Charter itself.

<sup>7</sup> The list of Treaty provisions referred to in the second reference was longer than the first, with some overlap: arts 2 and 3 TEU, art. 4(2), arts 9, 26, 34, art. 101(1)(e), arts 106, 151 to 153 and 156 TFEU, arts 16 and 28 of the Charter, the European Social Charter and the Charter of Social Rights. The CJEU has no jurisdiction to interpret the European Social Charter see *CIM* cit. para. 50.

<sup>8</sup> *CIM* cit. para. 68.

a preliminary ruling. This means that as well as providing the questions themselves, the national court must provide (i) a summary of the subject-matter of the dispute and relevant findings of fact or at least, an account of the facts that have led to the questions referred; (ii) the tenor of the relevant national provisions and, where appropriate case law; and (iii) a statement of reasons which prompted the question on interpretation or validity and the relationship between the EU laws in issue and the national legislation in the case.<sup>9</sup> In this case, the *Consiglio di Stato* had failed in both preliminary references to state why an interpretation of the range of EU Treaty provisions it referred to were necessary to resolve the dispute. The CJEU suggests all it had done was repeat the questions of the applicant without giving its own assessment. This is a clear reminder to national courts that there is an obligation to assess the request from a party and not just to act as a conduit to the CJEU. The obligation to give due consideration to the request, is further underlined in the main body of the judgment where the CJEU discussed the obligation and power to refer.

### III. THE ADVOCATE GENERAL OPINION

In this second reference the CJEU was asked whether a court of last resort is obliged to make a reference even if the parties request such a reference after the initial pleadings, or after the case has been set down for judgment and even after a first preliminary reference has been made. Its expansive judgment may have been prompted by the opinion of Advocate General Bobek<sup>10</sup> who thought it was high time for the Court to revisit the *CILFIT* test.<sup>11</sup> He noted inconsistencies in application of the *CILFIT* criteria in recent case law by the CJEU.<sup>12</sup> For example, two CJEU decisions on the same day pointed in different directions as to the scope of discretion to refer:<sup>13</sup> One case did not require a court of last resort to make a reference just because a lower court had made a reference on the same

<sup>9</sup> Art. 94 Rules of Procedure cit. and Recommendations C 380/1 of the CJEU of 8 November 2019 to National Courts and Tribunals in relation to the initiation of Preliminary Ruling Proceedings, para. 15.

<sup>10</sup> Case C-561/19 *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi (CIM)* ECLI:EU:C:2021:291, opinion of AG Bobek. The Opinion generated considerable comment see e.g. E Gambaro and I Bellini, 'Preliminary Ruling and Court of Last Instance: Do the EU's 'CILFIT' Criteria Need to Be Revisited?' (May 2021) GTLaw [www.gtlaw.com](http://www.gtlaw.com); F Liguori, 'Sulla riformulazione dei criteri CILFIT: le conclusioni dell'AG Bobek nel caso Consorzio Italian Management e Catania Multiservizi' (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 955.

<sup>11</sup> See the next section for a detailed discussion of the test. The German government and the Commission as interveners in the case did not think *CILFIT* should be revisited at all see *CIM*, opinion of AG Bobek cit. para 39.

<sup>12</sup> *CIM*, opinion of AG Bobek cit. paras 69-87. See also J Claassen, 'In the Courts the CJEU Does not Trust? The National Courts' Obligation to Refer Preliminary Questions to the CJEU after Consorzio Italian Management' (12 October 2021) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de).

<sup>13</sup> See the discussion in J Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar 2021) 12.

issue,<sup>14</sup> while the other case held that a court of last resort could not ignore conflicting decisions from lower courts and differing interpretations in other Member State courts.<sup>15</sup> The Advocate General also pointed to the interoperability of the criteria; the increase in preliminary references in recent years; and the maturation of the legal order from one of judicial partnership to one with 'vertical elements'.<sup>16</sup> He suggested that the preliminary reference system can function only because no one applied the *CILFIT* criteria literally.<sup>17</sup> He suggested a different test that is more systemic in approach, namely that a national court of last resort would have to refer a case to the CJEU if it raised (i) a general issue of interpretation of EU law (as opposed to its application); (ii) to which there was objectively more than one reasonably possible interpretation; (iii) for which the answer could not be inferred from the existing case-law of the CJEU (or with regard to which the referring court wished to depart from that case-law).<sup>18</sup> This more systemic approach would mean that very specific issues of interpretation would no longer come before the CJEU.<sup>19</sup>

The CJEU rejected this approach. Rather than jettison the long standing precedent of *CILFIT*, it offered clarification as to the aims of art. 267 TFEU and set down an obligation to give reasons when not referring as a means of containing national court discretion by increasing transparency. Thus, the Court favoured the existing vision of the relationship with courts of last resort as one of direct cooperation, implicitly rejecting the Advocate General view that there are "vertical elements" to that relationship while at the same time, paradoxically, setting out national court obligations and constraints on their discretion.

## IV. THE NATURE AND SCOPE OF ART. 267 TFEU

### IV.1. THE UNIFORMITY OF EU LAW

In its ruling the CJEU noted that art. 267 TFEU is the keystone<sup>20</sup> of the EU judicial system under which a judicial dialogue is set in train between the CJEU and national courts. The aim of this dialogue is to secure the uniform interpretation of EU Law through a system of direct cooperation between the national courts and the CJEU. It is this uniform interpretation that in turn ensures consistency, full effect and autonomy of EU Law and ultimately its

<sup>14</sup> Joined cases C-72/14 and C-197/14 X ECLI:EU:C:2015:564.

<sup>15</sup> Case C-160/14 *Ferreira da Silva e Brito and Others* ECLI:EU:C:2015:565.

<sup>16</sup> *CM*, opinion of AG Bobek cit. 124.

<sup>17</sup> *Ibid.* para 2.

<sup>18</sup> *Ibid.* para 134.

<sup>19</sup> *Ibid.* paras 140-143. The French government intervening in the case had also advocated for this see the opinion of the AG at para. 41.

<sup>20</sup> See also *Avis 2/13 Adhésion de l'Union à la CEDH* ECLI:EU:C:2014:2454 para. 176.

“particular nature”.<sup>21</sup> The tasks of interpretation and application as between the CJEU and national courts are indispensable for the preservation of the very nature of EU Law.<sup>22</sup>

The Court specified what is meant by uniformity of interpretation, setting a very high standard viz. that in all circumstances EU law has the same effect in all Member States. Divergences in interpretation that can arise as a result of EU law being applied within the different national judicial systems are to be avoided.<sup>23</sup> The Court did not address whether this uniformity is required at the level of the specific case or more generally, but the requirement of uniform effect of EU Law “in all circumstances” suggests it will continue to respond to references where the interpretation sought is very specific, remaining with existing practice.<sup>24</sup>

#### IV.2. THE TENSION BETWEEN POWER AND OBLIGATION

Because of this objective of uniformity, national courts have the broadest power or obligation to refer.<sup>25</sup> All national courts have the power to refer under the conditions set down in art. 267 TFEU and courts of last resort are obliged to refer save where the *CILFIT* criteria are met. A power is different from an obligation.<sup>26</sup> It indicates the exercise of legitimate authority which is what a national court is doing when making a reference, that authority having been conferred by the treaties and by national constitutions. An obligation is different in that it is imposed, which is the position for courts of last resort. Despite the categorical nature of art. 267 TFEU, courts of last resort do exercise discretion under the *CILFIT* test and it is this tension between the between power (which implies discretion) and obligation (which does not) that is the focus of the discussion in this case. The CJEU outlines the scope of court discretion to refer through an examination of the exceptions to do so as articulated in *CILFIT*.

<sup>21</sup> *CIM* cit. para. 27. See *CIM*, opinion of AG Bobek cit. on differences in case law as to the nature of the requirement of uniformity at para. 53.

<sup>22</sup> *Ibid.* para. 31. It has described national courts as EU courts see *Avis 1/09 Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 para. 80.

<sup>23</sup> In contrast to many federalist systems, such as that in the United States, the national courts apply EU law within their own jurisdictions, what Schütze terms a form of co-operative federalism. See R Schütze, *European Union Law* (Cambridge University Press 2018) chapter 11.

<sup>24</sup> See *CIM*, opinion of AG Bobek cit. para. 149. One of the most famous examples of specificity – mainly due to the eloquent irritation of AG Jacobs is case C-338/95 *Wiener v Hauptzollamt Emmerich* ECLI:EU:C:1997:352, opinion of AG Jacobs where the CJEU was asked to decide on the classification of a garment as a pyjamas or day wear under the customs code. While the legal issue appears trivial, the financial consequences of the case for business was considerable.

<sup>25</sup> *CIM* cit. para. 28. The CJEU refers to the EU Rules of Procedure in both *CIM* cases. AG Bobek discussed the importance of national procedural rules in his academic writing. See M Bobek, ‘Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice’ (2008) *CMLRev* 1611, 1626.

<sup>26</sup> See S Perry, ‘Law and Obligation’ (2005) *American Journal of Jurisprudence* 263.

### IV.3. *CILFIT* CONFIRMED AND TWEAKED

The CJEU faithfully follows the language of the *CILFIT* judgment and the exceptions contained therein. First, a court of last resort does not need to make a reference where the answer to the question of EU Law can in no way affect the outcome of the case, whatever that answer may be. Advocate General Bobek noted that there could be a discussion as to whether this could be construed as falling outside the obligation to refer at all rather than being an exception to it.<sup>27</sup> However, the CJEU, consistent with its more cautious approach, stayed with the *CILFIT* categorisation.

Second, no reference need be made if the question raised is “materially identical” (*acte éclairé*)<sup>28</sup> to one already subject to a preliminary ruling in a similar case or where established case law of the CJEU has resolved the legal issue (irrespective of the proceedings and even if the issues in dispute are not strictly identical). Nonetheless, the CJEU was keen to point out that national courts can still bring the matter before it if they consider it appropriate to do so and must make a reference where they have trouble understanding the scope of the CJEU ruling.<sup>29</sup>

Finally, no reference need be made where the correct application of EU Law is so obvious as to leave no scope for any reasonable doubt (*act clair*). This is where the core discussion of the nature of art. 267 TFEU discretion arises in this case.

The CJEU notes that a national court of last resort must be convinced that the matter is equally obvious to its counterparts in other Member States and must also take into account (i) the characteristic features of EU law, (ii) the particular difficulties to which its interpretation gives rise and (iii) the risk of divergences in judicial decisions within the European Union.<sup>30</sup> All language versions of EU Law are equally authentic and one language version cannot be relied on as the sole basis for interpretation or to override other language versions.<sup>31</sup> This onerous threshold is softened only to the extent that it is not required to examine each language version, but the national court must bear in mind divergences in various language versions of which it is aware, or which are set out by the parties. EU law also uses its own terminology and concepts that may not correspond to those at national level hence any EU law provision has to be placed in the context of EU Law as a whole, the objectives and state of evolution of EU law. At the same time, the fact it is possible to interpret EU law in different ways is not sufficient to create a reasonable doubt as to interpretation where those different ways are not deemed sufficiently plausible.<sup>32</sup> Where a national court is aware of diverging lines of case law either within the state or across national courts in a number of states,

<sup>27</sup> *CIM*, Opinion of AG Bobek cit. para. 62.

<sup>28</sup> *CIM* cit. para. 36 and *CILFIT* cit. para. 13.

<sup>29</sup> *CIM* cit. para. 37 and 38.

<sup>30</sup> *Ibid.* para. 41 and *CILFIT* cit. para. 21.

<sup>31</sup> *CIM* cit. paras 43-48.

<sup>32</sup> *CIM* cit. for the discussion of AG Bobek at para 150 ff.

it has to be particularly vigilant as to whether there is reasonable doubt as to interpretation and have regard to the objective of uniform interpretation. Only having had regard to all these caveats, can a national court conclude that there is no reasonable doubt to be had as to the correct interpretation.

Thus, the scathing criticism of the Advocate General – just one more in a long line of Advocate Generals critical of the *CILFIT* criteria<sup>33</sup> – is set aside with the only change being that regard does not have to be had to every language. The test of reasonable doubt is further modified in that, while national courts need to be particularly attentive to divergent case law, they may still find an interpretation to be beyond reasonable doubt if other interpretations are not plausible in light of the context and purpose of the law in issue and the system of rules of which it forms part. Thus, there is some elasticity given to a finding of obvious interpretation but the most significant change wrought by the judgment is in relation to the giving of reasons.

#### IV.4. A NEW REQUIREMENT: GIVING REASONS

The refusal to refer must now be justified by the giving of reasons that show either that (i) the EU law issue is irrelevant to the outcome of the case; (ii) or the interpretation deployed is one based on the CJEU case law; (iii) or where there is no such case law, the interpretation is so obvious as to leave no reasonable doubt. In other words, the national court must explain how the case falls within the *CILFIT* exceptions. The requirement to give reasons is required under art. 47(2) of the Charter.<sup>34</sup>

The obligation to give reasons has several consequences. First, it requires the national court to consider and explain why it is not going to refer the matter. A corollary of this is that when the national court decides to refer, it must show how the answers sought are necessary for the outcome of the case. This is clear from the findings of inadmissibility in this case and the requirements set down in the CJEU Rules of Procedure. This means that whether the court decides to refer or not, it must explain its decision, increasing transparency in judicial reasoning in relation to preliminary references and imposing an obligation to consider and to report on that consideration on the national court.

Second, if the reasons not to refer are inadequate, it leaves open the possibility of a damages action under *Köbler*.<sup>35</sup> However, the criteria in *Köbler* are robust and not easily met. The legal rule infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the State obligation and the loss or damage sustained by the injured party. Art. 267 TFEU is not intended to confer rights on individuals and the *CILFIT* criteria do not sit easily

<sup>33</sup> *CIM*, opinion of AG Bobek cit. para. 99 ff.

<sup>34</sup> *CIM* cit. para. 51. The Italian government as an intervenor had also emphasised the giving of reasons *CIM*, opinion of AG Bobek cit. para 40. See also the discussion by AG Bobek at para. 107.

<sup>35</sup> Case C-224/01 *Köbler* ECLI:EU:C:2003:513.

with the requirements of a direct causal link between the failure to give (adequate) reasons and the loss sustained.<sup>36</sup>

There is however another possible route to the CJEU should a national court fail in an (obvious) duty to make a reference: a cause of action under art. 258 TFEU for failure of a Member State to meet its Treaty obligations, brought by the Commission. In 2004, the Commission issued a reasoned opinion against Sweden when the Swedish Supreme Court was seen as being very restrictive in its use of the preliminary reference procedure. The proceedings were halted when legislation was passed in Sweden requiring the Court to give reasons for not making a preliminary reference, such legalisation being controversial as it interferes with the authority and discretion of the Court.<sup>37</sup> More recently, the CJEU held that failure by a court of last resort to make a reference can constitute an infringement of art. 267(3) TFEU given the risk of an incorrect interpretation of EU Law.<sup>38</sup> A 2015 study found that only nine out of eighteen constitutional courts had ever made a preliminary reference.<sup>39</sup> And even when the German Constitutional Court did belatedly make a reference, Advocate General Cruz Villalón was very critical of the manner in which the Court framed its reference<sup>40</sup> with the same German Court rejecting the decision of the CJEU in *Weiss*.<sup>41</sup> All these factors show that the requirement to give reasons for not making a reference is a small but potentially significant step by the CJEU in shoring up the obligation of courts of last resort.

While a remedy underlines the importance of an obligation, the fact reasons are now required per se should lead to a more careful analysis of why a reference is or is not being made with careful consideration of the three *CILFIT* criteria, some regard to other language versions, and the sui generis nature of EU Law including the objective of uniformity.

<sup>36</sup> See the *CIM*, opinion of AG Bobek cit. at para. 114. The Italian government, intervening suggested that the statement of reasons may mitigate liability of the state where an action is brought alleging failure to make a reference. *CIM*, opinion of AG Bobek cit. para 40.

<sup>37</sup> U Bernitz, 'Preliminary Rulings to the CJEU and the Swedish Judiciary: Current Developments' in M Derlèn and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives Hart* (Oxford 2018).

<sup>38</sup> Case C-416/17 *Commission v France (Précompte mobilier)* ECLI:EU:C:2018:811 para. 100 ff.

<sup>39</sup> M Dicosola, C Fasone and I Spigno, 'Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis' (2015) *German Law Journal* 1317.

<sup>40</sup> C-62/14 *Gauweiler and Others*, opinion of AG Cruz Villalón ECLI:EU:C:2015:7: "[i]n short, a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received" at para. 36.

<sup>41</sup> German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 ECLI:DE:BVerfG:2020:rs20200505.2bvr085915. The Commission has initiated infringement proceedings but later closed the case see EU Law Live, *PSPP: Commission closes infringement proceedings against Germany following formal commitments to respect EU law primacy and CJEU jurisdiction* eulawlive.com.



#### IV.5. THE OBLIGATION TO REFER WHERE A MATTER IS RAISED LATE IN PROCEEDINGS

It is not until para. 52 of the judgment that the CJEU answers the specific question posed by the *Consiglio di Stato* as to whether there is an obligation to refer where the reference is proposed by a party at an advanced stage of proceedings, especially after a preliminary reference had previously already been made at the request of that party.

The CJEU emphasised that just because a party to the case claims the dispute gives rise to a question of EU law does not mean that the court has to consider that such a question has been so raised. Neither can a national court be compelled by a party to make a reference. It remains at all times independent such that the questions referred are its responsibility alone both as to substance and as to when to refer (although the CJEU cannot hear a preliminary reference if the case has already been concluded at the national level). At the same time, the fact a reference has already been made by the national court in a case does not preclude another reference *per se*. However, national procedural rules that render inadmissible a further question on EU Law after a preliminary reference, where it changes the subject matter of the dispute can be relied on by the national court provided the procedures are consistent with the EU law principles of equivalence (rules apply without distinction as between actions alleging infringement of EU Law and similar actions alleging infringement of national laws);<sup>42</sup> and effectiveness (the national procedural rules cannot render impossible in practice or excessively difficult the exercise of EU rights).<sup>43</sup> A holistic view can be taken of the national procedural rules with consideration taken of principles that underpin the national legal order e.g., the rights of the defence, legal certainty and the proper conduct of judicial proceedings e.g., national procedural rules that protect national procedures from delays.<sup>44</sup> This means that a late request to make a second preliminary reference can be refused by a national court of last resort on grounds of inadmissibility under national procedural rules. Given such procedural rules, a reference is neither necessary nor relevant for judgement and need not be made.

#### V. CONCLUSION

The CJEU steered a steady course in this case. It did take up the invitation of the Advocate General to dig deep into the nature and purposes of art. 267 TFEU, this keystone provision of EU law. For courts of last resort it retained the *CILFIT* exceptions subject to two

<sup>42</sup> Case C-14/83 *Von Colson et Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153. See generally P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2020) ch. 9; A Arnulf, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) ELR 51.

<sup>43</sup> See M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014) ch. 6.

<sup>44</sup> The *CIM* case has taken 9 years thus far. The challenged decision to deny a price review was taken in February 2012. The first instance judgment was handed down on June 11, 2014. The decision to first refer was made on 24 Nov 2016 and received by the CJEU on 24 March 2017. That CJEU decision was handed down 19 April 2018 and following a hearing by the Italian court on 14 Nov 2018, a further reference was made to the CJEU with judgment on October 21, 2021.

changes: first, in considering if the matter is an *act éclair*, the national court must have regard to the special nature of EU law in a holistic manner but does not have to refer to all language versions. This seems more an acknowledgement of the limitations on national courts while also noting that no one language version can trump any other. Second, national courts must give reasons for deciding not to refer. This imposes an obligation on courts of last resort to consider any request to refer and to provide reasons for its decision whether to refer or not. Courts must now fully consider and engage with their powers and obligations under art. 267 TFEU. Finally, regard should be had to the wider context of this ruling. As well as the challenge posed by the German Constitutional Court decision in the *Weiss* case, the preliminary reference procedure has been used by Polish courts to challenge threats to their judicial independence while on the other hand the daily fines being imposed on Poland in the context of failure to comply with a CJEU judgement.<sup>45</sup> This suggests that in this febrile context, an emphasis on the partnership between the CJEU and national courts is important and necessary.

<sup>45</sup> For the Polish Supreme Court preliminary reference see C-487/19 *W.Ż. (Chambre de contrôle extraordinaire et des affaires publiques de la Cour suprême - nomination)* ECLI:EU:C:2021:798. See also C-791/19 *Commission v Poland (Régime disciplinaire des juges)* ECLI:EU:C:2021:596 and for interim measures see case C-204/21 *Commission v Poland* ECLI:EU:C:2021:593. For analysis see U Jaremba, 'Defending the Rule of Law or Reality Based Self-defense? A New Polish Chapter in the Story of Judicial Cooperation in the EU' (2020) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 851.