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COMMENT TO THE JUDGMENT OF THE SUPREME ADMINISTRATIVE COURT OF 16 FEBRUARY 2023, I GSK 432/19

1. Introduction

On 16 February 2023 the Polish Supreme Administrative Court (SAC) rendered a decision[1] (Judgment) dismissing a cassation appeal by an undertaking in a case regarding customs classification of goods. The case on its merits may certainly be of interest to trade lawyers; in this paper, however, I wish to deal with but one aspect of the Judgment, largely detached from other judicial considerations – namely, the duty to make a preliminary reference to the Court of Justice of the European Union (CJEU). The SAC, as a court of last resort, in principle has such a duty when met with a question of EU law, under Article 267(3) of the Treaty on the Functioning of the European Union (TFEU). A question of EU law was, indeed, presented in the case. Consequently, the SAC entertained the idea of making a reference and rejected it, based on the lack of reasonable doubts as to the meaning of EU rules in question. This invocation of the *acte clair* doctrine (albeit without calling it such) raises the question of conformance with EU-law standards. Especially so, as the SAC did not refer to the CJEU case-law even once, instead relying on its own jurisprudence.

In this paper I assess the Judgment under EU law, as espoused by the CJEU. Further, I reflect on the practicality of the current CJEU position

1 Judgment of the SAC of 16 February 2023, I GSK 432/19.

with regard to the *acte clair* doctrine. The exposition of these investigations is as follows. First, I introduce the Judgment. Then, I move to discuss its background: the relevant case-law of the SAC and of other Polish courts. In the fourth section, I move to EU law, discussing the CILFIT judgment[2] and, in the subsequent section, further developments as well as their application by domestic courts, after which, follows the conclusion.

2. The Judgment

As the Judgment is only available in Polish, it seems fair to summarize the holding with regard to the duty to make a preliminary reference. The SAC decided it has no such duty, based on its own existing case-law, summarized in the following theses:

1. Raising a question of EU law by a party does not, itself, oblige the SAC to make a preliminary reference.
2. The SAC is under duty to make a preliminary reference only when 'according to the SAC, construction of acts adopted by Union institution is necessary to decide the case.'
3. A preliminary question must pertain to the EU law applicable in the case pending before a domestic court. From this, it is inferred that:

> Courts whose decisions are appealable are not under duty to make a preliminary reference to the CJEU, *i.a.* when they come to the conclusion that the issue presented as debatable has no fundamental bearing for deciding the case or when they do not recognize doubts as to the understanding of Union rules.

4. Moreover, courts of last resort enjoy the same kind of freedom – when deciding whether to make a preliminary reference – as lower courts.
5. Since neither the administrative court in the first instance nor the SAC harboured doubts as to the meaning of EU law in the case, there was no need to make a preliminary reference. The SAC did not explain in any way why it did not harbour any doubts;

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

in particular, it did not show why the proper construction (or application) of the provision in question is clear.

Of these, point 1 is correct under the CJEU case-law.[3] Point 2 is technically correct,[4] but it glosses over the possibility that the actual determination whether EU law is applicable in a case may depend on the interpretation of the UE law in question.

Point 3 is correct as to the conclusion: lower courts have no duty to refer (questions regarding interpretation of EU law). It is, however, misleading, to link their discretionary power to the applicability of EU law or reasonable doubts. Simply put, lower courts are always at the liberty to interpret EU law on their own, save instances of an existing interpretation by the CJEU.

Point 4 is wrong in equalling the discretionary power of courts of last resort to discretionary power of the courts below. Courts of last resort are under duty to refer under Article 267(3), pure and simple. Courts below are not.

Finally, point 5 is an application of the *acte clair* doctrine without any regard to its prerequisites. It is also the subject of our further investigation: not whether the SAC was correct to find the provisions in question clear (as this correctness or wrongness is accidental) but rather how it should have tested them against the *acte clair* doctrine.

From a purely formal point of view of EU law, the SAC erred by completely ignoring the CJEU case-law and usurping the competence to construe EU law on its own. Under Article 19(1) of the Treaty on European Union, the interpretation of EU law lies with the CJEU. Whereas national courts do enjoy some competence as to the interpretation of EU law, under Article 267(3) TFEU this competence is extremely limited for a court of last resort. Consequently, the SAC should discuss its duties under Article 267 TFEU by referring to CJUE jurisprudence. Moreover, this jurisprudence is followed by a majority of dogmatic sources, Polish and foreign, from academic handbooks to journal articles, and the SAC opted to disregard all of them.

3. SAC Case-law

Since the actual application of the *acte clair* doctrine in the Judgment is supported by invoking SAC own case-law, it seems interesting to go through

3 *CILFIT*, para. 9.
4 *CILFIT*, para. 10.

the SAC cases cited: II GSK 2170/15,[5] II GSK 2406/16,[6] I GSK 236/12,[7] and II GSK 3045/17.[8] While we quoted them in the order of appearance in the Judgment, we shall go through them chronologically.

In I GSK 236/12, the SAC made a detailed analysis of Article 267 TFEU. As to the duty of the court of last resort, the SAC observed, erroneously, that such a court enjoys the same extent of liberty to refer the case as the lower courts. This was claimed to stem from the CJEU case-law but no such case-law was cited and in fact none exists. The manifestly false premise led, however, to a much less controversial conclusion: that a court of last resort has no duty to refer questions that do not have fundamental bearing for deciding the case. Depending on how we understand 'fundamental,' this may be true under the relevant case-law.

Questions with no relevance for deciding the case clearly cannot be referred to the CJEU. Under the plain wording of Article 267 TFEU:

> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, *if it considers that a decision on the question is necessary to enable it to give judgment,* request the Court to give a ruling thereon [emphasis added].

Since a national court may not refer an unnecessary question to the CJEU, *a fortiori,* it is not under the duty to do so.[9] The requirement of necessity has been explained in the CJEU case-law on the admissibility of preliminary questions, as an unnecessary question is hence inadmissible. Generally speaking, a question is necessary when the preliminary ruling based upon could affect an outcome of the case before the national court.[10] Under this understanding, the question whether a given provision of EU is applicable under the circumstances of the case is necessary and may be referred to the CJEU. It is so, as the positive answer to this question causes the EU law to be applied and therefore affects the outcome.

Consequently, not falling within the ambit of EU law is itself a question of EU law that should be referred to the CJUE by any court of last resort,

5 Judgment of the SAC of 17 May 2017, II GSK 2170/15.
6 Judgment of the SAC of 26 January 2017, II GSK 2406/16.
7 Judgment of the SAC of 26 February 2013, I GSK 236/12.
8 Judgment of the SAC of 23 June 2020, II GSK 3045/17.
9 This is confirmed in *CILFIT*, para. 10.
10 Prete & Wahl, "The gatekeepers of Article 267 TFEU", 531 ff.

unless the *acte clair* or the *acte éclairé* applies. *Acte clair* applies when, after following the correct test, it is clear that no permissible interpretation of a provision would be relevant for the outcome of the case. Treating the non-relevance of the question as a separate exception to the duty to refer is, therefore, wrong.

In I GSK 236/12, the SAC discussed the *acte éclairé* and *acte clair* doctrines. The latter was explained as a situation when the correct construction of an EU provision is obvious to the point it does not give rise to any reasonable doubts.

The judgment in II GSK 2406/16 contains a rather nuanced analysis of Article 267 TFEU by the SAC. Faced with parties' motions to make preliminary references, the SAC this time drew a clear distinction between courts whose decisions are appealable on the one hand and courts of last resort (such as the SAC), on the other. It observed, not very accurately, that the courts of last resort have a duty to make a preliminary reference unless they decide that the question has no relation to the case or it was answered in the CJEU case-law. The SAC then mentioned that there is no duty to refer if there are no doubts as to the meaning of EU law; furthermore, it stressed that this is left to the assessment of a domestic court. To this point, the SEC cited the CJEU judgment in *Kernkraftwerke,*[11] which is not a good authority as it does not really says what the SEC said and, moreover, it deals with completely different problems (competing claims of unconstitutionality and non-conformance with EU law). Interestingly, when actually refusing to refer a question to the CJEU, the SEC used different arguments. It highlighted that the party that had made the motion for the reference had not indicated any relation between EU law and domestic law applicable in the case. Additionally, the motion had not specified any interpretative problems that could be solved by the reference.

In case II GSK 2170/15, the SAC found that there was no need to refer the case to the Court of Justice where a party claimed that domestic rules infringe EU law (a directive, in this case) but an administrative court did not share this conviction. If such is the case, interpretation of EU law was said to be unnecessary to issue a judgment. This, according to the SAC, was no different for a first-instance administrative court and for the SAC itself.

Finally, in case II GSK 3045/17, the SAC dealt with preliminary references only marginally. It noted that the duty to make a preliminary

11 C-5/14 *Kernkraftwerke*, ECLI:EU:C:2015: 354.

reference arises only when a court had doubts as to the correct interpretation – and the SAC did not harbour any doubts. It is not explained why the SAC did not have any doubts.

In all these judgments, there are three major common points. First, the lack of relevance of a question (and hence the lack of necessity of the preliminary ruling) is treated as a separate exception to the duty to refer. Second, the clarity exception (commonly, but not by the SAC, called *acte clair*) is simply understood as a situation when a national court has no reasonable doubts as to the meaning of EU law. No further tests or conditions are ever mentioned. Third, it is never explained *why* a given provision is clear – the method applied is 'pure impression'. These three characteristics feature also in the Judgment, which is hence a representative example of SAC case-law regarding the duty to make a preliminary reference.

4. Other Polish Case-law

A wider look at the jurisprudence of other Polish courts confirms that the Judgment is representative for their general understanding of the *acte clair* doctrine. The official legal database[12] returns 116 SAC's decisions mentioning *acte clair*. A look at the four latest, issued in 2023,[13] shows that *acte clair* is consistently defined as a situation (exception to the duty to refer) 'when the construction of a provision is so obvious that there are no reasonable doubts as to the content of an answer to a preliminary question.' This definition is not elaborated upon; in particular, no details are given as to how to assess this lack of doubts.

The official database[14] of the Supreme Court[15] case-law returns 20 decisions mentioning *acte clair*. Most of them are orders and they reference the doctrine in a cursory manner, not explaining its meaning. Where the meaning is explained, it is defined as a question that 'has not been answered in the case-law, but it is so obvious that there are not any reasonable doubts as to the manner of its explanation.'[16] This is accompanied

12 Available at the webpage https://orzeczenia.nsa.gov.pl.

13 These are: the judgment of the SAC of 21 November 2023, III OSK 2632/21; judgment of the SAC of 21 November 2023, III OSK 2327/22; judgment of the SAC of 10 October 2023, III OSK 846/22; judgment of the SAC of 16 June 2023, I FSK 1026/18.

14 Available at the webpage https://www.sn.pl.

15 The Polish Supreme Court is the court of last resort in civil and criminal cases.

16 Order of the Supreme Court of 22 June 2022, I CSK 2979/22; order of the Supreme Court of 22 June 2022, I CSK 3123/22.

by a reference to the CILFIT judgment; the CILFIT conditions, however, remain unmentioned.

In addition, the former database returns 122 SAC's decisions citing CILFIT. While I have not gone through all the citations, the ones that were checked at random universally refer to the *acte* éclairé doctrine (without invoking the name), and not to the *acte clair*. In the other database, there are 47 Supreme Court's decisions citing CILFIT. Whereas some of them discuss the *acte clair* doctrine, this discussion is again limited to the conclusion that 'the correct application of EU law is so obvious that there are no reasonable doubts.'

Admittedly, this cursory look at the jurisprudence does not take into account situations when courts declined to make a preliminary reference because of provision's supposed clarity, simply not invoking the words *acte clair*. Likewise, it does not include instances when common courts of the second instance were acting as courts of last resort because no cassation appeal to the Supreme Court was available.

5. CILFIT

In the CILFIT judgment the CJEU detailed the criteria for what is known in the legal literature as *acte clair*. It is popularly asserted that the doctrine determines when the *interpretation* of EU law is clear; however, upon closer inspection, it is revealed that the CJEU deals with situations when there the *application* of law is clear:

The correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.[17]

This is a sensible approach. When the application of a provision to given facts is clear, it is immaterial whether the provision in question is clear in its entirety, or it leaves some other sets of facts unresolved. For instance, the prohibition of discrimination based on sex may be unclear as to whether it applies merely to the two main sexes, or it protects any sexual identity. However, the application of the same provision would be abundantly clear in a case of payment discrimination when a women sues her employer for earning less than men in equivalent positions.

17 *CILFIT*, para. 16.

The conditions for actually invoking this clarity exception are much less practical. The CILFIT criteria are extremely difficult to be satisfied,[18] to the point of being outright impossible. The domestic court is required to:[19]

1. Be sure that the matter is obvious to the domestic courts of other member states.
2. Be sure the matter is obvious to the CJEU.
3. Take into account features and particularities of Community law and its interpretation:
    a. Compare different, equally authentic, language versions.
    b. Take into account peculiar terminology of EU law, autonomous from any meaning of the same terms in domestic legal systems.
    c. Take into account the context, Community law as a whole, its objectives, and state of evolution.

6. Acte Clair beyond CILFIT

Interestingly, the two EU documents dealing with the *acte clair* exception simply do not include the CILFIT criteria. The non-binding *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, issued by the CJEU, simply refer to a situation when "the correct interpretation of the rule of law in question admits of no reasonable doubt."[20] Likewise the very much binding *Rules of Procedure of the Court of Justice* allows for replying by a reasoned order 'where the answer to the question referred for a preliminary ruling admits of no reasonable doubt.'[21]

It is far from clear whether the *Guidelines* and *Rules* merely quote a concise version of CILFIT, implicitly requiring the application of its method of assessment, or they adopt an independent test of no reasonable doubts. Anyway, giving such guidelines to national courts is likely to produce exactly such decisions as the Judgment, treating the *acte clair* as a matter of court's impression.

18 See, *e.g.*, Broberg, "*Acte clair* revisited", 1384; Dąbrowska, *Skutki orzeczenia wstępnego Europejskiego Trybunału Sprawiedliwości*, 36 (also noting that the criteria are at times criticized for being subjective); Wojtaszek-Mik, *Pytania prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, 49.

19 CILFIT, paras. 16-20.

20 Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2019/C 380/01, 6.

21 Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, Article 99.

This danger was already present in CILFIT, as reminded in an early warning by A. Arnull:

> The effect of the CILFIT decision [...] would be to enable national judges to justify any reluctance they might feel to ask for a preliminary ruling by reference to a decision of the European Court.[22]

Further studies consistently found that national courts of last resort apply the *acte clair* doctrine very liberally,[23] which leads to a question that may sound paradoxical: Should the CILFIT criteria be liberalized? It could be, of course, argued, that the mere existence of the *acte clair* doctrine opens the Pandora box and allows courts of last resort to withhold questions from the CJUE. Another interpretation is, however, possible. It may be that the stringency, and in fact impossibility, of the CILFIT test makes the courts disregard it. If there was only a simpler test, with better criteria, they would be more willing to apply it. Consequently, in the legal literature we find both voices arguing for the liberalization of CILFIT criteria[24] and against it.[25]

A. Kornezov argued[26] that in cases *X and Van Dijk*[27] and *Ferreira da Silva e Brito*[28] the CJEU liberalized, or rather abolished the CILFIT criteria. I do not find this entirely convincing. In both cases CILFIT is cited and in neither is it expressly overruled. Admittedly, the CJUE mentions some criteria for *acte clair*. Has any court made a preliminary ruling? Are there conflicting national decisions? Are there difficulties in other member states? These criteria, however, may as well be understood as concretization of CILFIT with regard to the specific situation in the cases at hand. Later authors recognized that further case-law seems to revert to the CILFIT criteria.[29] For these reasons I would rather agree with A. Limante, who found both judgments a missed opportunity to clarify *acte clair* criteria.[30]

22 Summarizing his even earlier position, Arnull, "The Use and Abuse of Article 177 EEC", 626.

23 See, *e.g.*, Broberg, "*Acte clair* revisited", 1384. Similarly, eight years later, Kornezov, "The new format of the *acte clair* doctrine and its consequences", 1317 f.

24 Broberg, "*Acte clair* revisited".

25 Kastelik-Smaza, *Pytania prejudycjalne do Trybunału Sprawiedliwości Unii Europejskiej a ochrona praw jednostki*, 129 ff.

26 Kornezov, "The new format of the *acte clair* doctrine and its consequences", 1323 ff.

27 C-72/14 & 197/14 *X and Van Dijk*, ECLI:EU:C:2015: 564.

28 C-160/14 *Ferreira da Silva e Brito*, ECLI:EU:C:2015: 565.

29 Broberg & Fenger, "If You Love Somebody Set Them Free", 718 ff.

30 Limante, "Recent Developments in the Acte Clair Case Law of the EU Court of Justice".

M. Broberg, though, together with N. Fenger, found a new proof for relaxation of the CILFIT criteria in the 2021 case *Consorzio*.[31] The relaxation would consist in a very minor detail: not requiring that the matter is equally obvious to every national court; courts of last resort now suffice.

7. Concluding Remarks

A short commentary to the Judgment could be that, on the one hand, it ignores the CILFIT criteria and infringes EU law; on the other hand, the criteria leave a lot to be desired and their application may even be unfeasible. This, however, would be an oversimplification, as there are at least two other factors potentially playing roles in similar decisions not to refer: first, the length of the proceedings; second, the general reluctance of the Polish courts to engage with the CJEU.

In 2023 The length of preliminary proceedings before the CJUE averaged 16.8 months.[32] The perspective of prolonging the case by this time may alone make national courts more reluctant to make a reference and hence, more likely to invoke the *acte clair* exception. From a formal standpoint, this length may interfere with the right to a hearing within a reasonable time under Article 6 of the European Convention on Human Rights,[33] as well as more broadly with various due process safeguards under EU law and constitutional laws of the member states.

On top of that, the Polish courts were never well-known for their willingness to make preliminary references. It was observed that, taking into account Poland's population, the number of cases and the number of judges, Poland's courts are among those making the fewest references in the EU.[34] Polish administrative courts were, however, much more willing to ask for a preliminary ruling than the rest.[35]

This picture was valid for years; much, though, changed during the crisis of the rule of law. When looking at the number of Polish references

31 C-561/19 *Consorzio*, ECLI:EU:C:2021: 799.

32 Gaudissart, "A brief overview of the main statistical trends in 2023", available at https://curia.europa.eu/jcms/jcms/J02_7032/en.

33 Kastelik-Smaza, *Pytania prejudycjalne do Trybunału Sprawiedliwości Unii Europejskiej a ochrona praw jednostki*, 203 ff.

34 Sadomski, "Pytania prejudycjalne polskich sądów powszechnych", 36. See also Miąsik, "Instytucja pytań prejudycjalnych do Trybunału Sprawiedliwości w praktyce Sądu Najwyższego RP", 6.

35 Sadomski, ibidem, 34. Also Barcik, "Pytania prejudycjalne polskich sądów".

per year,[36] we see an increase in 2016 and again a sharp increase in 2018, the number of references remaining high ever since:

'05	'06	'07	'08	'09	'10	'11	'12	'13	'14	'15	'16	'17	'18	'19	'20	'21	'22	'23
1	2	7	4	10	8	11	6	11	14	15	19	19	31	39	41	34	39	48

The belief therefore is that the increase since 2018 is attributable to the growing number of references regarding Article 19(1) TEU and the independence of Polish courts, feeling under attack from the government.

This seems to be supported by a slower rate of growth of references from the SAC. As of 2015, there were 13 references from the Supreme Court vs 32 references from the SAC.[37] As of 2023, there were 59 references from the Supreme Court vs 73 references from the SAC.[38] This means the number of references from the Supreme Court rose by a factor of 4.5, whereas the number of references from the SAC by a factor of 2.28, which is half as high. The explanation could be that, first, the Supreme Court was at the forefront of the rule of law struggle, referring a lot of questions in this regard, whereas the SAC was not and, moreover, that it was rather easy to inflate the very weak statistics from the Supreme Court, whereas the SAC kept its steady pace in referring questions not related to the rule of law.

All in all, it must be said that even though the Polish statistics in making preliminary references were traditionally poor and may still be poor when excluding the rule of law issues, the SAC statistics are much better. Therefore, the general Polish reluctance to refer is not a sufficient explanation of the uses and abuses of the *acte clair* doctrine.

All things considered, the SAC should not be criticized for not applying the CILFIT criteria even though, technically, it was a breach of EU law. It does not seem feasible to compare twenty odd language versions of EU law, neither to make sure other courts in the EU would draw the same conclusion. It is even understandable to me that the SAC did not want to cite CILFIT explicitly, merely to reject it: this would go against judicial comity. There is, though, one major point of critique that should be raised against the Judgment and more generally the Polish case-law on *acte clair*.

Whereas it may not be possible to use the CILFIT criteria to show that there are no reasonable doubts as to the proper application or interpretation

36 Source of data: Annual Report 2023: Statistics concerning the judicial activity of the Court of Justice, 32.

37 CJEU, Annual Report 2015: Judicial Activity, 99.

38 Annual Report 2023: Statistics concerning the judicial activity of the Court of Justice, 34.

of a provision, this nevertheless should be shown *somehow*. It is utterly insufficient for the SAC, or any court of last resort, to claim that it has no reasonable doubts and therefore it will not make a reference. Such a court should at least explain why it has no doubts, by presenting its interpretation of the provision in question and demonstrating that this interpretation is fully governed and determined by non-controversial canons.

It may be that the courts do not feel obliged to do so as they treat preliminary questions similarly to so-called questions of law, referred to the Constitutional Court, the Supreme Court, and the SAC.[39] These are, however, two distinct institutions. Questions of law are always voluntary and they must pertain to important legal issues. Preliminary questions are compulsory for courts of last resort, even when they pertain to minute details, such as what pyjamas are.[40] A highest court needs a good reason to ask a question of law but, contrariwise, it needs a good reason not to ask a preliminary question.

As a final remark, we should dispel the myth that, somehow, the *acte clair* doctrine is an embodiment of the principle *clara non sunt interpretanda*. First, it is not. CILFIT shows that declaring an application of a provision clearly requires a prior extensive interpretation, therefore it is rather *interpretation cessat in claris*. Second, even if we adopt the so-called clarification theory of interpretation and allow for instances of direct understanding, where no interpretation is required, the *acte clair* doctrine is not such a case. As noted by J. Wróblewski,[41] instances of direct understanding depend on the pragmatic context. If the context is a party to the proceedings questioning the meaning of EU law before a court of last resort, the direct understanding is already challenged and therefore lost. The meaning given by the direct understanding may either be defended by presenting an interpretation in its favour, or rejected, but either way, an interpretation is required.

39 For a comparison, see Kastelik-Smaza, *Pytania prejudycjalne do Trybunału Sprawiedliwości Unii Europejskiej a ochrona praw jednostki*, 247 f.

40 They are, of course, 'not only sets of two knitted garments which, according to their outward appearance, are to be worn exclusively in bed but also sets used mainly for that purpose' – see C-395/93 *Neckermann*, ECLI:EU:C:1994: 318.

41 Wróblewski, „Pragmatyczna jasność prawa", 5.

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