Court of Justice of the European Union
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Advocate General's Opinion in Case C-561/19
Consorzio Italian Management and Catania Multiservizi SpA / Rete Ferroviaria Italiana SpA

Press and Information

Advocate General Bobek: the Court should revisit its case-law (the CILFIT criteria) on the duty of national courts of last instance to request a preliminary ruling

The Court should deem that the existence of this duty depends on three cumulative conditions: (i) a general issue of interpretation of EU law; (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court

In 2017, in a procedure concerning a litigation about a contract for cleaning services within some Italian railway stations, the Consiglio di Stato (Council of State, Italy), as a last instance national court, referred a request for preliminary ruling to the Court of justice. In 2018, the Court delivered its judgment [1]. The parties in that procedure then requested the Consiglio di Stato to refer other questions for a preliminary ruling. Hence, in 2019, the Consiglio di Stato referred three more questions to the Court.

In accordance with the Court's request, today's Opinion by Advocate General Michal Bobek focuses exclusively on the first question, where the Consiglio di Stato asks whether it is mandatory for a national court of last instance to refer a case for a preliminary ruling on the interpretation of EU law in circumstances such as those described above. Therefore, this question concerns the interpretation of the **third paragraph of Article 267 of the Treaty on Functioning of the European Union (TFEU), which sets the duty, for national courts of last instance, to refer a case to the Court of Justice for a preliminary ruling**.

Advocate General Bobek points out that his Opinion concerns exclusively requests for preliminary rulings about the *interpretation*, not about the validity, of an EU act. He also stresses that, aside from the *duty* to refer, a national court of last instance, like any other national court, has always the *option* to seek assistance from the Court of Justice for interpreting the EU law, should it deem that necessary in order to settle the individual case before it.

As for the "gist" of the duty to refer, Advocate General Bobek concludes that the intervention of the Grand Chamber is necessary in order to revise the current relevant case-law, in particular the "CILFIT criteria" [2]. Consequently, **the Grand Chamber should clarify exactly what is, at present, the nature and the scope of the duty under the third paragraph of Article 267 TFEU and the exceptions to it**.

Advocate General Bobek proposes that the Court should find that national courts of last instance have a duty to refer a case for a preliminary ruling on the interpretation of EU law, provided that three cumulative requirements are met : (i) the case raises a **general issue of interpretation of EU law** ; (ii) the EU law may be **reasonably interpreted in more than one possible way** ; (iii) the way in which it has to be interpreted **cannot be inferred from the existing case-law of the Court** nor from a **single, clear enough judgment of the Court.**

[1] Judgment of the Court of 19 April 2018, Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA (C-152/17).
[2] In the historical judgment of 6 October 1982, CILFIT (C-283/81), the Court laid down three exceptions to the duty to refer of courts of last instance. These exceptions are: 1) the question is not relevant in the specific case; 2) a precedent has already been established by the Court ("acte éclairé); 3) the EU law is so clear that there is no reasonable doubt as to the manner in which the question raised is to be resolved ("acte clair").

In the Advocate General's view, **the lack of just one of these requirements relieves national courts of last instance from the duty to refer**. Accordingly, if they decide not to submit a request, national courts of last instance should nonetheless duly explain which of those requirements has not been met and why. Alternatively, if they decide to refer the case for a preliminary ruling despite the existence of relevant case-law, they should expressly set out the reasons for their disagreement and, ideally, explain what ought to be, in their view, the proper approach.

In order to propose the above-mentioned solution, Advocate General Bobek analyses the Court's case-law on this topic, revealing its flaws. In particular, he observes that the possible enforcement of the duty to refer under the third paragraph of Article 267 TFEU could be a matter of either state liability or an infringement action. Nevertheless, within these kinds of proceedings, national courts and the Court itself have never consistently applied the CILFIT criteria.

Advocate General Bobek observes that it is generally accepted that the duty to refer aims at the uniform interpretation of the EU law by all courts within any of the Member States and across the Union. However, in this respect, the Advocate General challenges the so-called **'acte clair' exception**, i.e. the absence of any reasonable doubt as to the correct application of EU law in a specific case. From a logical point of view, a duty, which was set out in order to ensure a general objective, cannot depend on any subjective doubts as to the outcome of an individual case. Instead, it must depend on an objective divergence in the case-law at the national level, thereby threatening the uniform interpretation of EU law within the Union.

Advocate General Bobek highlights that the **uniformity aimed at is not, and never has been, at the level of single outcomes of each individual case, but at the level of legal rules to be applied**. This means that, in principle, while there is a reasonable degree of uniformity of legal rules (*interpretation*), there may be diversity in terms of specific outcomes (*application*).

He also notes that it has become difficult to find an area where the interpretative help of the Court is not needed. Today we witness a staggering increase in the number of requests for a preliminary ruling, while the judicial resources of the Court are not limitless. In this context, insisting that references be made by national courts of last instance in every case where any form of reasonable doubt exists appears unfeasible and unwarranted.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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