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## *CILFIT* and *Foto-Frost* in their Historical and Procedural Context

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The judgments of the Court of Justice in *CILFIT*<sup>2</sup> and *Foto-Frost*<sup>3</sup> are frequently misunderstood. They have been cited as examples of judicial activism by which the Court is alleged to have stretched the limits of its own jurisdiction at the expense of the national courts, especially the supreme courts. The opposing point of view is that these cases do no more than exemplify the normal judicial function of interpretation where the text is open to doubt and there is a practical problem to be resolved: one may disagree with the result, but that is no reason to question the motives that led to that result.

In order to understand why the two cases were decided as they were, it is important to place them in context.

### The Legislative Background

The ECSC Treaty (like the later EEC and Euratom Treaties) provided that ‘the Court shall ensure that in the interpretation and application of this Treaty ... the law is observed.’<sup>4</sup> It also provided, in a very sketchy way, for a system of preliminary references to the Court of Justice from national courts, giving the Court exclusive competence to rule on questions of validity (not interpretation):

La Cour est *seule compétente* pour statuer, à titre préjudiciel, sur la *validité* des délibérations de la Haute Autorité et du Conseil, dans le cas où un litige porté devant un tribunal national mettrait en cause cette validité.<sup>5</sup>

The wording implies, but does not expressly impose, a duty on national courts to refer any live issue of validity to the Court of Justice.

When the Rome Treaties were negotiated in 1956, Nicola Catalano, a member of the drafting committee who became a Judge of the Court of Justice in 1958, proposed a form

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<sup>2</sup> Case 283/81 *Srl CILFIT e Lanificio di Gavardo SpA v Ministero della Sanità* [1982] ECR 3415.

<sup>3</sup> Case 314/85 *Foto-Frost v HZA Lübeck-Ost* [1987] ECR 4199.

<sup>4</sup> Article 31 ECSC; *cp* Articles 164 EEC and 136 Euratom.

<sup>5</sup> Article 41 ECSC (emphasis added).

of words that, in part, followed the terms of the ECSC Treaty and, in part, foreshadowed the eventual text of Article 177 EEC (now Article 234 EC) and Article 150 Euratom:

La Cour est *seule compétente pour statuer en dernière instance* sur toute question concernant l'interprétation ou l'application du présent Traité, ainsi que des mesures prises en son exécution. Lorsqu'une telle question est soulevée, suivant les règles de procédure nationale devant *une juridiction de dernière instance* d'un des États membres, cette juridiction, si elle estime qu'une décision sur ce point est nécessaire pour rendre son jugement, demande à la Cour de statuer sur cette question et se conforme à l'arrêt de celle-ci.

In this formulation, validity was not expressly mentioned.

The drafting committee then produced three versions. The first version followed the lines of Article 41 of the ECSC Treaty, but giving the Court exclusive competence for interpretation as well as validity. The second version followed the Catalano proposal—giving the Court exclusive competence at last instance and imposing an obligation to refer on national courts of last instance. The third version was very close to what became Article 177 EEC. The final form of Article 177 differed, first, in making explicit the distinction between (i) interpretation of the treaty, (ii) validity and interpretation of acts of the institutions, and (iii) interpretation of statutes of bodies established by the Council; and, second, in imposing the duty to refer on courts and tribunals, 'against whose decisions there is no judicial remedy under national law', irrespective of their status in the national hierarchy.<sup>6</sup>

Thus, in the choice between exclusive competence and shared competence, the drafting committee opted for shared competence both for interpretation and for validity, balanced by an unequivocal obligation to refer imposed on national courts whose decisions are final. The unequivocal nature of that obligation is, if anything, clearer in the original language texts than in English.<sup>7</sup> The obligation to refer is conditional only to the extent that the national court must 'consider that a decision on the question is necessary to enable it to give judgment'.

The text of Article 177 gave rise to controversy on two issues:

- (1) In what circumstances is a national court whose decisions are final entitled not to refer a question to the Court of Justice?
- (2) May a national court whose decisions are not final decide on the validity of an act of a Community institution?

*CILFIT* was concerned with the first question, *Foto-Frost* with the second.

<sup>6</sup> For the evolution of Article 177, see Schulze and Hoeren (eds.), *Dokumente zum Europäische Recht*, vol II, pp 373–439 (emphasis added).

<sup>7</sup> French: *cette juridiction est tenu de saisir la Cour de justice*; Dutch: *is deze instantie gehouden zich tot het Hof van Justitie te wenden*; German: *so ist dieses Gericht zur Anrufung des Gerichtshof verpflichtet*; Italian: *tale giurisdizione è tenuta a rivolgersi alla Corte di giustizia*; English: *that court or tribunal shall bring the matter before the Court of Justice*.

## The Jurisprudence before *CILFIT*

In *da Costa*<sup>8</sup> the Netherlands Tariefcommissie referred two questions identical to those it had referred in *Van Gend en Loos*.<sup>9</sup> The propriety of the reference was not in question since, at the stage of making the second reference, the Tariefcommissie had not yet received the answer to *Van Gend en Loos*. Once *Van Gend en Loos* had been decided, the Commission urged that the *da Costa* reference should be dismissed for lack of substance, but the Court rejected that solution.

In his Opinion, Advocate General Lagrange started from the position he had already taken in *Fédéchar*,<sup>10</sup> that where the text is clear it requires no ‘interpretation’. His solution was an application of the theory of the *acte clair*, which had been adopted by the French *Conseil d’État* (and, to a lesser extent, by the *Cour de cassation*) in order to get round the rule that the French executive has exclusive competence to interpret treaties. By holding that treaties did not require interpretation when the meaning was clear, the French courts restricted the power of the executive to interfere with the role of the judiciary.<sup>11</sup> Parallels to the doctrine of *acte clair* existed in Italian and German statute law as regards the obligation to refer questions of constitutionality to the Constitutional Court.

In its judgment in *da Costa*, the Court started from the ‘unrestricted’ nature of the obligation imposed by the third paragraph of Article 177. It did not endorse *acte clair* or any comparable approach. It relied instead on two concepts—(i) the authority of a ruling of the Court, and (ii) the ‘cause’ of the national court’s obligation to refer—holding that the authority of a prior ruling may deprive that obligation of its *cause*, and so empty it of its content.<sup>12</sup> The Court added: ‘Such is the case especially<sup>13</sup> when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.’

Notwithstanding the Court’s rejection of the *acte clair* doctrine, the French *Conseil d’État* persisted in applying it, not least in its refusal to accept that the provisions of directives might have direct effect,<sup>14</sup> although the Court had, in the meanwhile, stressed that ‘the particular objective of the third paragraph [of Article 177] is to prevent a body of national case law not in accord with the rules of Community law from coming into existence in any Member State’.<sup>15</sup>

In the meanwhile, the Court of Justice had declined, on grounds of jurisdiction (*compétence*), to answer questions that did not fall within the scope of Article 177—*Mattheus and Foglia v Novello*.<sup>16</sup>

<sup>8</sup> Joined cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Nederlandse Belastingadministratie* [1963] ECR 31.

<sup>9</sup> Case 26/62 *Van Gend en Loos v Nederlandse Belastingadministratie* [1963] ECR 1.

<sup>10</sup> Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1954–56] ECR 245 at 277–8.

<sup>11</sup> See the Opinion of Advocate General Capotorti in *CILFIT* [1982] ECR 3435.

<sup>12</sup> There is no precise equivalent of *cause* (Latin *causa*) in common law terminology, so the English translation is not entirely satisfactory (‘the authority of an interpretation ... may deprive the obligation of its purpose and thus empty it of its substance’).

<sup>13</sup> Translating *notamment*, which can mean anything from ‘for example’ to ‘especially’.

<sup>14</sup> See the list of cases in the Opinion of Advocate General Capotorti in *CILFIT*, 3437.

<sup>15</sup> Case 107/76 *Hoffmann-La Roche v Centrafarm* [1977] ECR 957, point 5.

<sup>16</sup> Case 93/78 *Mattheus v Doego Fruchtimport und Tiefkühlkost* [1978] ECR 2203; Case 104/79 *Foglia v Novello* [1980] ECR 745, and (subsequently) Case 244/80 *Foglia v Novello II* [1981] ECR 3045.

The extent of the duty to refer became what Advocate General Capotorti described as a 'lively controversy in progress among legal writers and discernible in decisions of national courts'.<sup>17</sup> It was also the subject of a Written Question in the European Parliament. The Commission's answer was that:

National courts are not required, under Article 177 of the EEC Treaty, to stay proceedings and systematically refer to the Court of Justice all questions concerning the interpretation of Community law which are submitted to them. They can decline to make a reference and decide the matter themselves in cases where such questions are perfectly straightforward and the answer is obvious to any lawyer with a modicum of experience.<sup>18</sup>

### CILFIT—The Issue and Submissions

It was in that context that the Italian Court of Cassation referred *CILFIT* to the Court of Justice. The underlying question of Community law was whether, for the purpose of import levies, wool was an 'animal product' within the scope of the relevant Community regulation. The Italian Ministry of Health had decided that wool did not come within the scope of the regulation and this decision had been upheld by the Court of Appeal. Before the Court of Cassation, the Ministry argued that 'the factual circumstances are so obvious as to rule out the possibility of their being capable of any other interpretation, and that obviates the need to refer the matter for a preliminary ruling to the Court of Justice'.

Ironically, when the substantive issue was referred to the Court of Justice two years after the first reference, a chamber of three judges was able to answer the question in 13 paragraphs—wool was not an animal product for the purposes of the Regulation.<sup>19</sup> But, perhaps because the answer was obvious, this was a good case in which to test the nature and extent of the duty to refer.

The question referred by the Court of Cassation was:<sup>20</sup>

Does the third paragraph of Article 177 ... impose an obligation to refer that does not allow the national judge to make any assessment<sup>21</sup> of whether the question raised is well-founded or is the obligation conditional, and if so within what limits, on first finding a reasonable interpretative doubt?

Before the Court, the claimants argued that the *acte clair* theory was inept in the context of Community law. They drew attention to the technical nature of Community law, to the fact that national courts do not have access to all the sources, and to the uncertainties 'due to the sometimes complex interaction between national law and Community law'. They added that allowing supreme courts a discretion to refer would involve 'the risk of creating an atmosphere of tension between national courts and Community institutions' and might promote discord.

<sup>17</sup> Advocate General Capotorti in *CILFIT*, 3433.

<sup>18</sup> Answer to Written Question by Mr Krieg No 608/78 (OJ 1979 C 28), quoted under 'Facts and procedure' in *CILFIT*, 3425.

<sup>19</sup> See Case 77/83 *Srl CILFIT e Lanificio di Gavardo SpA v Ministero della Sanità* [1984] ECR 1257.

<sup>20</sup> As the English translation of the question in *ECR* does not quite convey the sense of the original, an alternative translation is offered.

<sup>21</sup> In the original, *delibazione*—tasting or sampling.

The governments and the Commission, on the other hand, while recognising the importance of uniform interpretation and application, urged the adoption of an *acte clair* approach, each using a somewhat different formula. The Danish Government and the Commission drew attention to the fact that Community texts are drafted in several languages, and the Commission added that they frequently reflect political compromises with the result that ‘the exercise of discretion by a national court in relation to Community legislation calls for much greater caution than recourse to the theory of the *acte clair* in a national context’. The Commission suggested that recognition by the Court of the national court’s margin of discretion ‘would bear witness to its confidence in national courts’.

## CILFIT—The Advocate General’s Opinion

In his Opinion, Advocate General Capotorti rejected all the arguments based on the text of Article 177 except the ‘simple fact’ that

the only unequivocal indication which may be derived from the text ... is the difference between the provisions of the second paragraph and those of the third.

He rejected the *acte clair* approach advocated by his predecessor Lagrange, not only on theoretical grounds, but also because of the way in which the *Conseil d’État* had used *acte clair* to avoid making a reference in circumstances where it clearly ought to have done so. Rejecting the statutory test in Italian constitutional law of whether the point is ‘manifestly unfounded’, he stressed ‘the specific technical and formal characteristics of Community law ... (different language versions; novelty of the content and terminology of Community law)’ as well as ‘differences in the methods of interpretation adopted by the Court of Justice and those on which national courts rely, stemming from the differences between the legal spheres in which the former and the latter operate’.

In conclusion, the Advocate General advocated a hard line approach, pointing out that national courts already have a ‘wide margin of discretion’ in determining whether a ruling on the interpretation of a provision of Community law is really necessary to enable them to give judgment.

## CILFIT—The Court’s Judgment

Against that background, the Court was faced with a limited choice. It could give effect to the words of the Treaty and insist on the unconditional obligation to refer, or it could find a way of introducing an element of discretion for which the Treaty did not provide. If the Court had been intent on stretching the limits of its jurisdiction at the expense of the national courts, it would have chosen the first (strict constructionist) alternative. In the event, it opted for a limited variant of the second, going further than the Advocate General but less far than had been proposed by the Commission and the intervening governments.

The Court began by stressing the discretion (*pouvoir d’appréciation*) of the national courts, including courts of last resort, to decide whether a decision on the question of

Community law is necessary to enable them to give judgment. If they so decide (but not otherwise), the Treaty unequivocally requires courts of last resort to refer.

The Court then recalled its decision in *da Costa*, limiting the obligation to refer where the question raised is ‘materially identical with a question which has already been the subject of a preliminary ruling in a similar case’. To this, it added a further limitation ‘where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical’. In effect, the Court adopted a doctrine of precedent that involves considering the *ratio decidendi* of a previous case rather than its formal relationship to the case in hand.

Finally, the Court envisaged the situation where ‘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’. The use of the expression ‘application of Community law’ is significant, since it focuses on the essential function of the national court, which consists in applying Community law to concrete cases. Of course, application may require prior interpretation but even if it does, the first task of the national court is to determine whether the text *could* apply to the fact situation before it, even if there is a doubt as to its interpretation.

It is at this point in its reasoning that the Court introduced what have come to be called ‘the *CILFIT* criteria’:

- if the correct application of Community law appears obvious to the national court, it must be convinced that it would be equally obvious to the courts of other Member States and to the Court of Justice;
- the national court must take account of ‘the characteristic features of Community law and the particular difficulties to which its interpretation may give rise’. These are:
  - that Community legislation is drafted in several languages, all equally authentic;
  - that Community law uses terminology peculiar to it;
  - that legal concepts do not necessarily have the same meaning in Community law and the national law of the Member States;
  - and that provisions of Community law must be construed in their textual, purposive and temporal context.

## *CILFIT*—Discussion

The difficulties and criticisms to which *CILFIT* has given rise stem from two statements in the judgment: first, that the national court ‘must be *convinced* that the matter is equally obvious to the courts of the other Member States and to the Court of Justice’,<sup>22</sup> and second, that ‘an interpretation of a provision of Community law involves *a comparison of the different language versions*’.<sup>23</sup>

Some critics read these statements literally, suggesting that national courts have to engage in an exhaustive linguistic and jurisprudential comparison of all the language texts

<sup>22</sup> *CILFIT*, point 16.

<sup>23</sup> *CILFIT*, point 18.

and speculate about the way in which the national courts of other Member States (about which they may have no reliable information) would look at the matter. That interpretation of the judgment cannot reflect the intention of the Court.

In those passages the Court was drawing attention to a point made by *all* those who submitted observations (claimants, governments and Commission)—namely, that Community texts are not monolingual and cannot be interpreted according to purely national canons of interpretation. One can concede that the Court's phraseology is not ideal, without going to the opposite extreme of absurd literalism. Moreover, the critics do not do justice to the judgment as a whole.

Perhaps the most important point to note is that the Court rejected the doctrine of *acte clair*, as it had already done in *da Costa* 20 years before. So it is deeply regrettable that the expression '*acte clair*' has entered the vocabulary of Community law, particularly in the United Kingdom, whether for reasons of linguistic snobbery<sup>24</sup> or because it is thought to be useful as legal shorthand. As shorthand, it is seriously misleading because it oversimplifies the problem with which the Court was faced and the answer it gave.

The proper question for the national court is *not* whether the law is 'clear', precisely because of the 'characteristic features and difficulties' of Community law, which were foreshadowed in the submissions to the Court and the Advocate General's Opinion and would have been self-evident to anyone acquainted with academic discussion of the problem. As explained by the Court, the question for the national court is more sophisticated and is reflected in the more recent wording of Article 104(3) of the Court's Rules of Procedure.

First, the court should consider whether the 'question' is materially identical to a question on which the Court has already ruled<sup>25</sup> or whether the point of law has already been dealt with.<sup>26</sup> Next, the court should consider whether there is 'scope for any *reasonable doubt*' as to the manner in which the question raised is to be resolved.<sup>27</sup> It is in this last context that the national court should take account of the '*CILFIT* criteria'. Read in that context, they are caveats rather than strict criteria and, indeed, read fairly, they are no more than common sense.

## *Foto-Frost*—The Background

*Foto-Frost* presented the same kind of problem as *CILFIT*. Both cases were concerned with interpretation of the text of Article 177 and in both cases the relevant part of the text appeared, at first sight, to be unambiguous. The court's task was to divine the intention of the Treaty makers.

The case concerned the import by Foto-Frost into the Federal Republic (West Germany) via Denmark and the United Kingdom of binoculars made at the Carl Zeiss factory in Jena in the GDR. Indirect import was necessary because of an agreement between Foto-Frost and the West German Zeiss company based at Oberkochen. The question was

<sup>24</sup> *Omne ignotum pro magnifico est*. Tacitus, *Agricola* 30.

<sup>25</sup> *Da Costa*, cited at *CILFIT*, point 13.

<sup>26</sup> *CILFIT*, point 14.

<sup>27</sup> *CILFIT*, point 16.

whether import duties were payable. In the past, Foto-Frost had been exempted from payment of duties by the West German customs authorities. On this occasion the customs authority asked the Commission for a ruling on whether duty should have been charged and, if so, whether Foto-Frost was now liable to pay it.

The Commission ruled that import duties should have been paid, and that although Foto-Frost had been granted exemptions on previous occasions, it ought to have known that this was wrong: Foto-Frost was therefore liable for the import duty. The Commission also held—it later conceded wrongly—that Foto-Frost had failed to comply with the requirements concerning customs declarations.

In the reference to the Court of Justice by the Hamburg Finance Court the main point at issue was the validity of the Commission's decision. The first question was whether the Finance Court could review the validity of the decision and, if it found it to be invalid, determine whether payment of duty could be waived. On the assumption that the answer was No, subsequent questions asked whether the Commission's decision was valid and whether payment could be waived.

### *Foto-Frost*—The Issue and Submissions

The question whether a national court could review the validity of an act of a Community institution was, as Advocate General Mancini said, 'one of the thorniest (*tra i più scabrosi*) that the Court has ever had to tackle'. Essentially, the choice was between literal interpretation of the text and the workability of the system.

On the one hand, there was the text of Article 177 as compared with Article 41 of the ECSC Treaty. The ECSC Treaty expressly gave the Court exclusive competence to rule on the validity of acts of the institutions; the EEC Treaty did not. The legislative history described above shows that the possibility of giving the Court exclusive competence, either in the short formula of the ECSC Treaty or as part of a longer formula, was one of the choices before the drafting committee. How could it be argued that the Treaty makers intended the Court to have exclusive competence when that option had clearly been rejected?

On the other hand, from the point of view of uniform and fair application of Community law, there was the unappealing prospect of national courts throughout the Community declaring Community regulations, directives and decisions invalid without control by any Community authority unless and until the case reached a court that was bound to refer under the third paragraph of Article 177. On several occasions, German administrative and finance courts had asserted the power to declare Community acts invalid and on at least one occasion had done so. Lurking in the wings was the judgment of the German Constitutional Court in *Solange I*.<sup>28</sup>

Academic opinion was divided, but the submissions to the Court of Justice were not. Foto-Frost, the German government and the Commission all submitted that the Court must have exclusive jurisdiction on issues of validity. The German government gave no

<sup>28</sup> *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.



reasons for its view. (No other government intervened.) The Commission attached particular importance to the effectiveness of its decisions, such as the decision in issue.

## *Foto-Frost*—The Advocate General's Opinion

In his Opinion Advocate General Mancini examined the arguments on either side. He rejected arguments based on *dicta* of the Court (in *Schwarze*<sup>29</sup> and *Granaria*<sup>30</sup>) that were said to support the contention that the Court did not have exclusive competence. He accepted that 'the arguments based on the wording of Article 177 are solid ones', but he felt that 'they also lead to such dangerous and anomalous results as to overshadow the undeniable uneasiness which one feels in rejecting them'. Since the authors of the Treaty could not have overlooked the consequences of a literal interpretation, 'the "elliptical" wording of Article 177 is attributable to a singular but not impossible oversight'.

He went on to identify four anomalies that would arise if the Court did not have exclusive competence to declare Community acts invalid—two legal and two practical.

The first legal anomaly would be that inferior national courts would be free to declare Community acts invalid, whereas the highest courts could not do so since they would be bound to refer the matter to the Court of Justice. The second would be the threat to the coherence of the Community legal order if national courts of all the Member States were free to declare Community acts invalid. The Advocate General stressed the underlying logic of Article 189 EEC (now Article 249 EC) that acts of the Community institutions must be applied uniformly through the Community.

The first practical anomaly would be that the national court would be faced with a task for which it is 'ill equipped or, in any case, very much less well equipped than the Court of Justice'. '[T]o review the validity of Community measures is a delicate task necessitating perfect knowledge of the relevant provisions, which are often drafted in an unpalatable, even esoteric, jargon, or of economic data to which there is no ready access'. The second practical anomaly would be that 'the national court could never put temporal limits on the effects of the judgment by which it declares a measure to be invalid ... which would have potentially disruptive [economic] consequences on the functioning of the common market'.

The Advocate General's conclusion was that his solution was 'not irrefutable, but certainly reasonable and, in any event, more satisfying than the opposite view'. Having said that, he accepted that a national court does not have an obligation to refer where it concludes that the Community act is valid (because there is then no 'question' to refer). He also accepted that there should be an exception to the general rule in summary or interlocutory proceedings, where protection of the trader requires suspension by the national court of the operation of the Community act. This had already been explicitly recognised by the Court in *Hoffmann-La Roche v Centrafarm*,<sup>31</sup> and was supported by the Commission in its submissions.

<sup>29</sup> Case 16/65 *Firma G Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1965] ECR 877 at 886.

<sup>30</sup> Case 101/78 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, point 4.

<sup>31</sup> Above note 15, at point 4.

## *Foto-Frost*—The Court’s Judgment

The Court began by saying that the text of Article 177 did not settle the question whether national courts could declare a Community act invalid. Like the Advocate General, it accepted that national courts can reject arguments of invalidity where these are unfounded since ‘by taking that action they are not calling into question the existence of the Community measure’. The Court then advanced four reasons why national courts do not have competence to declare a Community act invalid:

- the main purpose of Article 177 is to ensure uniform application of Community law;
- divergences between national courts would jeopardise the unity of the Community legal order and detract from legal certainty;
- the coherence of the system of judicial protection requires that the power reserved to the Court under Article 173 [Article 230 EC] should likewise be reserved to the Court under Article 177 [234];
- the Court is in the best position to decide on the validity of Community acts:
  - because the institution(s) the validity of whose acts are in question can participate in the proceedings in order to defend the validity of those acts; and
  - because the Court can require non-participating Member States and institutions to provide any necessary information.

## *Foto-Frost*—Discussion

The judgment in *Foto-Frost* is perhaps somewhat peremptory in its tone, and may be thought to rely too much on formulaic pronouncements such as ‘the very unity of the Community legal order’ and ‘the necessary coherence of the system of judicial protection’. That may explain some of the unfavourable reaction to the judgment. Nevertheless, there is an underlying seam of common sense which is better expressed in the Advocate General’s Opinion and some of the academic writing.

The question at issue was not one to which there was an obvious answer. There was a strong textual argument in favour of recognising the competence of national courts to declare Community acts invalid. The arguments against were essentially practical: the Community system would not work, and certainly would not work fairly, if national courts—particularly lower courts—were free to declare acts of the institutions inapplicable within their jurisdiction. Support for these arguments could be found in the Treaty, notably the inferences that could be drawn from Articles 173 and 189. So the method of interpretation chosen by the Court was certainly ‘purposive’ but it did not do violence to the Treaty text.

## Assessment

Two questions arise. First, are *CILFIT* and *Foto-Frost* 'good law'? Second, looking ahead, do they provide an adequate basis for the future relationship between the Court of Justice and the courts of 27 or more Member States?

As regards the first question, neither *CILFIT* nor *Foto-Frost* can reasonably be said to be an example of judicial activism. In both cases, there was a genuine problem of interpretation to be resolved, on which professional and academic opinion had differed. *CILFIT* gave greater leeway to the national courts than a strict reading of Article 177 would have required: *Foto-Frost* gave less. The Court could have reached a different decision but there was a rational legal justification for both judgments.

In practice, the relationship between the Court of Justice and the national courts, including the supreme courts, has worked reasonably well—as well, at any rate, as could reasonably have been expected in a federal or quasi-federal system.<sup>32</sup> Tension has, on the whole, been avoided by the exercise of common sense on both sides. The judgments in *CILFIT* and *Foto-Frost*, far from creating tension or failing to show confidence in the national courts, have been helpful in drawing a workable line of demarcation of competences.

Perhaps the best vindication of *CILFIT* and *Foto-Frost* as sound interpretations of the will of the Treaty makers lies in the fact that, despite repeated academic and political urgings, and despite recommendations by the Due Working Party on the future of the Community court system,<sup>33</sup> the text of Article 234 was not altered by the Treaty of Nice, nor was any amendment on this point suggested in the Draft Treaty establishing a Constitution for Europe or the Treaty of Lisbon.

As regards the future, the question is not so much whether *CILFIT* and *Foto-Frost* should be reconsidered, but whether the strict requirements of Article 234, as interpreted in those judgments, should be reconsidered. In seeking to answer that question, it is as well to accept that there will always be a degree of tension between national courts and the Court of Justice. Similar tensions exist *within* national systems: judges of first instance often resent the way in which their judgments are reversed or criticised by the courts of appeal, and judges of the courts of appeal are often heard to say that the supreme court is too remote from the practicalities of everyday judicial life.

Whatever rules may be made, it is inevitable that national courts will sometimes feel that they should allowed to get on with deciding cases rather than being forced to refer them to the Court of Justice. This will be true particularly of supreme courts, not least because their cases are likely to be already several years old and a reference to Luxembourg will only add further delay. Bearing in mind the requirements of the ECHR, it is legitimate for national courts to ask whether the further delay involved in a reference is really necessary.

Again, it is as well to recognise that, while uniform application of the law is an ideal that all courts should aim to achieve, complete uniformity is frequently unattainable in

<sup>32</sup> See, eg, the comparative study of EU and US practice in Matthew T King, *Towards a Practical Convergence: The Dynamic Uses of Judicial Advice in United States Federal Courts and the Court of Justice of the European Communities* (2002) 63 *University of Pittsburgh Law Review* 703.

<sup>33</sup> *Report by the Working Party on the Future of the European Communities' Legal System*, January 2000, 15–16, [http://ec.europa.eu/comm/dgs/legal\\_service/docs/due-\\_en.pdf](http://ec.europa.eu/comm/dgs/legal_service/docs/due-_en.pdf).

practice. Thus, it is accepted in the United States that one of the grounds on which the Supreme Court will grant *certiorari* is that a conflict exists on a point of law among the various federal circuits. Divergences of view with divergent results are part of the reality of judicial life.

Having said that, it is important also to recognise the dangers of giving free rein to national courts. These were graphically illustrated by Case C-129/00 *Commission v Italy*,<sup>34</sup> which concerned the perennial problem of repayment of taxes and duties levied contrary to Community law (*répétition de l'indu*). The Court of Justice had repeatedly stated (notably in *Comateb*<sup>35</sup> and *Dilexport*<sup>36</sup>) that Member States must not impose on the taxpayer the obligation to prove that the cost of an unlawful tax or duty has not been passed on to third parties. Nevertheless, the Italian courts, and especially the Corte Suprema di Cassazione, interpreted Italian law in such a way as effectively to create a presumption that the cost of the tax or levy had been passed on and that it was up to the taxpayer to prove the contrary.

The Commission took the almost unprecedented step of launching an infringement action against Italy on the ground that the national case law—largely the case law of the supreme court—and administrative practice based on that case law, were contrary to Community law. The Court found in the Commission's favour, stressing that:

A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.<sup>37</sup>

The cases of *Köbler*<sup>38</sup> and *Traghetti del Mediterraneo*,<sup>39</sup> raising the issue of state liability for the actions of national courts, also illustrate the potential for greater conflict where national courts appear not to be prepared to accept the lines of demarcation of competences established by the Court of Justice.

The advantage of maintaining the existing text of Article 234 as interpreted in *CILFIT* and *Foto-Frost* is that, at the very least, it reminds national courts of their duty to apply Community law in accordance with the case law of the Court of Justice and to seek guidance from the Court if they are in doubt as to what the law is. Delay is less of a problem than it used to be since Article 104(3) of the Rules of Procedure now enables the Court to give a quick answer where it can be deduced from existing case law or admits of no reasonable doubt.

If it is accepted that the texts provide the basis for a reasonable working relationship between the Court of Justice and national courts, it may be wise to be guided by the maxim 'If it works, don't fix it'.

<sup>34</sup> Case 129/00 *Commission v Italy* [2003] ECR I-14637.

<sup>35</sup> Joined Cases C-192/95 to 218/95 *Société Comateb and others v Directeur général des douanes et droits indirects* [1997] ECR I 165.

<sup>36</sup> Case 343/96 *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-579.

<sup>37</sup> *Commission v Italy*, point 29, citing Case 77/69 *Commission v Belgium* [1970] ECR 237, point 15.

<sup>38</sup> Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

<sup>39</sup> Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana* [2006] ECR I-5177.