

**APLIKACE DOKTRÍNY “ACTE CLAIR” NÁRODNÍMI SOUDY A JEJÍ
ZHODNOCENÍ VE SVĚTLE PŘÍPADU CILFIT (NA PŘÍKLADECH
BRITSKÉ JUDIKATURY)**

**APPLICATION OF THE ‘ACTE CLAIR’ DOCTRINE BY THE NATIONAL
COURTS AND ITS EVALUATION IN THE LIGHT OF THE CILFIT CASE
(DEMONSTRATED ON THE UK CASE LAW)**

LENKA ČERVENKOVÁ

Faculty of Law, Masaryk University

Abstrakt

Příspěvek se zabývá řízením o předběžné otázce a ochotou národních soudů obracet se na Evropský soudní dvůr podle článku 234 Smlouvy ES. Jeho první část přibližuje doktrínu acte clair a vysvětluje kritéria Cilfit, druhá část je věnována aplikaci této doktríny v praxi na příkladech judikatury soudů Velké Británie.

Klíčová slova

Evropský soudní dvůr, doktrína acte clair, doktrína acte éclairé, kritéria Cilfit, řízení o předběžné otázce, precedenční systém

Abstract

The article deals with the preliminary ruling procedure and the issues of willingness of national courts to refer to the European Court of Justice pursuant to Article 234 of the EC Treaty. Its first part introduces the acte clair doctrine and explains the Cilfit criteria, the second part focuses on an application of the doctrine in praxis, demonstrated on the United Kingdom case law.

Key words

European Court of Justice, acte clair doctrine, acte éclairé doctrine, Cilfit criteria, preliminary ruling procedure, system of precedents

1. Introduction

Besides the Council and the European Parliament, there is the European Court of Justice whose position as “a legislator” within the European Union cannot be, nowadays, simply overlooked. By force of preliminary ruling procedure, the ECJ defined the key principles of the EU law (principle of direct effect, supremacy principle etc.) and thus has gained its significant role in the integration process.

Since the 1950's, the preliminary ruling procedure has been regulated in Article 234 (ex 177) of the Treaty Establishing the European Community. The Treaty of Amsterdam then established specific forms of preliminary ruling procedure for ‘visa, asylum and immigration’ (Article 68 of the EC Treaty) and for the field of ‘police and justice cooperation in criminal matters’ (Article 35 of the EU Treaty).

Preliminary ruling procedure might be also seen as “a natural way” of communication between the ECJ and national courts of the Member States. Whereas in 1961, requests for preliminary rulings made by the national courts to the Court of Justice represented only 4 per cent, in 2005, references accounted already for about 44% of all cases brought before the ECJ.¹

Facing these still increasing numbers of references on one hand and displeasure of some national courts – notably courts of last instance – to ask the ECJ for interpretation on the other, the Court of Justice stated already in 1962 in *Da Costa* case² that “an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance”,³ known as the *acte éclairé* doctrine. This case in fact initiated a system of precedent (otherwise unknown to European civil system of law) and modified so far existing conception of

¹ COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, *Annual Report 2005*, Luxembourg, 2006, p. 192, available at <http://www.curia.europa.eu/en/instit/presentationfr/rapport/stat/st05cr.pdf>. For the earlier statistics see also IVO ŠLOSARČÍK, *Evropský soudní dvůr a předběžná otázka podle čl. 234 SES [The European Court of Justice and Preliminary Ruling in Article 234 ECT]*

² *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration*, 28-30/62 [1963] ECR 31

³ See *id.* in „Grounds“ of the case, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0028:EN:HTML>

a horizontal and bilateral relationship between the ECJ and national courts.⁴ The Court of Justice, therefore, strengthened its superior position to the national courts.

Twenty years later in *Cilfit* case,⁵ the ECJ referring to *Da Costa* case determined conditions for correct application of Community law by national courts without the obligation to bring the matter before the Court of Justice. This is called *acte clair* doctrine. Both *acte éclairé* and *acte clair* doctrine are to encourage the national courts to rely on previous ECJ's decisions which are, thus, given the power of precedents.

Compared with courts of other Member States, the United Kingdom courts took a specific and reserved position to the ECJ. Not surprisingly, as the UK legal system (so-called judge-made law) is based on precedents itself, the courts try to defend autonomy of their own case law and the "horizontal and bilateral" relationship with the ECJ.

For the mentioned reason and a long tradition of posing questions to the Court of Justice, this article attempts to discuss application of the *acte clair* doctrine on very examples of a communication between the ECJ and British national courts.

2. The 'acte clair' doctrine

In 1981, the Italian *Corte Suprema di Cassazione* (Supreme Court of Cassation) referred to the ECJ for a preliminary ruling under Article 177 (now 234) of the EC Treaty⁶ a question on the interpretation of the third paragraph of this Article. Let us set aside the facts and rather focus on point of law of this case.

⁴ CRAIG & DE BÚRCA, *EU Law – Text, Cases & Materials*, p. 442

⁵ *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, 283/81 [1982] ECR 3415

⁶ "[1] The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

[2] 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 of Justice to give a ruling thereon.

[3] Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

As the ECJ ruled in *Da Costa* case already, a distinction must be made between the obligation imposed by the third paragraph and the power granted by the second paragraph of Article 234 to refer to the Court of Justice, however, the courts or tribunals under both the second and the third paragraph have “the same discretion to ascertain whether a decision on a question of Community law is necessary to enable them to give judgement”.⁷

With reference to *Da Costa* case and the *acte éclairé* doctrine which may deprive the court under the third paragraph of the obligation to refer for a preliminary ruling when the question raised is materially identical with a question that has already been answered in a similar case, the ECJ stated that the same effect may be produced when previous decisions of the Court have already dealt with the point of law in question, even though the questions at issue are not strictly identical.⁸ Thus, the ECJ formulated the *acte clair* doctrine.

In one breath, however, the Court added quite strict criteria limiting the application of the doctrine. It might be debatable, then, whether it is (or is not) disserviceable and whether the ECJ, therefore, did (or did not) leave even more space for discretion to national courts. The Court stated following requirements that must be met before the *acte clair* doctrine is applied:⁹

- no reasonable doubts about correct application of Community law,
- equal obviousness to the courts of the other Member States and the ECJ itself,
- assessment of the characteristic features of Community law, such as:
 - equal authenticity of the different language versions,
 - particularity of Community law terminology, and
 - interpretation in context of Community law as a whole.

Since every rule has its exceptions, the ECJ held that there might be three exceptions to the obligation to bring the matter before the Court of Justice. These occur in case when:

- question raised is irrelevant to final judgment,
- question has already been interpreted by the Court (*acte éclairé* doctrine), or

⁷ *Da Costa en Schaake NV v. Nederlandse Belastingadministratie*, 28-30/62 [1963] ECR 31, § 10; see *id.* § 15

⁸ Compare *id.* §§ 13-14

⁹ For the details see *id.* §§ 16-20

- correct application of Community law is so obvious as to leave no scope for any reasonable doubt (*acte clair* doctrine).

In conclusion, the ECJ answered that the third paragraph of Article 234 of the EC Treaty must be interpreted as meaning that a court or tribunal against whose decision there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless one of the exceptions, mentioned above, occur. In case that the *acte clair* doctrine is applied, however, the stated conditions must be fulfilled as well.

3. Application of the doctrine by the United Kingdom courts

For understanding the application of the doctrine in the United Kingdom, it is necessary to know the structure of British courts and how the system works. It is entirely at discretion of lower courts to refer to the Court of Justice. Whereas, as far as courts of last instance (which have the obligation to pose the question raised before them to the ECJ) are concerned, it might be rather problematic.

Widely accepted “concrete theory” says that a court of last instance is that court against whose decision there is no judicial remedy under national law. Nevertheless, in the British courts’ environment, it may mean the House of Lords as well as the Court of Appeal and in some particular circumstances also the High Court. This is because the Court of Appeal is not obliged to refer to the ECJ as its decisions might be normally appealed to the House of Lords, however, the leave to appeal must be granted.

3.1. High Court

The High Court presents both a civil court of first instance and a civil and criminal appellate court for cases from the subordinate courts. It consists of three divisions – the Queen’s Bench, the Chancery and the Family divisions. The Administrative Court is then a specialist court within the Queen’s Bench Division of the High Court and deals with the administrative law of England and Wales.

3.1.1. Custom and Excise v Anchor Food Ltd¹⁰

The High Court acted as an appellate court in a case where the Commissioners of Customs and Excise appealed against the decision of the VAT & Duties Tribunal in dispute with Anchor Foods Ltd, making and importing “Spreadable butter” and “Ammix butter” from New Zealand.

Pursuant to the Regulation 1600/95,¹¹ butter – at least six weeks old, of a fat content by weight of not less than 80% but less than 82%, manufactured directly from milk or cream – imported into the European Union from New Zealand attracts a preferential rate of customs duty if it satisfies the tariff quota criteria stated in Annex I to the Regulation.¹² The disputable point was, however, whether the butter was “manufactured directly from milk or cream” and thus subjected to a lower rate of tariff duty under the said Regulation.

Since this was rather question of fact than of law, the High Court decided in favour of Anchor, while considering linguistic meaning of the word “directly” and the opinion of experts in the dairy industry.

Nevertheless, the other issue, which the High Court must have settled up, was the Commissioners’ request to the court to refer to the ECJ for a preliminary ruling on meaning of the words “manufactured directly from milk or cream”.

The judge considered following points:

- importance of the question,
- “complete confidence” in determining the question, and
- necessity of the reference for giving judgment.

The High Court stated to the first point that the issues are primarily of concern to the parties to the appeal with “no real importance for harmonised practices in all the Member States”.¹³ Secondly, it considered the obviousness of the question with expressed reference to the Cilfit case

¹⁰ Customs and Excise v Anchor Foods Ltd, High Court (Administrative Court), 26 June 1998, CO/1045/98

¹¹ Commission Regulation (EC) No 1600/95 of 30 June 1995 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products, OJ L 151, 1.7.1995, p. 12–43

¹² Customs and Excise v Anchor Foods Ltd, High Court (Administrative Court), 1998; for further facts see id. § 7

¹³ Id. § 83

and ruled that it could reach conclusions without any real doubt, while admitting that the “doctrine of *acte clair* has any application other than to references by a court of last instance under Article 177(3)”.¹⁴ And finally, as the issue was not of high importance for development of Community law and, moreover, the delay that was likely to be occasioned by a reference under Article 177 would cause great hardship to Anchor.¹⁵

In conclusion, after weighing various considerations, the High Court decided not to refer to the ECJ, reasoning that although the parties may suggest referring to the Court of Justice, it is at discretion of a court to do so.

Additionally, the parties were granted the leave to appeal since the House of Lords recognised the issues as one of high importance.

3.2. Court of Appeal

The Court of Appeal consists of two divisions – the Civil Division hears appeals from the High Court and County Court, while the Criminal Division may only hear appeals from the Crown Court.

3.2.1. Royscot Case¹⁶

The Court of Appeal (Civil Division), as the Supreme Court of Judicature, decided on appeal from the High Court, Queen’s Bench Division, concerning reference made to the ECJ and its withdrawing.

The applicant, the Commissioners, asked the Court of Appeal to withdraw a reference on interpretation of VAT regime and in particular of the provisions in the Second (67/228/EEC) and Sixth (77/388/EEC) VAT Directives,¹⁷ which the High Court had made to the Court of Justice

¹⁴ Id. § 81

¹⁵ Compare id. § 82

¹⁶ *Royscot Leasing Ltd and others v Commissioners of Customs and Excise*, Court of Appeal, 5 November 1998, FC3 98/7287/4

¹⁷ Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, *OJ* 71, 14.4.1967, p. 1303–1312; Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization

under Article 177 (now 234) of the EC Treaty. The Commissioners reasoned that there was no necessity to refer to the ECJ since meanwhile a similar case¹⁸ related to the same directives was decided by the Court. The appellants, however, objected to the withdrawal of the reference, arguing that the recent case was distinguishable from the present cases.

The Court of Appeal, nonetheless, refused to withdraw the request for a preliminary ruling, reasoning that the ECJ could itself suggest withdrawing to the national court if it considered that there “was no prospect of a different conclusion”.¹⁹ The Court of Appeal continued that as the ECJ had not done so, it indicated that the question in issue was not covered by the *acte clair* doctrine. Bearing in mind also frugality of a procedure, the Court of Appeal added that it would not be effective to withdraw the reference since it was in its “last stage” before giving the judgment.

Finally, as it is in the court’s power to withdraw a reference or not, in other words, as it has the right to pose a question to the ECJ albeit it is not obliged, the Court of Justice answered the questions²⁰ with reference to the said case decided before.

3.2.2. Custom and Excise v First Choice Holidays Plc²¹

The Court of Appeal (Civil Division) dealt with a dispute on taxable amount between First Choice Holidays Plc, a tour operator selling package holidays to the public through intermediary travel agents, and the Commissioners of Customs and Excise, stemming from an unclear provision of the Sixth VAT Directive (77/388/EEC), particularly from the meaning of the phrase “the total amount to be paid by the traveller” in this provision.

The case was heard before the VAT & Duties Tribunal, which decided in favour of First Choice. Then the Commissioners appealed to the High Court, where it was also found in favour of First Choice. Thus, the Commissioners applied for leave to appeal to the Court of Appeal and asked

of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ L 145, 13.6.1977, p. 1–40

¹⁸ Commission v France, ECJ, C-43/96, 18 June 1998

¹⁹ See *id.* fn. no. 16, § 4 (LORD JUSTICE SCHIEMANN’s judgment) available at <http://www.bailii.org/ew/cases/EWCA/Civ/1998/1698.html>

²⁰ *Royscot Leasing Ltd and others v Commissioners of Customs and Excise*, ECJ, C-305/97, 5 October 1999

²¹ *Customs and Excise v First Choice Holidays Plc*, Court of Appeal (Civil Division), 7 March 2001, A3/2000/2534

the court to refer to the ECJ for preliminary ruling on interpretation of article 26(2) of the said directive, which was not – in their point of view – acte clair.

First Choice objected that this is purely matter of fact, referring to the Tribunal's analysis, which is not necessary to be decided by the Court of Justice. The Commissioners, on the other hand, emphasized that it is a question of fundamental principle of VAT law, a question of construction of the disputed provision and as such, it is to be judged by the ECJ.

The Court of Appeal, considering the criteria stated in Cilfit case, ruled that the issue is not acte clair because the correct application of Community law is not so obvious as to leave no scope for any reasonable doubt. Moreover, the court stated that without the guidance of the ECJ it would not be able to give judgment, and as the question was found to be of importance for the travel industry as a whole, it decided to refer to the ECJ and hear the parties further in the light of its judgment.²² The Court of Justice ruled on the question on 19 June 2003.²³

3.3. House of Lords

The House of Lords, the upper house of the British parliament, is the highest court of appeal in England and Wales. It means when a case is heard before the House of Lords and a question concerning Community law raises, it must be referred to the ECJ, unless it falls under the exceptions stated by the Court.

3.3.1. Bank of England Case²⁴

This case, concerning the banking in the United Kingdom that was in its final stage heard before the House of Lords, with more than 6,000 plaintiffs is rather complicated. Summarized, the Bank of England following the winded-up Bank of Credit and Commerce International SA was sued by its depositors for tort of misfeasance in public office.

The House of Lords had to answer questions of law raised before the Court of Appeal:

²² Compare id. §§ 12-14

²³ First Choice Holidays, ECJ, C-149/01, 2003

²⁴ Three Rivers District Council and others v The Governor and Company of the Bank of England, House of Lords, 2000

- Is the Bank liable to the plaintiffs for the tort of misfeasance in public office?
- Is the Bank is liable to the plaintiffs in damages for violation of the requirements of the First Council Banking Co-ordination Directive (77/780/EEC)?²⁵ Particularly, whether the said directive confers rights on depositors.
- Were the plaintiffs' losses caused in law by the acts or omissions of the Bank?

The House of Lords examined all these questions, notably all elements of tort that were found to be set out. Since the Community law issue raised the question of interpretation whether the Directive conferred rights of reparation on depositors, the House must have dealt also with this question; it ruled – with complete confidence – that “the Directive was not intended to confer rights on individual depositors”.²⁶

Being the court of last resort in the United Kingdom, the House may only determine the Community law issue if the matter is truly *acte clair* or make a reference for a preliminary ruling to the ECJ. Applying the *acte clair* doctrine, the House of Lords decided not to refer to the Court of Justice.

4. Conclusion

In conclusion, by wording the *acte éclairé* and the *acte clair* doctrine, the Court of Justice undoubtedly introduced a system of precedent, most probably not unintentionally. The objectives of the ECJ might be that it wished to avoid repeating itself by answering the same questions posed by courts or tribunals of different Member States, on one side, and/or to legalize “not referring” for a preliminary ruling, albeit under strict conditions, on the other.

These rather stringent “*Cilfit* conditions” are often criticised, notably by the British courts. It is said that the relaxation of the obligation under Article 234(3) of the EC Treaty might be “risky” with respect to potential in-bad-faith decisions of national supreme courts. Nevertheless, this may always happen no matter how strict the criteria are; whereas if these were more relaxed, they

²⁵ First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17.12.1977, p. 30–37

²⁶ See *id.* fn. no. 24, § 35 (LORD STEYN’s judgment) available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2000/33.html>

would not entail undue procedural delays, nor prevent the courts from “realising their considerable potential to contribute to the development of EC law”.²⁷

Courts in the United Kingdom are statistically²⁸ less willing to refer to the ECJ than courts of other Member States. There might be seen a strong tendency to consider – before making a reference – not only the importance of the particular issue for Community law, but also impact upon the parties. Keeping questions referred to the minimum, the UK courts attempt to strike a balance between these two interests. Let us assume the British courts may dare to do so. Perhaps, it is due to the fact that the relationship between them and the ECJ is rather more co-operative (than hierarchical) unlike in other Member States.

Bibliography:

- [1] Craig, P. & de Búrca, G., EU Law – Text, Cases & Materials, Oxford University Press, 2003
- [2] The Judiciary of England and Wales, The Quality of European Legislation and Its Implementation and Application in the National Legal Order, 2004, available at http://www.juradmin.eu/colloquia/2004/england_wales.pdf
- [3] Šlosarčík, Ivo: Evropský soudní dvůr a předběžná otázka podle čl. 234 SES, [The European Court of Justice and Preliminary Ruling in Article 234 ECT], Europeum, 2004
- [4] Court of Justice and Preliminary Ruling in Article 234 ECT], Europeum, 2004
- [5] Court of Justice of the European Communities, Annual Report 2005, Luxembourg, 2006, p. 192, available at <http://www.curia.europa.eu/en/instit/presentationfr/rapport/stat/st05cr.pdf>

Table of Legislation:

- [1] Treaty Establishing the European Community, March 25, 1957, OJ C152
- [2] Treaty on European Union, July 29, 1992, OJ C191
- [3] Commission Regulation (EC) No 1600/95 of 30 June 1995 laying down detailed rules for the application of the import arrangements and opening tariff quotas for milk and milk products, OJ L 151, 1.7.1995, p. 12–43

²⁷ See further, THE JUDICIARY OF ENGLAND AND WALES, The Quality of European Legislation and Its Implementation and Application in the National Legal Order, 2004, p. 12, available at http://www.juradmin.eu/colloquia/2004/england_wales.pdf

²⁸ Statistics per Member States available at <http://www.ena.lu/mce.cfm>

[4] Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes – Structure and procedures for application of the common system of value added tax, OJ 71, 14.4.1967, p. 1303–1312

[5] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ L 145, 13.6.1977, p. 1–40

[6] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17.12.1977, p. 30–37

Table of cases:

[1] *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, ECJ, C-28-30/62, 27 March 1963

[2] *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECJ, C-283/81, 6 October 1982

[3] *Royscot Leasing Ltd and others v Commissioners of Customs and Excise*, ECJ, C-305/97, 5 October 1999

[4] *Commission v France*, ECJ, C-43/96, 18 June 1998

[5] *First Choice Holidays*, ECJ, C-149/01, 19 June 2003

[6] *Three Rivers District Council and others v The Governor and Company of the Bank of England*, House of Lords, 18 May 2000

[7] *Royscot Leasing Ltd and others v Commissioners of Customs and Excise*, England and Wales Court of Appeal (Civil Division), 5 November 1998, FC3 98/7287/4

[8] *Customs and Excise v First Choice Holidays Plc*, England and Wales Court of Appeal (Civil Division), 7 March 2001, A3/2000/2534

[9] *Customs and Excise v Anchor Foods Ltd*, England and Wales High Court (Administrative Court), 26 June 1998, CO/1045/98

Kontaktní údaj na autora - email:

lenka.cervenkova@gmail.com

