The Transfer of Preliminary Ruling Jurisdiction to the General Court of the EU

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1. The Background

1.1. The Problem

The docket of the Court of Justice of the EU (ECJ) is under stress, especially with preliminary questions submitted by national courts under Art. 267 TFEU. That preliminary ruling procedure is a stellar success, and precisely that is the problem. The General Court of the EU (GC), by contrast, is not particularly busy since the number of its judges was doubled between 2017 and 2022. If the high influx of preliminary cases at the ECJ level is not effectively addressed on the demand side – see section 2. below – then it must be addressed on the supply side. The solution then seems obvious, i.e. a transfer of preliminary referrals to the GC. However, such a transfer was and still is not regarded with favour in respect of the unity and consistency of EU law and is considered a measure of last resort that is only to be pursued if all else fails to control the ECJ's workload. As it stated in its 1995 report on the future of the judicial system of the Union:[1]

> The preliminary ruling system is the veritable cornerstone of the operation of the internal market, since it plays a fundamental role in ensuring that the law established by the

1 *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union*, (Luxembourg, 1995), pp. 6-7.

> Treaties retains its Community character with a view to guaranteeing that that law has the same effect in all circumstances in all the Member States of the European Union. Any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market.

1.2. Why has a transfer of jurisdiction been held off for so long?

Notwithstanding this *credo*, a transfer of preliminary referrals from the ECJ to the GC was already made possible in February 2001 by Art. 225 of the Treaty of Nice which is now Art. 256 TFEU. The GC has thus already had a dormant jurisdiction for over 20 years to hear and determine preliminary referrals under Art. (now) 267. The term dormant is used because its jurisdiction only exists "*in specific areas laid down by the Statute*". No such "specific areas" have been stipulated in the court's statute until now but the (Committee on Legal Affairs of the) European Parliament and the Council of Ministers of the EU reached a political agreement in December 2023 on a legislative request submitted to them by the ECJ on the basis of Art. 281 TFEU to amend Protocol No 3 on the court's statute. The court's draft text was not accepted unchanged, however, as the European Parliament insisted on several amendments. At the time of submitting this article for print, Parliament's plenary had yet to agree to the political agreement reached, but that was expected to be a rubber-stamp matter.

The court's proposed text to change its statute and the changes made by Parliament are annexed below this article.

Art. 256(3) TFEU reads as follows:

> 3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.
>
> Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.
>
> Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

After the entry into force of the Treaty of Nice in February 2003, priority was given to establishing a specialized Staff Cases Tribunal – disbanded and reintegrated into the GC again in 2016 – and to transferring all actions for annulment and for failure to act to the GC except for those brought by Member States or an EU institution. The ECJ moreover succeeded in considerably increasing the number

of cases closed and in significantly reducing its case processing time by changing its rules of procedure and its internal organization. One of the major concerns that had instigated inserting (now) Art. 256 TFEU had thus been dispelled, and the ECJ could delay having to make amends on either the demand side or the supply side of the system of preliminary rulings for quite some time. In 2015, the EU's judicial framework was changed, a.o. to increase the number of GC judges, but no changes were made to the allocation of preliminary questions. However, the EU legislature did ask the ECJ for a report on possible modifications to the distribution of the preliminary rulings jurisdiction, especially in light of the fact that the number of GC judges was doubled after the 2015 reform of the EU judiciary. The ECJ reported in 2017 that it did not yet see a need for such modifications,[2] referring to (i) the challenges inherent in such an undertaking, especially regarding the unity and consistency of interpretation of EU law, (ii) the fact that requests for a preliminary ruling were dealt with expeditiously by the ECJ itself thereby resulting in an average length of time for dealing with such requests of 15 months (half of which was translation time), and (iii) the fact that the reform of the EU judicial framework was not yet completed as several GC judges had yet to be appointed, and the internal reorganization of the GC following that reform was still ongoing. It kept that position for five more years.

By the end of 2022, the court apparently considered that things had changed, the two most important ones being that (i) the average length of time of dealing with preliminary rulings had increased to over 17 months and showed an upward trend, not so much because of quantitative increases[3] but due to the complexity and the political sensitivity of the cases referred which also showed an upward trend, and (ii) the GC had finally completed its reorganization; its 27 new judges had not been sworn in to play golf – they needed cases.

2. Non-Intervention on the Demand Side of Preliminary Referrals – Options not Chosen

The most obvious solution to an overloaded docket is to reduce the influx of cases. Various such options have been considered over the years such as:

- Limiting the number of national courts empowered to make preliminary references by either (a) reserving that power to supreme courts alone or (b) to exclude courts of first instance. Already in 1995 and again in its 2000 report,[4]

2 Report submitted to the European Parliament, the Council and the Commission on 17 December 2017 under Art. 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015.

3 2017: 533 referrals; 2018: 568; 2019: 641; 2020: 557; 2021: 567; 2022 up to 1 October: 420.

4 Court of Justice, *Report of the Court of Justice on certain aspects of the application of the Treaty on European Union*, (Luxembourg, 1995), p. 6.; Court of Justice, *The Future of the Judicial System of the European Union (Proposal and Reflections)*, (Luxembourg, 2000).

the court dismissed that option as it "*would have the effect of jeopardizing the uniform application and interpretation of Community law throughout the Union, and could deprive individuals of effective judicial protection and undermine the unity of the case-law*". Option (a) would also be "*undesirable from the point of view of procedural economy. It would result in proceedings being brought before supreme courts in the Member States solely in order to enable the parties to seek a referral to the Court of Justice*". The court did not explicitly state so, but option (b) would also eliminate the possibility for first instance courts (which are the frontline) to bypass their supreme court in order to challenge that supreme court's interpretation of EU law, its refusal to apply it, or its reluctance or refusal to refer relevant questions.

- A filtering mechanism, meaning that the court would be accepting or rejecting preliminary referrals on the basis of their novelty, complexity, or importance. That option was rejected as it is incompatible with the basic idea of the preliminary reference procedure as judicial cooperation and as a dialogue between courts. National courts might refrain from referring questions to avoid the risk of those being rejected for lack of importance or novelty. That would jeopardize the mechanism for ensuring that EU law is interpreted uniformly throughout the Union. As former ECJ judge Kapteyn put it,[5] it would be as if a marriage partner would say to their spouse that from, now on, honey, only important issues are to be discussed between us.
- Variations on a filtering system have been considered but have also been rejected, although a "green light" procedure has been proposed many times, according to which a national court wishing to make a reference would be requested to frame a reply to its own questions. That would reduce the adverse effect on judicial cooperation, and the proposed reply could serve as a basis for choosing which questions must be answered by the ECJ and which could be answered in the terms indicated by the national court. To this author's knowledge, the court has not clearly explained in neither its reform request nor in prior documents why this option is not promising in terms of workload. Possibly, it is also considered as offending the cooperation and dialogue ideas behind the preliminary procedure as it could place the ECJ in a schoolmaster-like position. On the other hand, the ECJ does not seem to mind that position when dismissing, by reasoned order, preliminary questions that it does not consider very necessary. Davor Petrić[6] observes that recent research indicates that many national courts already propose a more or less elaborated answer to their own preliminary questions[7] and that they

5 P.J.G. Kapteyn, *Reflections on the Future of the Judicial System of the European Union after Nice*, Yearbook of European Law 2001, p. 180.

6 Davor Petrić, *The Preliminary Ruling Procedure 2.0*, European Papers 2023, pp. 25-42.

7 Depending on the area of law and research focus, those numbers range between a third and half of all national courts that appeared in the preliminary ruling procedure in a given period; he refers to K Leijon, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National*

suggest a correct answer in approximately half of the cases in which they suggest an answer.[8]

- Leave to appeal in cassation: National courts not bound to refer questions to the ECJ would be required to give a judgment themselves before making any reference. A party to the litigation would subsequently be required to request that national judgment to be forwarded to the ECJ for a ruling on the points of EU law in respect of which that party challenges the validity of the judgment. This would enable the ECJ to give a ruling in full knowledge of both the factual and legal context in which the points of EU law raised must be interpreted. This option, however, would correspond with neither the fundamental idea of judicial cooperation nor that of a dialogue. It would change the system into a hierarchical one, and the parties instead of the national court would decide on the reference. Moreover, it would not sit comfortably with national procedural law as the national court might be required to revise its judgment after the ECJ's ruling, and the party dissatisfied with the national court's judgment might be inclined to seek referral only to delay its enforcement.
  Such a system *is* applied by the ECJ, for that matter, for determining whether an appeal is allowed to proceed against GC judgments on decisions of boards of appeals of EU offices, bodies, or agencies (Art. 58a of the court's statute). The second part of the ECJ's legislative request to the European Parliament and the council relates to that mechanism. It seeks to extend the scope of that leave to appeal system to the EU offices, bodies, or agencies that existed on 1 May 2019 when this mechanism entered into force but which are not yet referred to in Art. 58a(1) of the statute, and to disputes on arbitration clauses in contracts concluded by the EU (Art. 272 TFEU). This author will not discuss that second part of the court's request as it does not affect (indirect) tax cases.
- Relaxing the *Cilfit*[9] criteria for mandatory preliminary referral of questions on EU law by highest national courts. Advocate general Bobek made another brave attempt in that respect in the *Consorzio Italian Management* case,[10] trying to replace the *Cilfit* criteria by the *Hoffmann-Laroche*[11] criteria. However, he failed to convince the court to extend the reach of the three exceptions (*acte clair*; *acte éclairé*, and irrelevance) to the obligation of national highest courts to refer matters of interpretation of EU law to the ECJ. On the other hand, the

Autonomy or Balancing Conflicting Demands?, (2021) West European Politics 510; A. Wallerman, *Can Two Walk Together, Except They be Agreed? Preliminary References and (the Erosion of) National Procedural Autonomy*,' (2019) ELR 159; D Petrić, *Interpreting EU Law: Legal Reasoning of National Courts in the Preliminary Ruling Procedure,* Doctoral Dissertation (University of Zagreb, 2022).

8 He refers to: A. Wallerman Ghavanini, *Power Talk: Effects of Inter-Court Disagreement on Legal Reasoning in the Preliminary Reference Procedure*' (2020) European Papers www.europeanpapers.eu 887; and D Petrić, *Interpreting EU Law: Legal Reasoning of National Courts in the Preliminary Ruling Procedure*, Doctoral Dissertation (University of Zagreb, 2022).

9 CJEU, 6 October 1982, C-283/81, *Cilfit a.o,* EU:C:1982:335.

10 CJEU, 6 October 2021, C-561/19, *Consorzio Italian Management*, EU:C:2021:799; Opinion of Advocate General Bobek, 15 April 2021, C-561/19, *Consorzio Italian Management,* EU:C:2021:291.

11 CJEU, 24 May 1977, C-107/76, *Hoffmann-La Roche/Centrafarm*, EU:C:1977:89.

court did seem to introduce in that case an obligation to give reasons for not referring notwithstanding a reasoned party request for referral, or at least to tick one of the three boxes, i.e. □ *acte clair*, □ *acte éclairé*, or □ not relevant for deciding the case. Sara Iglesias Sánchez[12] surmises a causal relation between the court's reiteration of *Cilfit* and its request for a transfer of selected preliminary referrals to the GC to relieve its docket. Agreeing in that respect with François Xavier Millet,[13] she also sees a causal relation between the court's reiteration of *Cilfit* and the fact that the rule of law in several Member States has been and still is being undermined which threatens effective judicial dialogue. This is not a time for relaxing the requirement to refer questions of EU law, especially constitutional ones, to the ECJ. Reiterating these requirements maximizes the possibilities for the commission to initiate infringement proceedings against Member States for failure of their highest courts to refer relevant questions of EU law,[14] especially those concerning the rule of (EU) law and judicial protection against the state.

Moreover, everyone has become accustomed and possibly even attached to the *Cilfit* myth, similarly to growing accustomed to a bad but familiar habit one learned to live with. If the *Cilfit* myth were to be abandoned or radically changed, the risk would ensue that the unicorn that Advocate General Wahl was not able to find in EU law (an *acte clair*)[15] would be replaced by an ugly dragon. Inevitably, the ECJ would be required to declare inadmissible referrals not meeting the new, non-*Cilfit* criteria for referral thereby inevitably leading to a long period of unpredictable case-by-case decisions. This would discourage national courts from referring questions and possibly merely frustrate the unity and development of EU law. In this author's view, another important objection against doing away with *Cilfit* or at least with preliminary rulings on the mere *application* of EU law to the facts – as opposed to the abstract *interpretation* of it independent of the particular circumstances of the case before the national court – is that the law is in the facts. Only when confronted with the effects of a particular interpretation of the rule does its meaning become apparent. A court, even one such as this author's court of cassation, cannot do without facts even though it is not supposed to rule on them. It is of no use for the ECJ to hand down just general criteria for, e.g., abuse of (EU) rights. What counts is the effect of their application in reality which cannot be detached from abstract interpretation as that could turn interpretation into ventriloquism or mere hot air. As Claus Staringer observed, a distinction between "factual" questions and "interpretative" questions would be, in the words of the ECJ itself, "a wholly artificial arrangement".

12 Sara Iglesias Sánchez, *Preliminary rulings before the General Court; Crossing the Last Frontier of the Reform of the EU Judicial System?*, EU Law Live , December 17, 2022.

13 François Xavier Millet, *Cilfit Still Fits: ECJ 6 October 2021, Case C-561/19, Consorzio Italian Management*, European Constitutional Law Review 2022, p. 542.

14 See, e.g., CJEU, 4 October 2018, C-416/17, *Commission v. France* (*précompte*), EU:C:2018:811.

15 See the Opinion of Advocate General Wahl of 13 May 2015, in the Joined Cases C-72/14 and C-197/14, *X* and *Van Dijk*, EU:C:2015:319.

None of these demand side interventions being satisfactory and no realistic options remaining for more preliminary ruling efficiency at ECJ level without sacrificing quality and deliberation time (or translation time), the lesser evil was chosen, i.e. increasing the supply side capacity of the court: more answers instead of less and/or better questions.

3. Supply Side Intervention: Transfer of 'Specific Areas' of EU Law to the GC

3.1. Six 'Specific Areas' – Four Selection Criteria

According to Art. 256(3) TFEU, the GC is to exercise its preliminary rulings jurisdiction in "specific areas" which implies that requests for a preliminary ruling not just focused on those areas but (also) raising "horizontal" questions are out of scope and remain at the ECJ level. In one of its amendments to the proposed Art. 50b of the statute (see the Annex below), the European Parliament defined such "horizontal" questions of EU law as "*independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights of the European Union*". Parliament wanted to ensure that cases raising any such question remain with the ECJ.

The ECJ stated four "parameters or guiding principles" it used to select the "specific areas" in which preliminary questions of national courts should become the GC's competence. These areas should:

- be "clearly identifiable" upon reading the preliminary ruling request and "sufficiently separable" from other EU law areas in order to avoid uncertainties as to the precise scope of the questions referred;
- raise minimal "issues of principle";
- be governed by "*a substantial body of case-law of the Court of Justice, capable of guiding the General Court in the exercise of its new jurisdiction and of preventing the potential risk of inconsistencies or divergences in the case-law*"; and
- be sufficiently high in incidence to make a significant difference in the ECJ workload if they are transferred.

On that basis, the ECJ identified the following six areas:

- the common system of value added tax,
- excise duties,
- the Union Customs Code,
- the tariff classification of goods under the combined nomenclature,
- compensation and assistance to passengers, and
- the scheme for greenhouse gas emission allowance trading.

According to the court's legislative request, those six areas:

> … are clearly defined and sufficiently separable from other areas covered by Union law, are governed by a limited number of acts of secondary legislation and (…) rarely give rise to judgments of principle (…). Those areas have, furthermore, given rise to abundant case-law on the part of the Court of Justice, which should considerably limit the risks of divergences in the case-law.

As, on average, they make up approximately 20% of all preliminary ruling requests each year, the transfer to the GC of the preliminary referrals in these areas should lead to a significant reduction in the ECJ's workload.

Interestingly, the court did not identify *all* types of cases that would qualify for transfer based on its four criteria. By consequence, it did not examine which options would be *best* according to those criteria. It did not *rank* options on the basis of the *extent* in which they meet the four parameters stated. As Michal Bobek observed, the areas selected are, "*if anything, a rather experimental batch*."[16]

Even together, the four areas of excise duties, the customs code, tariff classification of goods, and the scheme for greenhouse gas emission allowance trading amount to no more than a mere 4% of all preliminary referrals (less than 18% of the 20% represented by all six selected areas together and a mere 2,8% of the ECJ's total workload). This means that none of these four areas by far meet the quantitative criterion of making a discernable difference in workload. On average, each of them represents only 1% of the total number of preliminary requests and only 0.7% of the ECJ's total workload. In complexity and (political) sensitiveness, they probably represent even much less. The quantitative requirement of making a difference is only met by VAT cases (9% of all preliminary referrals; 45% of the areas selected; 6,3% of the total workload) and flight delay cases (7,5% of all preliminary referrals; 38% of the areas selected; 5,3% of the total workload). The latter were moreover largely created by the court itself in its infamous *Sturgeon* case.[17]

By not identifying and not ranking *all* eligible options and not making a reasoned *best* choice but simply presenting a single list, the ECJ apparently wished to avoid having to explain why clearly suitable areas other than the designated ones were not chosen. These could include, e.g., intellectual property, trademarks, public procurement, judicial cooperation in civil matters, pharmaceutical and cosmetic products, consumer protection, and motor vehicle liability insurance. Possibly, the court simply liked those better than indirect taxes and passenger rights, or the areas selected are the ones in respect of which the least resistance was expected from Member States (the council) and Parliament. Nevertheless, is a *non*-reasoned decision not a mortal sin for a court? It suggests that the choice of areas to

16 Michal Bobek, *Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?*, CML Rev. 2023, p. 1528.

17 CJEU, 19 November 2009, C-402/07, *Sturgeon*, EU:C:2009:716.

be divested preceded the selection of the parameters to identify those areas. It must be admitted, though, that it makes sense to transfer *all* indirect tax cases together.

The criterion "raise few issues of principle" may apply to flight delay cases (indeed, which factual circumstances qualify as extraordinary events justifying cancelling or delaying a flight?), but it is rather astonishing that the court would consider indirect tax cases not to raise significant "horizontal" questions, let alone fundamental issues. That is surprising in light of the fact that it was precisely indirect tax cases that prompted the court to develop very important general doctrines and very fundamental principles such as priority and direct effect of EU law, abuse of (EU) rights, the rights of the defence in administrative matters, the principle of protection of legitimate expectations, the principle of legal certainty, the usability of illegally obtained evidence, the principle of neutrality, and the principle of *ne bis in idem* in respect of concurrence of administrative penalties and criminal charges for the same behaviour. One only needs to think of cases such as *Van Gend & Loos*,[18] together with *Costa/ENEL* probably the most important case *ever* on EU law, *Emsland-Stärke*,[19] seminal to the Court's abuse of rights doctrine, further developed in the VAT case *Halifax*,[20] the *Sopropé* case,[21] seminal to the EU law principle of the rights of the defence in administrative matters, *Åkerberg Fransson*,[22] which answered the very, very fundamental question of the scope of the EU Charter of Fundamental Rights, and which is also a fundamental case on the *ne bis in idem* principle, *Webmind Licenses*,[23] on the consequences of illegality for the use of illegally obtained evidence, *Taricco*,[24] on the relationship between the criminal Statute of Limitations and the effectiveness of EU law, and so on and so forth. The EU Policies Committee of Italy's *Camera dei deputati* observed in a comment[25] on the court's legislative request that the VAT system precisely "*seems particularly liable to generate new issues, including issues of systemic relevance*". It cited the *Taricco* case as exemplifying that observation: "*Although the origins of the case lie in a question of VAT fraud detrimental to the financial interests of the Union, the case itself reshaped relations between the Constitutional Court of Italy and the European Court of Justice.*"

Moreover, one "parameter" is conspicuously absent, i.e. the expertise and experience available at the GC. In none of the areas selected is the current GC either an expert or experienced in any way.

18 CJEU, 5 February 1963, *Van Gend & Loos*, Case 26/62, EU:C:1963:1.
19 CJEU, 14 December 2000, C-110/99, *Emsland-Stärke*, EU:C:2000:695.
20 CJEU, 21 February 2006, C-255/02, *Halifax and Others*, EU:C:2006:121
21 CJEU, 18 December 2008, C-349/07, *Sopropé*, EU:C:2008:746.
22 CJEU, 7 May 2013, C-617/10, *Åkerberg Fransson*, EU:C:2013:105.
23 CJEU, 17 December 2015, C-419/14, *WebMindLicenses*, EU:C:2015:832.
24 CJEU, 8 September 2015, C-105/14, *Taricco u.a.*, EU:C:2015:555, and 5 December 2017, C-42/17, *M.A.S. and M.B.*, EU:C:2017:936.
25 EU Policies Committee of Italy's Chamber of Deputies, *Project to amend the Statute of the Court of Justice of the European Union concerning preliminary rulings*, 15936/22 – 2022/0906 (COD), 2023.

The original idea behind Art. 256(3) TFEU was that the GC would function as an appellate court for decisions of specialized courts such as the former Staff Cases Tribunal and, at the same time, answer preliminary questions on the same types of issues as those arising from these specialized courts. That combined jurisdiction would make sense with a view to efficacy and expertise. These envisaged specialized courts have never come into existence, however, apart from the Staff Cases Tribunal that was dissolved and reintegrated in the GC again in 2016 after the number of GC judges was doubled. Art. 356(3) TFEU is thus not used for the precise purpose for which it was introduced.[26]

Possibly, the ECJ simply wanted to get rid of indirect tax and air passenger cases.

3.2. "Exclusively"

The new Art. 50b of the court's statute will confer preliminary ruling jurisdiction to the GC for requests "*that come exclusively within one or several of the (…) specific areas*". The scope of the GC's competence is therefore not only defined by the designation of the "specific areas" but also by the ECJ's interpretation of the term "come exclusively within" as it is solely the ECJ who performs the *triage* of incoming preliminary referrals. All preliminary questions will still have to be referred to the ECJ that will decide whether to forward them to the GC. This is to avoid that national courts would have to wonder to whom to refer their questions.

At least two types of overlap exist between the designated "specific areas" and other areas of EU law: (i) overlap with other areas of secondary EU law such as consumer rights, the own means of the Union, public procurement or environmental rules, and (ii) overlap (concurrence) with "horizontal" issues of EU law such as the unwritten abuse of rights doctrine, the principle of legitimate expectations, or the rights of the defence. Based on the normal meaning of the term "exclusively", *any* such concurrence would automatically place a preliminary referral on VAT or passenger rights out of scope for a transfer to the GC.

This seems to imply that it should not be difficult for a referring national court to choose its judicial dialogue partner – GC or ECJ – by simply (not) including a question on such a general issue of EU law, e.g. on the rights of the defense, the nondiscrimination principle or the proportionality principle, or the omnipresent principle of effectiveness of EU law. Any delimitation of "areas" creates its own border traffic and its own border disputes. Obviously, the requirement of loyal cooperation also addresses national courts, but some of them adjudicating in last instance in indirect tax cases, such as the German *Bundesfinanzhof*, may not feel particularly honoured if their questions are pushed down to the GC as less important and raising no issues of principle; unknown, unloved, as the saying goes. On

26 See, for elaboration on this issue, Michal Bobek, *Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?* CML Rev. 2023.