"Acte clair" doctrine and the literal interpretation of European Union Law by National Courts

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The European Union (EU) legal system provides for a mechanism that allows national courts to ask –before settling a dispute– for a preliminary ruling from the European Court of Justice (ECJ) about the interpretation of EU law. Article 267, paragraph 3 of the Treaty on the Functioning of the European Union, provides that if a question about the interpretation of EU law is raised before a national court "against whose decisions there is no judicial remedy under national law" (i.e. National Courts of Last Instance), the national court has the duty to refer the question to the ECJ. The aim of this obligation is to ensure uniformity of EU law in all Member States and avoid the development of divergent case-law across the EU (ECJ, CILFIT, § 7).

However, this duty has an important exception. In its *CILFIT* judgment, the ECJ established that a NCLI may refrain from submitting the question when 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 arises is to be resolved" (ECJ, *CILFIT*, §16). In addition, before reaching that conclusion, the NCLI must be convinced that the solution to the question is "equally obvious to the courts of the other Member States" and to the ECJ (ECJ, *CILFIT*, §17).

In that same judgment the ECJ has listed a number of criteria that are supposed to guide the NCLI when deciding whether or not to make a preliminary reference (ECJ, *CILFIT*, §18-20). First, the NCLI has to take into account the multilingual character of EU law. Indeed, the EU has 24 official languages and the different linguistic versions of legal texts are equally authentic. Interpretation of EU legal provisions therefore involves a comparison between linguistic versions, although not necessary all of them (Opinion AG Francis Jacobs in *Wiener*, § 65). Second, NCLI have to bear in mind the fact that EU legal terminology has autonomous concepts, such as "goods", "services" of "worker", which do not have the same meaning as in the domestic legal orders. Finally, the NCLI has to consider the interpretation methods most often used by the ECJ such as the systematic and teleological interpretation.

On the other hand, keeping in mind a classical conception of the application of the *acte clair* doctrine, that reduces legal interpretation to literal interpretation, some EU legal scholars have criticized the use of this doctrine in the EU legal system because it does not take into account either the specific features nor the technical specifications of EU Law and it threatens its coherence and uniformity (see, *inter alia* Bebr, 1983, p. 439).

Nevertheless, in certain cases where the parties raised a question or a doubt about the meaning of an EU law provision, the NCLI used the literal argument to interpret it and justify its decision tot to refer the issue to the ECJ. In addition, the ECJ itself has answered preliminary questions through reasoned orders using exclusively the literal method of interpretation.

The question here is: in the EU legal context, how the use of the literal or grammatical method of interpretation can be understood as an argument to interpret EU law and avoid the duty to refer an interpretative question to the ECJ?

This paper advocates the adoption of a pragmatic view in that respect. More specifically, it will be suggested that, after the identification of all possible meanings of a

certain provision of EU law, the literal or grammatical argument may be sufficient to convince the 'universal audience' (a discursive construction of the national judge of last instance made up of other national judges and the ECJ).

In this sense, easy cases in EU legal context could be understood not as an *ex-ante* reading and a straightforward application of the legal provision to the case, but as the product of an *ex-post* assessment of the whole process of argumentation where the persuasive force of the literal argument proves to be so high that it rules out any conflicting interpretation based on other resources or methods.

Finally, in order to preserve the coherence and the unity of EU law, it must be pointed out the existence of one limit that stems from a new reading of some developments of the ECJ case-law about the infringement procedure and the Member State liability for damages caused to individuals by breaches of EU law.

§. 1 The classical acte clair doctrine and the EU legal system

The *acte clair* doctrine can be summarized in a Latin expression widely spread among legal scholar since the early nineteenth century: *in claris non fit interpretatio*. In other words, judges, lawyers, etc. do not have to interpret a text when it is clear, but they have to merely apply it to the legal facts. This doctrine presupposes that in these cases, the interpreters, especially the judges, are completely chained to the wording of the legal provision. In that perspective, interpretation (considered as an activity) is reserved only to those situations where the meaning of the text raises in unclear (van de Kerchove, 1978, p. 13) or where there are legal gaps or antinomies.

Furthermore, this doctrine also presupposes the preexistence of an objective and univocal meaning that, as if it were a fact, the interpreter has to discover or merely infer from the legal text: this meaning is nothing more and nothing less than the meaning which manifests itself to the interpreter in an evident or immediate manner (van de Kerchove, 1978, p. 13). In addition, privileging the literal dimension of texts over other interpretative aspects, and building a solid bridge (at least in appearance) with the directive of literal interpretation, this evident or immediate meaning is considered clear from a straightforward reading of the legal provision and then from the ordinary meaning of its wording.

In this regard, some legal philosophers? endorse to some extent the acte clair doctrine's thesis. It's the case of Jerzy Wroblewsky, when he reduces the operative legal interpretation (wykladnia operatywna) to its definition of Interpretation-S (*stricto sensu*): "when the ascription of meaning to a linguistic sign in cases where its meaning is doubtful in a communicative situation, this means, cases where its direct understanding is not sufficient for the communicative purpose at hand" (Dascal & Wroblewski, 1988, p. 204). Or, Andrei Marmor, when he formulated the distinction between the activities of understanding and interpretation, and affirms that "interpretation is only required when the formulation of the rules raises doubt as to its applicability in a given set of circumstances" (Marmor, 1990, p. 79).

The *acte clair* doctrine, of course, has not been exempt from criticism. Michel van de Kerchove recalls indeed that the clarity of the text is not the rule but rather an exception, and finally the recognition of the clarity is itself the product of an interpretation (van de Kerchove, 1978, p. 14). Stanley Fish denies the existence of any clear meaning of the text that would be "independent of the context, the attitude of the speaker and the audience", that could preexist its interpretation and would therefore constrain the interpreter (Fish, 1995, p. 3).

Concerning now the EU legal system, it is hardly disputable that the *acte clair* doctrine cannot be easily reconcied with the multilingual character of EU law and the existence of autonomous concepts in its terminology. Indeed, this doctrine rests on the presumption that the text is formulated in only one language – be it ordinary or technical. As noted above, EU legal texts are formulated in 24 different languages. Therefore, the literal interpretation of one and the same EU legal provision could lead to very different outcomes depending on the linguistic version examined. The same is true for the autonomous concepts that pervade EU law and that may receive different meanings across the various legal languages of the Member States.

§ 2. Collaborative interpretation and the pragmatic perspective of literal interpretation

In legal disputes before the national judges that involve the application EU law, it would seem more appropriate to adopt another conception of interpretation that, without falling into the position of the *acte clair doctrine*, both acknowledges the fact that national judges often (exclusively) rely on literal interpretation when applying EU law and accepts the idea that in some cases such an interpretation may sufficient to provide a *convincing* answer.

From the perspective of this article, interpretation has to be understood in a wide sense: it occurs any time a reader tries to make sense of (legal) text, including when this text is allegedly clear.

Unlike the conception of interpretation underpinning the *acte clair doctrine*, the collaborative approach adopted here is based on the idea that the meaning of a legal provision is not a fact that the interpreter merely has to discover. Instead, the determination of the meaning of a legal text is the product of a construction, of an argumentative and collaborative process where, even if the judge plays in there a prominent role, there are other actors (parties attorneys', legal scholars, etc.) that contribute to the construction of that meaning. It could be seen as a "practice of collaboration between authors and readers, in which everyone, from their place, contributes to reading-writing of the law" (Ost and van de Kerchove, 2018, p. 416).

In this process, they propose different possibilities to interpret the legal text using for this purpose their knowledge as well as a whole network of interpretative resources that oscillate between the legal and non-legal spectrum (*soft law*, legal values, textual provisions, contracts, notes, customs, gentlemen's agreements, among many other things) (this is the cognitive dimension of the *iurisdictio*, Bailleux, 2013, pp. 517, 520, 521). It may be noted that in this process, not all the interpretations or meanings are allowed. Its output is a set of interpretations that have been identified among the multiple possible meanings that would be accepted by the audience.

In a legal discourse context where the NCLI has to interpret and apply a certain EU legal provision to a specific case, and in the light of the collaborative dimension of legal interpretation, the literal arguments of interpretation could be seen in a more pragmatic perspective. This means in particular that among the multiple interpretations that a legal text could receive, the literal interpretation(s) could generate the acceptance of the thesis defended by the speaker and convince the universal audience (Perelman & Olbrechts-Tyteca, 1958, p. 698).

This description of the use of the literal argument goes along with with a prescriptive proposal: national judges could reason their refusal to refer a preliminary ruling to ECJ using the literal argument of interpretation, but they have to be convinced that this argument could lead to a solution likely to be found acceptable, not only by the parties at trial, but also by

judges of other member states and the ECJ itself. This prescriptive-descriptive proposal concerns not only the national judges, but also other parties (lawyers, advocates general, etc.). Even if a NCLI plays an important role and its interpretation is final and authoritative, the other parties have a part of responsibility in this construction of meaning.

At this stage, one would argue that this perspective, as well as the perspective underlying the *acte clair doctrine*, could conflict again with the multilingual character of EU law and its variety of autonomous concepts. However, there are at least two differences between both positions.

The first one concerns the strength of the literal argument. Its strength or its pragmatic effectiveness no longer resides, as provided by the *acte clair* doctrine, in the self-evidence character of the wording of a certain EU legal provision and the authority of the text. From the perspective presented here, the effectiveness of the argument derives not only from the ordinary meaning of the words used by the EU legislator, that have, in addition, to correspond to other linguistic versions (if not, the literal argument lost its strength), but also from the context of its application, particularly, because the case fits perfectly into the normative hypothesis (Schauer, 1985, p. 414). In this regard, it can be said that the semantic perspective is partially present, indeed the intention was never here to proclaim its abandon.

Secondly, the *acte clair doctrine* has the particular tendency to attribute in advance a great weight to the literal interpretation and that is so for legal certainty reasons (Perelman, 1976, p. 24). From our perspective, it has to be recalled, the literal argument is not an argument that *a priori* prevails over other arguments. Quite to the contrary, the judge's decisions to use this kind of argument is itself the result of an interpretative process. This perspective therefore rejects any proposal to give preeminence or precedence to the literal argument such as, for example, the pragmatic rule proposed by Robert Alexy according to which the argument that "gives expression to a link with the actual words of the law… takes precedence over the other arguments, unless rational ground can be cited for granting precedence to the other arguments" (Alexy, 1989, p. 248).

In addition, giving credit to the EU legal scholar critics, it could be stated that, unlike national legal contexts, in the EU legal context the literal argument has to be seen as an exception rather than a rule. The literal argument in many cases could not have enough strength to convince the universal audience because it is suspected that probably the EU legal provision contain an autonomous concept, because there are different meanings between the linguistic version of the same legal provision, because the literal argument has unacceptable consequences (see, Perelman, 1984, p. 43) in the light of the objectives of the legal provision at stake or the principles and values of the EU, or because it gets in manifest contradiction with the existing case-law of the ECJ (see, below).

§ 3. Easy cases in EU legal context?

Contemporary legal theory has focused largely on the resolution of hard cases. Even if some authors such as H.L.A Hart (1958, pp. 606-621), Frederich Schauer, Lon Fuller and its debate with Hart (1958, pp. 630-672), Ralf Poscher (2015, pp. 281-293), Andrei Marmor (1990, pp. 70-ss) and Jonathan Crowe (2019, pp. 75-86) have given some thought to the definition of an easy case, this subject constitutes a commonly forgotten territory in legal adjudication.

In the EU legal context the easy case discussion claim relevancy and takes a different magnitude. For the reasons set out above, in this context, justification of the legal decision can no longer be reduced to the classical demonstration that the solution can be derived from the applicable norms based on a literal interpretation.

From this perspective, the easy case label is an ex post qualification (and not an *a priory* one), of a situation where after the assessment of all possible and permissible interpretations of a legal text, the literal argument prevails over the other interpretative arguments because it?? most likely could be accepted by the audience.

Unlike Hart (1958, p. 614) and Dworkin (1977, pp. 82-84) who consider that hard cases require judges to justify their decisions and easy cases do not, it is argued that easy cases involve a certain work of justification .

§ 4. Institutional restraints or sanctions (in a wider sense)

The margin of interpretation that NCLI derive from the CILFIT decision and the pragmatic approach about the literal interpretation of EU law must however be accompanied by restraints aimed at preserving the uniform interpretation of EU law. One limit could come from the principle of Member State liability for damages caused to individual by breaches of EU law, attributable to the State, and more specifically to a decision of a NCLI; and from the ECJ case-law about the infringement procedure in cases where the breach of EU law is due to a NCLI decision.

From a reading of *Kobler* and *Ferrera Da Silva* cases about liability of State, it could be asserted that NCLI *may not* adopt an interpretation that is contrary to the well-established ECJ case law. This would help the individuals concerned to fulfil the second condition to engage the liability of a Member State: the breach by the NCLI have to be sufficiently serious (ECJ, *Kobler*, § 51) and this can only occur "in the exceptional case where the court has manifestly infringed the applicable law". (ECJ, *Kobler*, § 53). In order to ascertain this condition, the NC hearing a claim for damages have to take account, in particular, "the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling …" (ECJ, *Kobler*, § 54-55). From a reading of *Commission vs. Spain* of 2009 and the recent decision *Commission vs. France* of 2018, we could arrive to a more compelling conclusion: the NCLI *must not* adopt an interpretation, so a solution, that is manifestly contrary to the well-established ECJ case law.

Both actions, despite its procedural differences (its objective and subjective nature, the individual and the commission, the competent judge, etc.), and the further possibility open to all NC to ask for a preliminary ruling from the ECJ, preserve the coherence and the uniformity of application of EU law. Indeed, in liability proceedings the national judge, as the Tribunal Supremo de Portugal did in *Ferrera Da Silva*, can ask for a preliminary ruling in order to know the meaning of the EU legal rule breached by the NCLI decision. This is the case also for the infringement proceedings before the ECJ and the further possibility for a non NCLI to ask a preliminary ruling to "challenge" a NCLI decision. This double aspect of these proceedings (limit to the interpretation and preservation of uniformity) has the advantage to respect the margin of appreciation of NCLI on the interpretation of EU law while reinforcing the spirit of cooperation between national judges and the ECJ.