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

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§1. Introduction

The European Union (EU) legal system provides for a mechanism that allows to 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, establishes that if a question about the interpretation of EU law is raised before a national Court or Tribunal "against whose decisions there is no judicial remedy under national law" (i.e. National Courts of Last Instance), the national jurisdiction 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 avoiding the emergence of divergent case-law between different national courts (ECJ, CILFIT, § 7).

However, this duty has an important exception. In its *CILFIT* decision, 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 to arrive to 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 order to provide guidance for the NCLI about the interpretation of EU law, the ECJ set up some criteria (ECJ, *CILFIT*, §18-20). The NCLI then has to take into account, in first place, 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 a EU legal provisions involves then a comparison between linguistic versions, but not all (Opinion AG Francis Geoffrey on *Wiener*, § 65). Second, NCLI have to borne in mind that EU legal terminology has autonomous concepts that receive one single meaning for all member states and generally these concepts, such as "goods", "services" of "worker", do not have the same meaning within EU law and in the different legal orders of Member States. Finally, the NCLI has to consider the directives of interpretation used by the ECJ such as the systematic and teleological directives.

On the other hand, keeping in mind a classical conception of the application of the *acte clair* doctrine, that narrows the legal interpretation to a mere comprehension of the text only based in it's wording (i.e. literal interpretation), some notably EU legal scholars had criticized the use of this doctrine in the EU legal system because it does not take into account the characterization nor the technical specifications of EU Law and it threatens its coherence and uniformity (see, such as, Bebr, 1983, p. 439).

Nevertheless, in certain cases where the parties arose a question or a doubt about the meaning of a EU law provision, the NCLI used the literal argument to interpret it and to justify its refrain from refer the issue to the ECJ. In addition, the ECJ itself has answered to preliminary questions by reasoned order 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?

The aim of this paper is to think over this method and to suggest the adoption of an entirely pragmatic view of the literal argument in the context of the interpretation of EU law. 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 could 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 literal argument prevails over other interpretative arguments because they may have the force to convince the audience.

Finally, in order to preserve the coherence and the unity of EU law, it must be pointed out the existence of one limit that stem 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.