

PRELIMINARY RULINGS - ARTICLE 234 TEC NICE (ARTICLE 267 TFEU LISBON)

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ABSTRACT:

An example of the treaty article's practical application in respect of the European Court of Justice determining what law is to be applied by the courts of a member state. The European Union's equivalent of a combined Declaration and Injunction. Such judgments require the courts of a Member State of the European Union to apply the law enunciated in the Court of Justice's judgment; and which, if the facts are similar in cases in other Member States' courts, must also be applied in those cases as well. Thus, it is the author's view that lodging an application for a Preliminary Ruling can be both litigation strategy as well as a means to establish the law to be applied in the European Union's Member States' national courts.

I INTRODUCTION

The European Court of Justice: Article 267 of the Treaty on the Functioning of the European Union – (hereinafter “Lisbon Treaty”) – is the current version of Article 234 of the Treaty Establishing the European Community (Nice); and deals with one of the European Court of Justice's (“ECJ”) enforcement procedures referred to as European Court of Justice Preliminary Rulings.

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This paper will refer to Article 234 (“the Article”) because the most significant number of important cases of the relevant case law and procedure used to date refers to Article 234; the Lisbon Treaty having come into effect in December 2009.

It should be noted however there are some changes in the wording of Article 234 (Nice) and Article 267 (Lisbon); the differences being noted below

Nevertheless, the main thrust of Article 234 (Preliminary Rulings) continues mainly intact in Article 267 of the Lisbon Treaty: to permit the ECJ alone to determine, *inter alia* what law the national courts of a Member States should apply in a matter being heard by that national court that involves an interpretation of Community (now Union) law.

The ECJ determines whether a Member States’ national legislation or case law is in conflict with Union legislation *viz* Regulations, Directives, and acts as well as EU Treaty provisions.

II. PURPOSE OF THE ARTICLE (234 NICE, 267 LISBON)

The Article is a mechanism by which the ECJ distinguishes and gives effect to “public” versus “private” enforcement of Union law. It is an example of a Treaty Article giving “Direct Effect”, or “enforceable rights” to individuals.

In 1963, the case of *Van Gend en Loos*¹, the ECJ recognized the principle of “direct effect” of certain Union legislation. Advocate General Roemer in that case observed that Preliminary Rulings dealt only with the ECJ’s interpretation of Community (now Union) law, while the national court applied that Union law to National case law² in national litigation.

Once the principle of the “Supremacy” of Union law over national law was established by the ECJ in 1964 in the *Costa* case³ and the concomitant abrogation of full state sovereignty by Member States, the stage was set for intervention by the ECJ into the judicial systems of the Member States. This point is succinctly put by the ECJ in *Costa*:

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the community cannot prevail.⁴

The Preliminary Ruling procedure articulated in Article 234 (Article 267 Lisbon) found a pre-eminent role in the functioning of the Court of Justice: currently over 60%; or about 8,000 of the Court judgments since 1952 being in respect of Preliminary Ruling matters⁵.

¹ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 13.

² Paul Craig, Gráinne de Búrca, *EU Law Text, Cases and Materials* (Oxford University Press, 4th Ed, 2008) 433.

³ *Flaminio Costa v ENEL* (Case 6/64) [1964] ECR 585.

⁴ *Ibid.*

⁵ Marc-André Gaudissart, ‘Professor at University of Gent’, (Lecture on Judicial Enforcement delivered at University of Gent, 13 February 2009).

An obvious reason and an essential effect of the Supremacy Doctrine is that the national law of all of the Union's Member States is consistent with Union legislation and in harmony with each other's legislation on subjects covered by Union legislation.⁶

A further aspect of the harmony principle is to require internal consistency of all national law within an individual Member State, where such national law is subservient to Union legislation.⁷ The *Pfeifer case* is of particular interest in respect of this principle:

The principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law.⁸

Craig and de Burca observe:

The obligation to harmonise applies even in a 'Horizontal' case between private parties⁹

The obligation [to harmonise] applies to all National law, and not only to legislation implementing a Directive¹⁰

A Article 234 (Nice)

⁶ Craig and Ed Burca, above n 2, pp344 – 354, 282 – 291, 461 – 462.

⁷ *Pfeifer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397- 403/01) [2004] ECR I-8835.

(see also *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1989] I-4135.

⁸ *Ibid.*

⁹ Craig and Ed Burca, above n 6, 288.

¹⁰ *Ibid.*, 289.

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) *the interpretation of the 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.*

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 of the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

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 or tribunal shall bring the matter before the Court of Justice.¹¹

B Article 267 (*Lisbon*)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;

¹¹ The Treaty Establishing the European Community (2002) done at Nice (2002/C 325/01) Consolidated Version, Article 234.

- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

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 to give a ruling thereon.

Where such a 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.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.¹²

C Distinctions Between Nice and Lisbon:

While minimal, there are changes to the Lisbon version of the Preliminary Ruling Article (Article 267 Lisbon) when compared with the wording of the Article 234 Nice. As succinctly stated by Vassilis Hatzpulos,

The ECJ is the body whose institutional role is to benefit most from this ‘depolarisation’, possibly more than that of the European Parliament. However

¹² The Treaty on the Functioning of the European Union (done at Lisbon) Consolidated Version (2008/C 115/01, Article 267.

spectacular this formal boost of the Court’s competence, the changes in real terms are not going to be that dramatic.¹³

Hatzpulos goes on to opine that certain changes found in Article 267 (Lisbon) are important; and comments specifically on the new (last) paragraph inserted in Article 267 of the Lisbon Treaty in respect the ECJ making decisions with the “minimum of delay” in cases of persons held in custody:

Article 267 TFEU now provides for a single preliminary procedure covering all issues of the current first and third pillar. This is compulsory for all Member States and for all jurisdictions and does not require any prior declaration [a Member State’s agreement] or other formality. Further, both primary and secondary law may be subject to the Court’s interpretation. A special fast-track procedure is provided for in the last paragraph of Article 267 [Lisbon], for cases stemming from the AFSJ, where ‘a person in custody’ is involved.¹⁴

The ECJ requirement to act with minimum delay in cases where there is party in custody is also considered noteworthy by the UK Parliament.¹⁵

It is arguable that the new final paragraph in Article 267 is merely a specific mandatory application of the accelerated (“Fast-Track”) procedure that was

¹³Vassilis Hatzopoulos, ‘Casual but Smart: The Courts new clothes in the Area of Freedom Security and Justice after the Lisbon Treaty’ (Research Papers in Law, College of Europe, European Legal Studies, February 2008).

¹⁴ *Ibid*, 9.

¹⁵ Library of the House of Commons, “The *Treaty of Lisbon* amendments to the *Treaty Establishing the European Community*”, Research Paper 07/86 (6 December 2007), 93.

discretionary with the ECJ; and rarely used (as of 2009 it was used on only three occasions since 2001).¹⁶

Alternatively, the insertion of the “minimum delay” paragraph into Article 267 Lisbon, may have been in response to the Lisbon Treaty’s formal recognition of fundamental human rights.

*D An Example Of The Use Of Article 234 Nice (Article 267 Lisbon) By
Private Parties To Litigation In A National Court*

The following is a hypothetical example of how the Preliminary Ruling procedure found in Article 234 of TEC (Nice) (now 267 TFEU) (Lisbon) can be utilised by a private party to litigation in the national court of a Member State.

In this hypothetical example, the Member State is the United Kingdom (“UK”).

1 The Facts of The Hypothetical Case

The facts of the hypothetical case involve the issue dealing with one of the Four Freedoms: the free movement of goods, that is Article 28 Nice (now Article 34 Lisbon) and its enforceability of that right by recourse to Article 234. The facts of the case may also invoke Competition law provisions of the TEC Nice *viz* Article 81 and Article 82.

¹⁶ Professor Van Den Hende, ‘Delivered at Lecture on Judicial Enforcement, (University of Gent, 3 April 2009).

The Defendant, Christie Ltd, alleges as a defence to a suit for a debt said to be owed to Movement Ltd that Movement Ltd engaged in actions that distorted the “internal market” of the EU in breach of Article 28 of the Nice Treaty that prohibits measures that inhibit the free movement of goods within the Internal Market of the EU. Article 28 TEC (Nice)¹⁷ is discussed in more detail below.

The matter is being heard in a superior court of the UK: the High Court of England and Wales (“the High Court”), which is not a court from which no recourse is available. Thus, the High Court has the discretion to refer (or not refer) Questions to the ECJ for a Preliminary Ruling; it is not required by TEC Article 234 that the High Court do so.

Transport Ltd (a large international transport corporation) says that the case is solely based on the simple fact that it provided transportation services to Christie Ltd pursuant to a contract with Christie Ltd that, without dispute by either party, contains “standard term” clauses. Transport Ltd says that no issue of EU law applies to the case. Christie Ltd says that the contract it entered into with Transport Ltd included “fine print”, that is “standard term” clauses of which Christie Ltd was not aware, and that were never specifically agreed to by Christie Ltd.

In addition to breaching TEC Article 28 with the effect of distorting the Internal Market, Christie Ltd says that the effect of these particular “standard

¹⁷ See Above n 11, Article 28.

term” clauses may also be to breach TEC (NICE) Competition Law: Articles 81 and 82.

2. The Relevant Legislation (Union and National)

There is a relevant Council Directive (the 1993 Directive on “Unfair Contract Terms”)¹⁸ which has been transposed into UK national legislation (the 1999 UK Regulation on Unfair Contract Terms)¹⁹ which became law in 1999 by the UK’s fast track rule-making procedure. There is also a pre-existing 1977 Act of the UK Parliament dealing with “Unfair Contract Terms” (“the UCTA 1977”).²⁰

3. The Key Community (Union) Law Issue To Be Decided By The ECJ

The “fine print” (or “Standard Term” clauses) in the contract between Transport Ltd and Christie Ltd state that the contract between the parties to a transport contract cannot (in any effective way) be reviewed by a court. Christie Ltd says that such Standard Terms in a contract are “unfair contract terms” and that those terms in its contract with Transport Ltd are in breach of the intent of Community legislation, that is Directive 93/13/EEC on unfair contract terms; and because of the Supremacy principle, Community (Union) law takes precedence over National legislation in overlapping areas. But there is a “catch”.

¹⁸ Council of the European Communities Directive on Unfair Contract Terms, 93/13/EEC, 5 April 1993.

¹⁹ Statutory Instrument: 1999 No. 2083 on Consumer Protection, The Unfair Terms in Consumer Contracts Regulation 1999

²⁰ *Unfair Contract Terms Act 1977* (UK) c 50.

While the UK *Unfair Contract Terms Act 1977* applies its protection to both “consumers” and “businesses”, the Council Directive as well as the transposed *Unfair Contract Terms Regulation 1999*) applies only to private persons who are consumers.

However, the UK *Unfair Contract Terms Act 1977*, which does apply to Christie Ltd, contains a narrow definition of an “unfair contract term”, thus excluding Christie Ltd from its ambit; while the *1993 Council Directive on Unfair Contract Terms* (and the transposed 1999 UK *Regulation*) does not cover Christie Ltd, a business, but does contain an a broad definition (extensive list) of “unfair contract terms” which applies to and prohibits the Standard Term clauses such as the impugned terms in the contract between Christie Ltd and Transport Ltd.

Christie argues that the High Court should, by statutory interpretation, apply the *Unfair Contract Terms Act 1977* to the case between Christie Ltd and Transport Ltd, but interpret the *UCTA 1977* in light of the broad definition of an “unfair contract term” contained in the 1993 Council Directive (and its UK transposition: the 1999 UK *Regulation*); in other words The High Court should read down or strike the narrow definition found in the 1977 statute and substitute the broad definition found in the 1993 Council Directive and transposed 1999 UK *Regulation*. It is this judgment that Christie Ltd seeks from the ECJ in a Preliminary Ruling.

Summarised, the issues are:

1. The claim by Christie Ltd that certain of the Standard Term clauses in its contract with Transport Ltd is are “unfair contract terms”;
2. That the unfair contract terms in its contract with Transport Ltd “distorts” the Internal Market of the EU and thus breaches TEC Nice Article 28 (now Article 34 Lisbon);
3. The UK *Unfair Contract Term Act 1977* applies to Christie Ltd, but has a narrow definition of an unfair contract terms that does not apply to the contract between Christie Ltd and Transport Ltd. The UK *UCTA 1977* applies to the contract between Christie Ltd and Transport Ltd because the 1977 Act applies to “business to business” contracts as well as business to consumer contracts.
4. The *1993 Council Directive* (and transposed *1999 UK Regulation*) contains a broad definition of an unfair contract term; but they do not apply to “business to business” contracts; they only apply to private persons who enter into a “consumer contract” under the definition of that term contained in the *1993 Council Directive* and the transposed *1999 UK Regulation*.
5. Christie Ltd also claims that certain Standard Term clauses in its contract Transport Ltd breach Article 81 and/or Article 82 of the Nice Treaty (now Article 101 and Article 102 of the Lisbon Treaty), which Articles deal with EU Competition Law.

Thus the ECJ is asked by the English High Court (at the request of Christie Ltd) what law the High Court should apply, should the ECJ find that the impugned “standard term” clauses in the contract between Christie Ltd and Transport Ltd “distort” the Internal Market of the EU in breach of Article 28 of the Treaty (Nice); and/or breach Articles 81 or 82 of the Nice Treaty relating to Competition Law.

Christie Ltd says that if there is a conflict between National law and Community (Union) law, then the ECJ should find that the principle of the Supremacy of EU legislation applies and require the High Court to determine the case in conformity with EU legislation *inter alia* reading into the UK *Unfair Contract Terms Act 1977* the definition of an unfair contract term found in the *1993 Council Directive on Unfair Contract Terms*, which had been transposed into the UK *Unfair Contract Terms Regulation 1999*.

Under English Rules of Court (Practice Direction supplement to CPR Part 68)²¹ any party to a law suit has the right to ask the court which is hearing its case to make a referral to the ECJ, if issues are raised in that law suit that involve an interpretation of Community (Union) legislation or Treaty. If the court is not a court of last resort, it may do so. If the UK court is a court of last resort, that is a court from which no appeal may be taken, then that court shall make a referral to the ECJ. This English Practice Direction is complies

²¹ Practice Direction Part 68 on References to the European Court (supplement to Civil Procedure Rule Part 68.

with the ECJ's Information Note on National courts referring matters to the ECJ.²²

4. *Community Law Relied on By Christie Ltd*

(a) *Dassonville*

Christie Ltd relies, firstly (but not exclusively)²³ on what is referred to as the *Dassonville* Principle.²⁴ This seminal judgment by the ECJ dealt with the free movement of goods within the Internal Market of the Community (Union). The ECJ was interpreting the predecessor Article to TEC Nice Article 28; and what constitutes a prohibited activity, that is an activity ("measure") that hinders the free movement of goods within the Union's Internal Market.

(b) Article 28 TEC (Nice)

Article 28 TEC (Nice) prohibits *inter alia* activities (measures) that have the effect of hindering the free movement of goods within the Internal Market:

*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*²⁵

²² Court of Justice Information Note on references from national courts for a preliminary ruling, (2005/C 143/01) 11.6.2005, Official Journal of the European Union.

²³ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (C-120/78) [1979] ECR 649.

²⁴ *Procureur du Roi v Benoît and Gustave Dassonville* (C-8/74) [1974] ECR 837.

²⁵ See above n 11, Article 28.

In *Dassonville* the ECJ considered the meaning of “measures that have equivalent effect” (“MEEs”). The ECJ defined MEEs as:

*All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*²⁶

Christie Ltd submits that certain clauses in the Standard Terms of its contract with Transport Ltd’s fall within the meaning of the above definition because they have the effect of distorting the Internal Market and are protected by UK State action, that is UK legislation that exempts such clauses from judicial review (or materially hinders judicial review). Christie Ltd says that in this case, this occurs in two ways: first, the narrow definition of an unfair contract term in the *Unfair Contract Terms Act 1977*, and secondly because that Act exempts “shipping contracts” from its ambit. Christie Ltd’s contract with Transport Ltd is a “shipping contract”.

E The Questions Christie Ltd Submits To The English High Court For Reference To The European Court Of Justice For A Preliminary Ruling

Pursuant to Article 234 Nice (Article 267 Lisbon), Christie Ltd’s lawyers make a submission to the High Court (as required by the Supplement to Practice Direction Part 68) in respect of why is it necessary for that court to refer the following Questions to the ECJ for a Preliminary Ruling. The Questions include relevant ECJ case law:

²⁶ See, above n 24.

1 Example of Preliminary Ruling Questions

- I. Whether Article 28²⁷ of the Treaty Establishing the European Community (Nice version) (“the TEC”) prohibits the “shipping exemption” (“the shipping exemption”) to the United Kingdom’s *Unfair Contract Terms Act 1977* (“the 1977 Act”)²⁸ described in Schedule 1 of the 1977 Act because the shipping exemption distorts or has the potential to distort the free movement of goods within the Internal Market of the European Union in that traders of similar goods in several of the Member States other than the UK are offered protection from such an exemption; and
- II. Whether under the *Dassonville*²⁹ principle the UK Government should repeal the shipping exemption to the 1977 Act or whether the shipping exemption should be judicially struck down under the *Dassonville* principle by the national courts of the UK; and
- III. Whether Article 28 of the TEC prohibits Standard Form Contract Terms such as Clause 21 and 27 of the British Industry Freight

²⁷ See above n 11, Article 28.

²⁸ See above n 20.

²⁹ *Rewe Zentrale v Bundesmonopolverwaltung fur Branntwein* (C-120/78) [1979] ECR 649.

Forwarders Association (“BIFA”)³⁰ because such Standard Terms distort or have the potential to distort the free movement of goods within the Internal Market of the European Union in that traders of similar goods in several of the Member States other than the UK are offered protection from such Standard Terms, *viz* s36, *Nordic Code*³¹ and ss305 – 310 BGB, and s242 BGB³².

- IV. If the Court answers Question III in the affirmative, whether the national courts of the UK should interpret the definition of an “Unfair Contract Term” in the 1977 Act by having regard to the definition of an “Unfair Contract Term” in *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* (“the 1993 Directive”)³³ and the transposition of the 1993 Directive into UK national law *viz* the *Unfair Terms in Consumer Contracts Regulations 1999*, Statutory Instrument 1999 No 2083 (“the 1999 Regulations”)³⁴, especially the non-exhaustive “black list”³⁵ (see esp *Marleasing*³⁶, and *Pffeifer*³⁷); alternatively
- V. Whether the *1993 Directive per se* distorts the Internal Market in breach of Article 28, ETC in that it affords protection from Unfair

³⁰ British International Freight Association (BIFA), *Standard Trading Conditions*, 2005 Edition, Clauses 21 and 27.

³¹ Law of contracts and other legal transactions in the law of property and obligations, s36, Sweden, Denmark, Norway and Finland.

³² *Bürgerliches Gesetzbuch* [Civil Code] (Germany) s242 and ss 305 – 310.

³³ See above n11.

³⁴ See above n 19.

³⁵ See above n11 and *ibid*.

³⁶ See above n 7.

³⁷ *Ibid*.

Contract Terms only to natural persons who are consumers defined as such by the *1993 Directive* and not natural persons who engage in certain business undertakings or businesses *per se*; and

- VI. If the Court answers Question V in the affirmative, then whether the UK Government should repeal the 1999 Regulations or whether the 1999 Regulations should be judicially struck down; and/or
- VII. Whether Article 81 of the TEC renders void pursuant to Article 81 (2) TEC³⁸, agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms³⁹ because such Standard Terms breach ss (1) (a) of Article 81 in that they “directly or indirectly fix purchase or selling prices or any other trading conditions”⁴⁰; and/or
- VIII. Whether Article 81 of the TEC renders void pursuant to Article 81 (2) TEC, agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms because such terms breach ss (1) (d) of Article 81 in that they “... apply dissimilar conditions to equivalent transactions with other trading parties [in different member states], thereby placing [one or more of] them at a competitive disadvantage”⁴¹; and/or

³⁸ See above n 11, Article 81 (2).

³⁹ See above n 26.

⁴⁰ See above 11, Article 81.

⁴¹ See above 11, Article 81 (2).

- IX. Whether Article 81 of the TEC, pursuant to ss (2), renders void (in whole or in part) contracts between freight forwarders and their clients, which contracts contain Standard Terms similar to BIFA's Standard Form Contract; and/or
- X. Whether Article 82 of the TEC prohibits pursuant to Article 82 (a) TEC⁴², agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms because such terms breach ss (a) of Article 82 in that they "directly or indirectly [impose] unfair purchase or selling prices or other unfair trading conditions"⁴³; and/or
- XI. Whether Article 82 of the ECT prohibits pursuant to Article 82 (c) TEC⁴⁴, agreements such as that between Transport Ltd and Christie Unique Ltd which include BIFA Standard Terms because such terms breach ss (c) of Article 82 in that they [apply] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"⁴⁵.

The above example of hypothetical Questions referred to the ECJ by the English High Court conforms with the Treaties' (Nice and/or Lisbon) essential requirements for what can be considered by the ECJ, that is:

⁴² Ibid, Article 82 (a).

⁴³ Ibid.

⁴⁴ See Above n 11, Article 82 (c).

⁴⁵ Ibid.

- Nice, Article 234 (a) (b) and (c)⁴⁶; and
- Lisbon, Article 267 (a) and (b).⁴⁷

While the English High Court is not obliged under Nice or Lisbon to refer the above Questions to the ECJ, because the Questions are not “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”,⁴⁸ Christie Ltd submits that the interests of British justice are best served by a timely, expeditious and cost effective referral of the Questions by the High Court to the ECJ; rather than waiting for an appeal by either party from an adverse judgment of the High Court to the English Supreme Court or Judicial Committee of the House of Lords; and then asking that court to refer the relevant Questions to the ECJ.

The High Court does not have the competence to decide the issues raised by the Questions because they involve interpretation of Community (Union) law; and only the ECJ, or possibly the Court of First Instance (post Lisbon referred to as the General Court) as determined by the ECJ in the *Foto-Frost case*⁴⁹.

In this example, there is no ECJ case law on the subject Questions; that is the Questions are not precluded by the *Acte Clair Doctrine*⁵⁰: the Questions

⁴⁶ See above at n 11.

⁴⁷ See above at n 12.

⁴⁸ See above at n 11.

⁴⁹ *Firms Foto-Frost v Hauptzollamt Lubeck-Ost* (C- 314/85) [1987] ECR 4199.

⁵⁰ *Srl Cilfit and Lanificio di Gavardo SpA v Ministry of Health* (C-283/81) [1982] ECR 3415.

have not already been so clearly answered that the High Court not need seek the guidance of the ECJ to decide the Questions by way of a Preliminary Ruling.

III SUMMARY

The case being heard before the English High Court in this hypothetical example includes Questions that properly may be referred to European Court of Justice; the purpose of Article 234 Nice (267 Lisbon) being served by the High Court making the reference to the ECJ. The Questions raise issues that can only be decided by the ECJ. There is no existing case law subject to the *Acte Clair Doctrine*.

IV CONCLUSION

Article 234 Nice (Article 267 Lisbon) is an effective method of direct action by private parties who wish to seek the intervention of the ECJ to give effect to rights conferred on private parties by the Treaties (and relevant ECJ case law interpreting the Treaties and Community/Union legislation); notwithstanding the general rule of no horizontal direct effect of Council Directives. The development by the ECJ case law in respect of “indirect effect” and “harmonious interpretation” has been central in this regard.⁵¹

⁵¹ *Von Colson and Kamann v Land Nordrhein-Westfalen*, (C-14/83) [1984] ECR 1891; see also *Marleasing*, above at n 7; and *Pfeifer*, above at n 7.