

# **DOES THE CJEU NEED A NEW JUDICIAL APPROACH FOR THE 21<sup>ST</sup> CENTURY?**

## **A CJEU USER'S PERSPECTIVE**

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### Introduction

1. The subject of this evening's discussion is whether the European Court of Justice needs a new judicial approach for the 21<sup>st</sup> Century. The other speakers this evening will analyse the Court's approach to judicial reasoning as well as the factors (both internal and external to the institution) that shape its approach.
2. I would like to set the scene for that discussion by making an observation from the perspective of someone who practises in the area of EU law and who is sometimes in the position of having to persuade the English courts to make a reference to the CJEU. The observation is this: the quality of the Court's judgments is uneven and this appears to be having an impact on the willingness of our domestic courts to make references for preliminary rulings.

### Qualitative issues

3. Judge Rodin's paper identifies a number of types of criticism that are often levelled at the CJEU and explains that some of these related to matters within the court's control whilst others are caused by factors beyond its control.
4. I would suggest that the criticisms that are of most concern to domestic practitioners and judges fall into the following categories:
  - (a) The Court's approach to interpretation in some areas is overtly policy driven such that it pays insufficient regard to the express language of the rules it is interpreting. This tendency is analysed by Professor Wyatt in his paper.

- (b) The reasoning in judgments can suffer from a lack of coherence and transparency.
  - (c) The Court sometimes fails to deal in its judgments with key arguments on important points, leaving the litigant wondering why a particular argument has been rejected.
  - (d) There can be a mismatch between questions referred and questions answered because the Court regularly reframes the questions referred to it by national courts.
5. All of the above criticisms are within the control of the Court though it is fair to say that some of them are rendered more likely by factors outside the Court's control (notably the absence of dissenting judgments).

An example

6. The Court's *Sturgeon* and *TUI Travel* judgments illustrate all of the above deficiencies. *Sturgeon*<sup>1</sup> was a judgment that considered two references from the German and Austrian courts in relation to the interpretation of Regulation No 261/2004 which provides for compensation and assistance to air passengers in the event of denied boarding, cancellation and delays of flights. The Regulation distinguishes in terms between those three events and provides that airlines must pay compensation to passengers who are denied boarding or whose flights are cancelled and that passengers whose flights are delayed are not entitled to compensation but to other measures of assistance. The questions asked by the referring courts were directed at ascertaining whether or not a lengthy delay should be treated as a cancellation such that compensation became due.
7. Advocate General Sharpston held in her Opinion that the Regulation drew a clear distinction between cancellations and delays. However, she raised the question whether that distinction might offend the principle of equal treatment (on the basis that lengthy delays and cancellations are indistinguishable in their impact). As this question had not been raised in the order for reference and had not been the subject of any written or oral argument she recommended that the Court reopen the oral procedure to afford the parties the opportunity to address the point.

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<sup>1</sup> Joined Cases C-402/07 and C-432/07 *Sturgeon and others*.

8. The Court, sitting as a chamber of five, declined to do so and instead held that the principle of equal treatment required it to interpret the Regulation so as to afford a right to compensation in the event of a delay of three hours or more. The Court acknowledged that this conclusion did “*not expressly follow from the wording of [the Regulation]*” and its conclusion was inconsistent with the Grand Chamber judgment in *IATA*.<sup>2</sup>
9. Following this judgment, various airlines and IATA secured a reference from the High Court seeking to persuade the Court to reconsider its ruling. There was detailed argument on the legislative history of the measure which demonstrated that the legislature had intentionally distinguished between cancellations and delays and that there were good grounds for it having done so such that there was no breach of the principle of equal treatment.
10. The Grand Chamber in *TUI Travel*<sup>3</sup> endorsed the *Sturgeon* judgment simply by repeating the same reasoning. It did not address any of the arguments based on the legislative history of the measure or on the objective differences between cancellations and delays. The upshot was that in these judgments, the Court answered a question that had not been referred to it; did so without the benefit of any argument; reached a conclusion that was policy-driven and inconsistent with the plain wording of the legislation and the intention of the legislature; and when it had the opportunity to address the points again with the benefit of full argument, failed to do so.

#### Judicial observations

11. The *HS2*<sup>4</sup> appeal in the Supreme Court raised two main questions. The first was whether the Government’s decision to promote HS2 was “*required by administrative provisions*” and “*set the framework for development consent*” so as to engage the requirements of the SEA Directive.<sup>5</sup> The second was whether the Parliamentary hybrid bill procedure, pursuant to which the Government intended to obtain development consent for HS2, met the requirements of the EIA

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<sup>2</sup> C-344/04 *IATA*.

<sup>3</sup> Joined Cases C-581/10 and C-629/10 *TUI Travel and others*.

<sup>4</sup> *HS2 Action Alliance Limited v Secretary of State for Transport* [2014] UKSC 3.

<sup>5</sup> Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment.

Directive,<sup>6</sup> taking account in particular of the fact that the debate would be subject to a Government whip and that issues of principle would be excluded from the select committee stage.

12. Each of these questions arose because the plain wording of the relevant directives had been interpreted by the CJEU in a manner which did not accord with their literal meaning.
13. The application of the SEA Directive is stated to be limited to measures “*required by legislative, regulatory or administrative provisions*”. In her Opinion in *Inter-Environnement Bruxelles*,<sup>7</sup> Advocate General Kokott found, following a careful analysis of the legislative history of the measure and of its different language versions, that “*required*” meant what it says: “*it covers only plans or projects that are based on legal obligation*”. However, the Fourth Chamber rejected her conclusion with almost no explanation, holding that “*required*” means “*regulated*”.
14. Lord Neuberger and Lord Mance held as follows at [187]:

“Had the meaning of article 2(a) come before the Supreme Court without there being any European Court of Justice decision to assist, we would unhesitatingly have reached the same conclusion as Advocate General Kokott and for the reasons she (as well as the Governments and the Commission represented before the Fourth Chamber) so convincingly gave. We would, like her, have concluded that “*the legislature clearly did not intend*” plans and programmes not based on a legal obligation to require an environmental assessment, even though they might have had significant effects on the environment [AG20].

We would also have regarded this as clear to the point where no reference under the *CILFIT* principles was required. The reasons given by the Fourth Chamber of the Court of Justice would not have persuaded us to the contrary. While they allude, in the briefest of terms, to the fact that the Governments made submissions based on the clear language of article 2(a) and the legislative history, they do not actually address or answer them or any other aspect of Advocate General Kokott’s reasoning.

In the result, a national court is faced with a clear legislative provision, to which the Fourth Chamber of the European Court of Justice has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend. For this reason, we would, had it been necessary, have wished to have the matter referred back to the European Court of Justice for it to reconsider,

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<sup>6</sup> Directive 2011/92/EC on the assessment of the effects of certain public and private projects on the environment.

<sup>7</sup> Case C-567/10 *Inter-Environnement Bruxelles*.

hopefully in a fully reasoned judgment of the Grand Chamber, the correctness of its previous decision.”

15. The application of the EIA Directive is excluded by virtue of Article 1(4) in respect of “*projects the details of which are adopted by a specific act of legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process*”.
16. On their face, the words “*since...legislative process*” are a statement of fact which explain why this category of project is excluded from the requirements of the EIA Directive. However, the CJEU has interpreted the word “*since*” as meaning “*provided that*” with the consequence that projects adopted by a specific act of legislation are only excluded from the Directive if the legislative process enables the objectives of the Directive to be achieved. Again, the reasoning of the CJEU is sparse. As Lord Neuberger and Lord Mance observed: the “*case-law does not identify any textual or contextual basis for the conclusions reached in respect of [Article 1(4)]. Its reasoning was based exclusively on the ‘objectives’ of the Directive. But the extent to which the European legislature concluded that these general objectives could and should be met, must be gathered from the Directive*”.<sup>8</sup>
17. The CJEU’s interpretation of Article 1(4) raises the question of the extent to which national courts are required by the Directive to scrutinise the procedures followed by their national parliaments. Two Advocates General have concluded that the Directive requires close scrutiny by national judges of the legislative process in order to ascertain whether the legislature has been able properly to examine and debate the proposal and whether they have performed their democratic function correctly and effectively.<sup>9</sup>
18. The Supreme Court unanimously held that such an approach would raise an issue under Article 9 of the Bill of Rights (“*a provision of the highest constitutional importance*”) which precludes the impeaching or questioning in any court of debates or proceedings in Parliament. Ultimately, the Court held that it did not need to make a reference on the point to the CJEU because the CJEU had not endorsed the wide conclusions of the two Advocates General and that “*it will also*

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<sup>8</sup> *HS2* at [196].

<sup>9</sup> Advocate General Kokott in Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias*; and Advocate General Sharpston in Joined Cases C-128/09 etc *Boxus*.

have been well aware of the principles of separation of powers and mutual internal respect which govern the relations between different branches of modern democracies... The Court cannot have overlooked or destabilised these". The Supreme Court also endorsed the view advanced by the German Federal Constitutional Court<sup>10</sup> in its judgment of 24 April 2013 on the Counter-Terrorism Database Act, that a decision of the CJEU should not be read by a national court in a way that places in question the identity of the national constitutional order.<sup>11</sup>

19. In addressing the interpretation accorded by the CJEU to the relevant provisions in each Directive, Lord Neuberger and Lord Mance stated that the following important practical consequences ensue "*if citizens and other users of the law cannot be confident that European legislation will be given its intended and obvious effect*": (i) a risk of loss of confidence at national level in EU law and a "*risk of impairment of the all-important dialogue between national courts and the Court of Justice, with its vital role of interpreting and consolidating the role of European law*"; (ii) national courts will find it much more difficult to decide whether a point of EU law is *acte clair* or not, and (iii) legislative drafting will become more difficult.<sup>12</sup>
20. The Supreme Court is not alone in expressing misgivings about the quality of the CJEU's reasoning.<sup>13</sup>
21. On several occasions, the English Courts have considered it necessary to make further references to the CJEU on an identical question of interpretation because the answer provided on the first reference was unclear. *Actavis v Sanofi*<sup>14</sup> is an example of this. Arnold J referred a question on the construction of Article 3(a) of the SPC Regulation<sup>15</sup> despite the fact that the question had been the subject of a

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<sup>10</sup> A court which made its very first reference to the CJEU in February 2014.

<sup>11</sup> *HS2* at [111] and [202].

<sup>12</sup> *HS2* at [172]-[174].

<sup>13</sup> See also *O'Byrne v Aventis Pasteur* [2008] UKHL 34, where a reference had been made to the European Court by the first instance judge. When the case reached the House of Lords, four members of the House thought that the CJEU's ruling meant one thing but Lord Rodger disagreed as to how the ruling should be interpreted. This necessitated a further reference.

<sup>14</sup> *Actavis v Sanofi* [2012] EWHC 2545 (Pat).

<sup>15</sup> Regulation 469/2009/EC concerning the supplementary protection certificate for medicinal products.

reference in five earlier cases. In his judgment in *Novartis Pharmaceuticals v MedImmune*,<sup>16</sup> Arnold J observed as follows:

“...the Court did not actually answer question 1 [of the reference in *Medeva*]. I have to say that, as the national judge who made one of the references before the Court, I am disappointed by this. One of the reasons for the multiplicity of references was the need of national courts for clear guidance as to the criteria to be applied in deciding whether a product is ‘protected by a basic patent’ within the meaning of Article 3(a)... not only has the Court not answered the question referred, but also the guidance it has provided is not sufficiently clear to enable future disputes to be resolved.”

22. The Court of Appeal subsequently endorsed these observations of Arnold J, holding that the issue would “*necessitate further references in due course*”.<sup>17</sup>
23. Arnold J considered that *Actavis* was an appropriate case for such a further reference and referred a question on the interpretation of Article 3(a) (to which he offered his own suggested answer “[i]n the hope that it will assist the Court of Justice to provide a clear answer this time”<sup>18</sup>) as well as a question on the interpretation of Article 3(c) of the Regulation.
24. In the event, the CJEU answered only the question on Article 3(c) taking the view that, in light of its answer, the question on Article 3(a) did not arise on the facts.<sup>19</sup> It has now, in yet a further reference from the High Court, addressed a narrower question on the interpretation of Article 3(a) of the Regulation.<sup>20</sup>
25. Recently, in *Walker v Innospec*,<sup>21</sup> the Court of Appeal had to consider two Grand Chamber judgments in the course of determining whether the effect of the Framework Directive was that the Appellant’s pension fund was required to pay a surviving spouse’s pension to his husband in the event that he outlived him. The Court of Appeal rejected the Appellant’s contention that the two judgments in question supported his appeal (which they did on their face), describing them as “*puzzling*” and “*frankly opaque*” and concluding that, in relation to one judgment,

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<sup>16</sup> *Novartis Pharmaceuticals UK Ltd v MedImmune Ltd* [2012] EWHC 181 (Pat) at [42].

<sup>17</sup> *Medeva BV v Comptroller of Patents* [2012] EWCA Civ 523, at [32]-[33].

<sup>18</sup> *Actavis* at [75].

<sup>19</sup> Case C-443/12 *Actavis*.

<sup>20</sup> Case C-577/13 *Actavis v Boehringer*.

<sup>21</sup> *Walker v Innospec* [2015] EWCA Civ 1000.

the European Court “gave an unnecessary answer to the wrong question”<sup>22</sup> and, in relation to the other, that it was “very difficult to understand the relevance of this question”.

26. Although frustration with the reasoning of the CJEU may be building, none of this is new.<sup>23</sup> In *Kaba*, the Immigration Adjudicator made a second reference to the European Court<sup>24</sup> on the compatibility with the EU free movement provisions of national requirements concerning applications for leave to remain made by spouses of EU nationals. The Adjudicator took the view that the Court had, in giving its ruling on the first reference,<sup>25</sup> misconstrued the relevant domestic legislation. Although this had been drawn to the attention of the Court after publication of the Advocate General’s Opinion, the Court had not reopened the oral procedure; nor had it taken account of the points in its ruling.

#### Impact on references to the European Court?

27. Qualitative concerns about the judgments of the CJEU are likely to have an effect on whether our domestic courts make references for preliminary rulings. It is difficult to say what the net effect is likely to be as such concerns can cut both ways. They can have the effect of making it more likely that courts refer (as in the *Actavis* saga) because the CJEU has failed to clearly to interpret a provision of EU law or has failed to answer a question referred by the national court. Similarly, lack of certainty as to what is or is not *acte clair* may, as Lord Neuberger and Lord Mance observed in *HS2*, lead to “the risk of Court of Justice’s already heavy caseload becoming over-loaded with references”.<sup>26</sup>
28. But concerns about quality of reasoning can also have the opposite effect of making national courts more reluctant to refer because of a lack of confidence in the ruling that might be given. It would be unwise to draw conclusions from statistics alone but it is at least relevant to observe that in the years 2013 and 2014, UK Courts made 14 and 12 references respectively to the CJEU. The analogous figures for Germany are 97 and 87, for Spain – 26 and 41, for France

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<sup>22</sup> *Walker* at [40].

<sup>23</sup> See, eg, the Sunday trading litigation where several further references were required following the Court’s opaque ruling in Case C-145/88 *Torfaen*.

<sup>24</sup> Case C-466/00 *Kaba*.

<sup>25</sup> Case C-356/98 *Kaba*.

<sup>26</sup> *HS2* at [173].

– 24 and 20, and for Italy – 62 and 52. The UK’s figures are very similar to those of Belgium (10 and 13).

29. I would also venture to suggest that there are several cases in which the Supreme Court has chosen not to make a reference to the CJEU in circumstances where it is difficult to say that the matter is *acte clair*.

30. *HS2* is a case in point. I find the Court reasoning on its decision not to refer the SEA Directive points to be convincing (see in particular Lord Sumption’s judgment). However, in my view it is difficult to say that issues arising under the *EIA* are *acte clair*. In particular, although the CJEU in *Boxus* and *Nomarchiaki* did not endorse the expansive reasoning of the two Advocates General, nor did it purport to address as a matter of principle the degree of scrutiny that Courts must apply in respect of parliamentary procedures. In both cases the Court stated that a parliamentary process would not meet the objectives of the Directive if it merely ‘ratified’ a decision without more.<sup>27</sup> But this leaves open the question of what more is required in order for a national court to be able to conclude that a legislative process meets the objectives of the Directive. The CJEU clearly envisaged that some degree of scrutiny must be exercised by national courts, holding in *Boxus* at [48] that:

“It is for the national court to verify that [the objectives of the Directive] have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates.”

31. Thus, although the reasoning of the Supreme Court to the effect that the CJEU must be assumed to be well aware of principles of separation of powers and cannot have intended to destabilise these is – with respect – compelling, it is difficult to derive firm support for this reasoning from the relevant CJEU judgments themselves such as to conclude that the matter is *acte clair*.

32. In *HMRC v Aimia Coalition*,<sup>28</sup> a VAT case, the Supreme Court refused – for the first time – to give effect to a preliminary ruling. Unusually, the reference had been made by the Supreme Court without hearing the appeal. The CJEU considered that the reference raised no new point of law and dispensed with the

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<sup>27</sup> See *Nomarchiaki* at [88]; *Boxus* at [48].

<sup>28</sup> *HMRC v Aimia Coalition*

need for an Advocate General’s opinion. It also reformulated the question such that it no longer addressed the interpretation of the VAT directive but instead considered specifically what the VAT treatment was of the payments at issue in the particular case. The Supreme Court (by a 3-2 majority) held that the CJEU had failed to take account of relevant facts and so had misinterpreted the question on the appeal.<sup>29</sup> The majority consequently did not apply the ruling. Lord Carnwath and Lord Wilson dissented, holding that “[i]n light of the CJEU judgment, I would have regarded the appeal as bound to succeed. With respect to my colleagues, I find it difficult to see how their contrary view can be compatible with our responsibilities under the European Communities Act 1972”.

33. In *HMRC v Aimia Coalition (No 2)*,<sup>30</sup> the Supreme Court considered further written submissions adduced by the parties and in which the Appellant argued that the Court should make a further reference to the CJEU. One of the Appellant’s arguments was that a reference was necessary because there had been a difference of view on EU law between the majority and minority of the Court in its first judgment. The Supreme Court declined to make a further reference despite that difference of view, holding as follows:

“Although the minority of the court questioned the approach adopted in the majority judgments to the application of EU law and to the judgment of the European court, those criticisms were not accepted by the majority, and they are not regarded by the court as now requiring or justifying a further reference.”<sup>31</sup>

34. Although the decision not to refer may have been pragmatically sound, it is – with respect – a little difficult to characterise as *acte clair* a point of EU law on which two members of the Supreme Court have dissented.
35. Finally, a topical example of the Supreme Court not making a reference in circumstances in which it might have done is provided by the prisoners’ voting saga. In *Chester v Secretary of State for Justice*,<sup>32</sup> the Supreme Court declined to make a reference on the question whether the ban on prisoners voting in European Parliamentary elections contravened EU law. Two important bases for this decision were as follows. First, EU law does not confer a right on a Member

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<sup>29</sup> See [41].

<sup>30</sup> *HMRC v Aimia Coalition (No 2)* [2013] UKSC 42.

<sup>31</sup> *Aimia Coalition (No 2)* at [6].

<sup>32</sup> *Chester v Secretary of State for Justice* [2013] UKSC 63.

State's own nationals to vote in European Parliamentary elections: Articles 20(2)(b) and 22 TFEU are rules of equal treatment requiring Union Citizens residing in Member States of which they are not nationals to be able to vote in Parliamentary elections "*under the same conditions as nationals*". Second, the principle of non-discrimination was not engaged because the facts did not fall within the scope of EU law.

36. In support of these conclusions, Lord Mance (giving the leading judgment) referred to the two CJEU judgments most in point: *Spain v United Kingdom*<sup>33</sup> and *Eman and Sevinger*.<sup>34</sup> Those judgments established that the right conferred by Article 22 TFEU was a right to non-discrimination enjoyed by nationals of Member States other than the host State. The judgments further made clear that EU law does not defined who is entitled to vote in European Parliamentary elections and so the definition of the persons entitled to exercise that right is a matter for each Member State to determine.
37. However, the CJEU has very recently given judgment in *Delvigne*,<sup>35</sup> a reference from the French courts concerning the compatibility of French legislation restricting the rights of prisoners to vote in European elections. The CJEU held that the issue *does* fall within the scope of the EU law such as to engage the application of the Charter of Fundamental Rights and the general principles of EU law. The Court acknowledged that the effect of its judgments in *Spain v UK* and *Eman and Sevinger* was as understood by the Supreme Court.<sup>36</sup>
38. But the CJEU held that the facts at issue did fall within the scope of EU law because of the application of Article 14(3) TEU which provides that "*the members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot*".<sup>37</sup> The Court's reasoning is scant but it is presumably relying on the words "*universal suffrage*" and extrapolating from those words that every Union citizen has a *prima facie* right to vote in European Parliamentary elections. The CJEU then went on to find that national

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<sup>33</sup> Case C-145/04 *Spain v United Kingdom*.

<sup>34</sup> Case C-300/04 *Eman and Sevinger*.

<sup>35</sup> Case C-650/13 *Delvigne*.

<sup>36</sup> *Delvigne* at [31] and [42].

<sup>37</sup> *Delvigne* at [32].

legislation limiting this right must comply with the Charter and with the principle of proportionality.

39. The CJEU's ruling does not, in my view, necessarily demonstrate that the Supreme Court was wrong not to refer. Its decision was based not only on the considerations described above but also on its conclusion that, even if engaged, EU law would not compel a different approach to that under the ECHR. But the ruling in *Delvigne* does highlight the pitfalls for a national court in placing weight on the reasoning of previous CJEU judgments and on that basis determining that a matter is *acte clair*.