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I. INTRODUCTION

In many ways the most important aspect of the work of the European Court of Justice (ECJ or Court of Justice) is its jurisdiction to give "preliminary rulings" under Article 177 of the Treaty of Rome[1]. Disputes involving Community law never come directly before the Court of Justice, but rather before the courts and tribunals of the Member States. Treaty provisions enable the Court of Justice to rule on questions of Community law, which arise in such litigation.[2] The system of "preliminary rulings" has proved a particularly effective means of securing rights claimed under Community law.[3] The term "preliminary ruling" is somewhat of a misnomer. The ruling is requested and given in the course of proceedings before the national court.[4] It is therefore an interlocutory ruling, a step in the proceeding before the national court.[5] The effect is that any question of Community law in an issue be-

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1. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, U.J. (C224) 1 (1992), [1992] (C.M.L.R. 573 (1992) [hereinafter EEC TREATY].

2. Article 177 EEC Treaty provides:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning: the interpretation of this Treaty; the validity and interpretation of acts of the institutions of the Community; the interpretation of the statutes of the 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 on the question is necessary to enable it to give judgement, 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 court or tribunal *shall* bring the matter before the Court of Justice.

Id. art. 177.

3. *See generally* NEVILLE BROWN & FRANCIS G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (3rd ed. 1989).

4. *Id.* at 172.

5. *Id.* at 171.

fore a national court may be authoritatively determined by the Court of Justice. A national court is in all cases entitled, and in some cases, *required* to make a reference to the Court; and the Court is the final arbiter on matters of Community law, though the case is heard in a national forum.[6] The need for a system of preliminary rulings can be seen most clearly in relation to questions of validity of Community legislation.[7] For a national court to declare Community legislation invalid would lead to intolerable confusion.[8] Furthermore, a similar line of reasoning may apply equally well to questions of interpretation. The applicability of Community law in a particular case depends as much upon its interpretation as upon its validity.[9] A narrow interpretation of legislation could be tantamount to holding it invalid, or the actual validity may depend on strict construction.[10] Thus, uniform interpretation of Community law is necessary for uniform application of Community law.[11] Without uniform application, Community law would be liable to fragment and become overlaid by various national legal systems.[12]

This article will examine the implications for Article 177(3) references in light of the holding and analysis by the Court of Justice in *Parfums Christian Dior SA & Parfumes Christian Dior BV v. Evora BV.*[13] This case re-examined what constitutes a national court whose decisions are final for the purpose of Article 177(3) and solidified the circumstances when such a court must refer to the ECJ for a preliminary ruling. However, in not following the opinion of the Advocate General the ECJ missed an opportunity to finally overrule a loophole in the review process first established in CILFIT *& Lannificio di Gavardo Spa v. Ministry of Health.*[14]

6. BROWN & Jacobs, *supra* note 2 at 172.

7. *See id.* at 173.

8. *See id.*

9. *Id.* at 174.

10. *Id.*

11. "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community." *Id.* (*quoting* Case 166/73 Rheinmuhlen [1974] ECR 33 at 38).

12. *See id.* at 175

13. Case 337/95, Parfums Christian Dior SA & Parfumes Christian Dior BV v. Evora BV, 1997 ECJ CELEX LEXIS 4641 [hereinafter *Dior*].

14. Case 283/81 CILFIT & Lannificio di Gavardo Spa v. Ministry of Health 1982 ECR 3415, ECJ CELEX LEXIS 1474 [hereinafter *CILFIT*].

II. CASE DESCRIPTION

A. *Summary of Facts*

Dior[15] commenced proceedings against Evora[16] on the grounds of trademark infringement. Dior put forth two claims: (1) that the marks have been used in breach of its exclusive right to use the marks in respect to the same goods in violation of Article 13A of the Uniform Benelux Law on Trademarks; or, (2) that the marks have been used in circumstances liable to cause damage by impairing the prestige and image of the marks.[17] Dior further claimed that Evora infringed on its

15. Parfums Christian Dior SA (Dior France) owns the exclusive rights to Eau Sauvage, Poison, Fahrenheit, Svelte, and Dune trademarks in the Benelux countries. The marks consist of package illustrations for perfume bottles. Additionaly, Dior France owns the copyright to the packaging and the bottles. The second plaintiff, Parfums Christian Dior BV (Dior Netherlands) is the exclusive franchisee of Dior France in the Netherlands. Dior Netherlands uses a *selective distribution system* to sell the products in the Netherlands. Selective distribution systems are lawful in the luxury cosmetics sector. Selected retailers can only sell the products to the ultimate consumer or another selected retailer. Selective distribution systems can be justified by the particular nature of the products: Selective distribution systems constitute an element of competition which is in conformity with Article 85(1) of the EEC Treaty if four conditions are satisfied: first, that the characteristics of the product in question necessitate a selective distribution system, in the sense that such a system constitutes a legitimate requirement having regard to the nature of the product concerned, in particular its high quality or technical sophistication, in order to preserve its quality and ensure proper use; second, that resellers are chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and not applied in a discriminatory fashion; third, that the system in question seeks to achieve a result which enhances competition and thus counterbalances the restriction of competition inherent in selective distribution systems, in particular as regards price; and fourth, that the criteria laid down do not go beyond what is necessary. Case T-88/92, Groupement d'achat Edouard Leclerc v. Commission of the European Communities, 1996 E.C.R., ECJ CELEX LEXIS 4474 ¶ 106 (Ct. First Instance 1996).

16. The defendant, Evora BV (Evora), operates a chain of chemist shops under the name of its subsidiary Kruidvat. Kruidvat shops are not part of the selected distribution system, but sell Dior products obtained by *parallel imports*. Parallel imports are products which are not obtained directly from Dior or its distributors, but which have already been marketed by Dior or with its consent. Parallel importers purchase products in batches in Member States where prices are relatively low and import them to sell below the manufactures official price while still making a profit. In a Christmas promotion in 1993, Kruidvat advertised, without Dior's consent, Eau Sauvage, Poison, Fahrenheit, Dune and Svelte perfumes, using depictions of the packaging and bottles of those products. Kruidvat carried out the advertising in a manner customary to retailers in the parallel imports sector.

17. *Dior*, 1997 ECJ CELEX LEXIS ¶ 3 (opinion of Mr. Advocate General Jacobs, delivered 29 April 1997) (second indent of the first paragraph of Article 13A of the Benelux Law entitled a trade mark owner to oppose any other use of the mark or a similar sign, in circumstances, which in the field of commerce, and without just cause, were liable to prejudice the trade mark owner).

copyright regarding bottles and packaging used for its goods.[18] Dior sought an order that Evora "should desist and continue to desist from making any use of Dior picture trade marks, and from any publication or reproduction of Diors' products.[19]

B. Procedural History in the Netherlands

The *Arrondissementsrechtbank Haarlem* (District Court) upheld Dior's claim and issued an injunction ordering Evora to desist and to continue to desist from using any of Dior's trademarks in "catalogues, brochures, advertisement or otherwise, in a manner not conforming to Dior's customary manner of advertising."[20] The injunction was set aside on appeal to the *Gerechtshof* (Regional Court of Appeals), against which Dior took the matter to *Hoge Raad* (Supreme Court).[21] In some circumstances requiring interpretation of Benelux Law, the *Hoge Raad* is required to refer questions to the Benelux Court for a preliminary ruling.[22] *Hoge Raad* decided that questions on the interpretation of the Uniform Benelux Law on Trade Marks should be referred to the Benelux Court, and questions on Community law should be refereed to the Court of Justice, and therefore stayed proceedings.[23] The Benelux Court also stayed its proceedings before it on the grounds that replies to questions submitted to the Court of Justice will effect its own response.[24]

The Court of Justice faced the following procedural question: in proceedings relating to interpretation of Uniform Benelux Law on

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18. *See id.*

19. *See id.* ¶ 7.

20. *See id.*

21. *See id.*

22. *See id.* ¶ 26. The Benelux Court may be asked by any court in the Benelux countries, under Article 6, to rule on a question of interpretation of Benelux law where there is a difficulty of interpretation and the national court considers that a decision on the question is necessary to enable it to give judgment. By the third paragraph of the same article, a national court against whose decisions there is no judicial remedy under national law is required to refer to the Benelux court. Article 7(2) of the treaty establishing the Benelux court provides that the national courts which take decisions subsequently in the action are bound by the interpretation adopted by the Benelux court. *Id.*

23. *Id.* The Benelux Convention on Trade Marks (Benelux Convention) (concluded between Belgium, Luxembourg, and the Netherlands) established the Benelux Court, which is composed of judges of the supreme courts of each of those three States. Article 10 of the Benelux Convention was concluded on 19 March 1962, and Article 6(3), concluded 31 March 1965, established the Benelux Court. Under Article 177(3) of the EC Treaty, a court of the Member State against whose decisions there is no remedy under national law is obliged to make a reference to the Court of Justice for a preliminary ruling. *Id.*

24. *See id.*

Trade Marks and interpretation of Council Directive 89/104/EEC[25], is the highest national court or the Benelux Court to be regarded as the court against whose decisions there is no remedy under national law and which is therefore required to refer to the Court of Justice for a preliminary ruling under Article 177.[26]

C. Opinion of Mr. Advocate General Jacobs

The Advocate General first noted that the appeal in the present case is in the context of an interlocutory proceeding.[27] Therefore, neither court is obliged to refer to the Court of Justice, provided that each party is entitled to continue proceedings on the substance of the case, and any question decided in the interlocutory proceeding may be the subject of a future reference to the Court.[28] However, the Advocate General thought it might be useful to complete the analyses.[29] He opinioned that interlocutory proceedings before the Benelux Court are a step in the proceedings before a national court; the answer given by the Benelux Court is binding on the referring national court; therefore, the Benelux Court is obligated to refer to the Court of Justice when the question presented depends on interpretation of Community law.[30] The only exception the Advocate General envisioned to a mandatory Article 177 reference centers on a lower court, in the same proceeding, already having made reference on the same question.[31] Simply, a court of a Member State "whose decisions are final should not decide a question of Community law" without a ruling from the Court of Justice.[32] The requirements of Article 177(3) will be satisfied so long as the Court of Justice gives a ruling at some stage of the case.[33]

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25. At the time in question the law amending the Benelux Law in light of the First Council Directive 89/104/EEC of 21 December 1988, to approximate the laws of the Member States, known as the Trade Mark Directive, had not come into force. However, where an individual relies on a directive which has not been transposed in the national legal system within the period laid down, the national rules are to be interpreted, as far as possible, in the light of the wording and purpose of the directive. *See* Case 91/92, Faccini Dori v. Recreb, 1994 ECR I-3325. Furthermore, this rule does not apply as the implementation period expired prior to events giving rise to this action.

26. *Id.* ¶ 14.

27. *Dior*, 1997 ECJ CELEX LEXIS (Opinion of Mr. Advocate General Jacobs delivered 29 April 1997).

28. *See id.*

29. *See id.* ¶ 25.

30. *Id.* ¶ 27.

31. *Id.*

32. *Id.* ¶ 28.

33. *See id.*

D. Court's Holding and Analysis

The court held that both the Benelux Court and the *Hoge Raad* are courts "against whose decisions there is no remedy under national law."[34] Therefore, both must make a reference to the Court of Justice under Article 177(3), when interpreting Uniform Benelux Law on Trade Marks in light of First Council Directive to approximate the laws of Member States relating to trade marks.[35] However, this obligation is not required when the question is substantially the same as one that has already been the subject of a preliminary ruling in the same national proceeding.[36]

In starting the analysis on the issue, the Court of Justice first examined whether a supranational court may refer questions for a preliminary ruling, and if so, whether there are circumstances when it would be obliged to do so.[37] In answering the question presented, the ECJ began with the premise that the Benelux Court could submit questions for a preliminary ruling.[38] Therefore, as reasoned by the ECJ there is no good reason why a court, common to a number of Member States, should not be able to submit questions for a preliminary ruling.[39] The Benelux Court has the task of ensuring that the Benelux countries uniformly apply the common legal rules.[40] It follows that a procedure before the Benelux Court is a step in the proceedings before the national courts, leading to a final interpretation of common legal rules.[41] Therefore, a national court faced with a task of interpreting Community legal rules should be allowed to follow the procedure established by Article 177 in order to serve the purposes of that provision.[42]

Since the Benelux Court is a court of a Member State, if a question of Community law is raised in a case, and there is no judicial remedy against its decision under national law, pursuant to Article 177(3), a reference for a preliminary ruling must be made to the Court of Justice.[43] This obligation to refer is based on cooperation, and ensures the proper application of Community law in all Member States.[44] The pur-

34. *Id.*
35. *See id.*
36. *See id.*
37. *See id.* at ¶ 19.
38. *Id.* ¶ 20.
39. *Id.* ¶ 21.
40. *See id.* at ¶ 22.
41. *See id.*
42. *See id.* ¶ 23 (the purpose of Article 177 is to ensure uniform interpretation of Community law).
43. *See id.* ¶ 24 (a court like the Benelux Court may be under an obligation to refer a question to the Court of Justice).
44. *See id.* ¶ 25. *See also CILFIT*, 1982 ECR 3415, ¶ 7.

pose of Article 177(3) is to prevent the creation of a body of national case law, that is not in accord with the rules of Community law.[45] The Court of Justice reasoned that where no appeal is possible against a decision of a supranational court of Member States, the court may be obliged to make a reference under Article 177(3), where a question of Community law is raised.[46]

However, in the situation faced by the *Hoge Raad*, it does not follow that both courts are obliged to make a reference to the Court of Justice.[47] If a substantially the same question has been raised as one that already has been the subject of a preliminary ruling in a similar case, the obligation of the ECJ to provide an interpretation may be without purpose.[48] It follows that if the question raised is the same as a question that has already been the subject of a preliminary ruling in the same national proceedings, the court of last resort is not obliged to refer the question to the Court of Justice.[49] Therefore, the law does not oblige the Benelux court to make a reference for a preliminary ruling if the *Hoge Raad* has already done so in the same case on the same question.[50] However, if the *Hoge Raad* made no such reference, then a supranational court, like the Benelux Court, is required to submit the question prior to giving its final judgement.[51] This answer differed slightly from the response given in the advocate general opinion. The advocate general opinion called for only one exception to requirements of an Article 177(3) reference.[52] The Court of Justice did not follow the Advocate General opinion in allowing only one exception to requirements of Article 177(3) reference, but instead followed established case law on the issue.[53]

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45. *Dior*, 1997 ECJ CELEX LEXIS. *See also* Case 107/76, Hoffman-La Roche v. Centrafarm, 1977 ECR 957, ¶ 5, ECJ CELEX LEXIS 914.

46. *Id.* ¶ 26.

47. *See id.* ¶ 28 (a reference by *Hoge Raad* and the Benelux Court in deciding the same case is not necessarily required).

48. *See id.* "According to the established case-law of the Court . . . the authority of an interpretation provided by the Court under Article 177 may deprive that obligation of its purpose and thus empty it of its substance. This is especially so when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in a similar case." *Id.*

49. *Id.*

50. *Id.* ¶ 30.

51. *Id.*

52. *Dior*, 1997 ECJ CELEX LEXIS ¶ 27 ("[S]ince the answer given . . . is binding on the referring court, the Benelux Court is . . . obliged to refer when the answer to a question referred depends upon the interpretation of a provision of Community Law. The only exception would be where the referring court has itself made a reference to this Court.").

53. *See id. See generally* Joined Cases 28-30/62, Da Costa v. Nederlandse Belastingsadministratie, 1963 ECR 31; *CILFIT*, 1982 ECR 3415,

III. ANALYSIS

The Court of Justice has on several prior occasions considered the definition of a court or tribunal of a Member State under Article 177. The Court has left itself free to determine the notion of a national court or tribunal for the purpose of Article 177 only.[54] In the past, to ensure the ECJ does not deprive itself of the competence to issue preliminary rulings, the ECJ widely and liberally construed this notion.[55] However, the Court is rather reserved in its analysis of the issue.[56] This case did not depart from that precedent. The Court simply could have found no "good reason" why a supranational court should not be able to submit questions for a preliminary ruling.[57] Judging by prior case law and this decision, what constitutes a 'national court' under Article 177 is not the same as under national laws.[58] Only on one prior occasion did the ECJ elaborate its views on this issue.[59] In *Vaassen*, an arbitration tribunal, established under Dutch law for settling social security disputes, made a reference to the ECJ. The ECJ considered the nature of the tribunal, its functions, its jurisdiction, its powers, the rules of procedure, and the law to be applied.[60] The Court of Justice further stressed the permanent nature of the tribunal and the compulsory jurisdiction of the tribunal.[61] According to case law, it is of no importance whether the referring body is considered a court under national law.[62] Instead, the decisive factors are rather the judicial functions of the body, application of procedural rules, and operation within consent of the public.[63] In case of doubt, the Court of Justice will make this decision.[64]

Given past analysis and case law, it is not a surprise that a supranational court of some Member States might be required to make an Article 177 reference. However, in not following the opinion provided by the Advocate General the court lost an opportunity to close a significant

54. *See generally* GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES (1981).

55. *Id.* at 368. *See generally* Preliminary ruling No. 61/65, [1966] ECR 261 (dealing with a request for a preliminary ruling from a Dutch social security arbitration panel).

56. *Id.*

57. *Dior*, 1997 ECJ CELEX LEXIS ¶ 21.

58. BEBR, *supra* note 54 at 368 (*citing* Case 61/65 Vaassen v. Beambtenfonds Mijnbedrif 1966 ECR 280, 281).

59. *See id.*

60. *Id.*

61. *See id.*

62. *See* MADS ANDENAS, ARTICLE 177 REFERENCES TO THE EUROPEAN COURT-POLICY AND PRACTICE (1994).

63. *Id.* at 149.

64. *Id.*

loophole in Article 177 review process. Two exceptions created by case law are available to a court facing the question whether or not a reference should be made to the Court of Justice.[65] The exceptions, *acte eclaire* and *acte clair,* were developed in two judgements of the Court of Justice: *Da Costa v. Nederlandse Belastingsadministratie* (*Da Costa*)[66] and *CILFIT & Lannificio di Gavardo Spa v. Ministry of Health* (*CILFIT*).[67]

A. Acte Eclaire

The doctrine of *acte eclaire*[68] allows a court falling under Article 177(3) to be exempt from the obligation to refer where previous decisions of the Court of Justice have already dealt with the point of law in question. This doctrine applies irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.[69] This doctrine, clarified by the Court in *Da Costa,*[70] alleviated the obligation to refer under the condition that it already interpreted the same provision of Community law.[71] In the opinion of the Court, such a preliminary ruling "may deprive the obligation of its purpose and thus empty it of its substance."[72] "Such is the case,"reasoned the Court, "when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."[73] This language, echoed in the current case, might be too simple to ensure consistent application of Article 177 review.[74] The obligation of the courts of last resort is liberalized if they are trying to interpret the same Community laws provision under "similar" circumstances.[75] This identification of a "similar" question is deceptive, offering national courts a loophole, or leading them to a wrong conclusion.[76] In the past some courts have taken the requirements of this rule too liberally.[77] As a result, they did not make a refer-

65. *Id.* at 17.

66. Joined Cases 28-30/62, Da Costa v. Nederlandse Belastingsadministratie, 1963 ECR 31.

67. *CILFIT,* 1982 ECR 3415, ¶ 7.

68. "Well informed act." MARIE-HELENE CORREARD & VALERIE GRUNDY, THE CONCISE OXFORD-HACHETTE FRENCH DICTIONARY (1995).

69. ANDENAS *supra* note 62 (*citing CILFIT,* 1982 ECR 3415, 3429 ¶ 14).

70. *De Costa,* 1963 ECR 31.

71. BEBR, *supra* note 54, at 511.

72. *Id.* (*citing Da Costa,* 1963 ECR 31).

73. *See id.*

74. *See id.*

75. *Id.*

76. *Id.*

77. *See generally* van Boven v. Etat belge, 27 Recueil de jurisprudence du droit administatif et du Conseil d'Etat 287 (1972) (Belgian court deciding whether an unemployment compensation is governed by the provision for equal pay between sexes by using a

ence to the Court of Justice in instances where they interpreted a provision of similar content of another Community rule.[78] This practice becomes a threat to uniformity of Community law if the highest national courts interpret a provision by analogy with a preliminary ruling interpreting another provision, or by disregarding the preliminary ruling and interpreting the provision in their own way.[79] It is doubtful that *Da Costa* intended to provide such a wide margin of discretion to national courts.[80] Unfortunately, the Court of Justice in the present case missed an opportunity to close this loophole for national courts to avoid their obligation under Article 177(3).[81]

B. Acte Clair

The doctrine of *acte clair*[82], derived from French law, subsumes the *acte eclaire* and goes beyond it, giving national courts authority to interpret Community law.[83] *Acte clair* exempts national courts from the requirement of making a reference if the answer to the question presented is sufficiently obvious, even if there is no decision of the ECJ directly on point.[84] In *CILFIT*,[85] the Court of Justice spelled out the conditions that must be satisfied before a national court of last instance can invoke *acte clair*.[86] The national court must bear in mind the risk of its decision diverging with prior judicial decisions in the Community.[87] Furthermore, the national court must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice.[88] In reaching this conclusion, the national court must consider "[t]he specific characteristics of Community law, the particular difficulties to which its interpretation gives rise, and the risk of divergences in

previous preliminary ruling from a case dealing with pension rights); 16 Aussenwirtschaftsdienst des Betriebsberaters 230 (1970) (German court deciding whether a special turnover tax on exports is a customs duty, prohibited by Article 12, by using several preliminary rulings dealing with compensatory taxes pursuant to agriculture regulations); 3 Revue Trimestrielle de Droit Eropéen 681-696 (1967) (French court deciding whether a para-fiscal charge on processing tomatoes infringed Article 91 and 92. The court held that Article 93 interpretation applies to Article 92, thereby refusing to make a reference to the ECJ).

78. BEBR, *supra* note 54, at 512.

79. *See id.*

80. *See id.*

81. *See id.*

82. "Absolutely clear act". CORREARD, *supra* note 68.

83. ANDENAS, *supra* note 62, at 18.

84. *Id.*

85. *CILFIT*, 1982 ECR 3415 (". . . the correct application of Community Law is so obvious as to leave no scope for any reasonable doubt").

86. *See* ANDENAS, *supra* note 62, at 18

87. *Id.*

88. *Id.*

judicial decisions within the Community."[89] In its decision the national court must look at:

> the need to compare the different language versions of Community legislation, each of which is equally authentic; the issue of terminology which is peculiar to Community law, or which has a different meaning in Community law from its meaning in the law of the Member States; and the need to place every provision of Community law in context and to interpret it in light of the provisions of Community law as a whole, regard being had to the objectives of Community law and to its state of evolution at the date on which the provision in question is to be applied.[90]

The strict requirement developed in *CILFIT* would seem not a relaxation of the duty to refer under Article 177(3), but an attempt to deter national courts from the use of *acte clair* by setting forth conditions that no national court could realistically satisfy.[91] However, examples abound of Member States' supreme courts not making a reference under Article 177(3) on the grounds of *acte clair*.[92]

Even if the national supreme court interprets Community law impeccably, this does not minimize the potential infringement of Article 177(3).[93] In disregarding an obligation under Article 177(3) there is an ever-present danger that the national court may misinterpret Community law.[94] This is an intolerable situation towards the goal of Article 177: the prevention of a body of national case law that is not in accord with the rules of Community law from coming into existence in any Member State.[95] An infringement of Article 177(3) prevents the Court of Justice from exercising its exclusive jurisdiction to interpret Community law.[96] *Acte clair* is a serious concern to the uniformity of Community law, if used by supreme national courts as a convenient instrument for restricting their obligation to refer.[97] Article 177(3) does not degrade courts of last instance to judicial automation, meaning requiring them to simply refer questions to the Court of Justice as soon as they occur.[98] Courts of last instance have the discretion to determine whether or not

89. *CILFIT*, 1982 ECR 3415.
90. ANDENAS, *supra* note 60, at 18.
91. *See id.*
92. *See generally id.* (*citing* Sixth Annual Report to the European Parliament on Commission Monitoring of the Application of Community law – 1988, Appendix, "The Attitude of National Supreme Courts to Community Law", 1989 O.J. (C 330) 146.
93. *See* BEBR, *supra* note 54, at 516.
94. *Id.* at 511.
95. *See id.*
96. *Id.*
97. *See id.* at 518.
98. *See id.*

such a question is relevant to the outcome of the case.[99] But this must to be the limit of their discretion, irrespective of how they may intend to interpret Community law, even if they consider the rule clear they must request a preliminary ruling from the Court of Justice.[100] *Acte clair* implies a larger margin than the one granted by Article 177(3).[101] Finding that a provision is clear already implies its interpretation, which is exclusive jurisdiction of the Court of Justice.[102] Such a strict interpretation of Article 177 is the only way to ensure uniform interpretation of Community law.[103] In the present case the Court of Justice had the opportunity to close this serious threat to uniform application of Community rules.

IV. CONCLUSION

In this case, the Court of Justice had an opportunity to decisively rule on the issue of the requirements of an Article 177(3) reference. However, by not following the opinion of the Advocate General the Court passed up an opportunity to close loopholes available to national courts interpreting Community law. The language of the opinion issued by the Court makes it clear that *acte eclaire* is still alive and well in Community case law. By allowing a national court to forgo its obligation to refer when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a "similar case", the court allowed a danger to uniformity of Community law to remain. If instead, the Court would have followed the language of the Advocate General opinion only one exception would be available to the supreme national court.[104]

The resolution of the *acte clair* issue is not that clear. The Court of Justice passed up the opportunity to clearly put the precedent established by *CILFIT* to rest. It remains to be seen if any national supreme court will invoke this controversial doctrine in a future case in light of this holding.

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99. *See id.* at 519.
100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *See Dior*, 1997 ECJ CELEX LEXIS ¶ 27 ("[S]ince the answer given . . . is binding on the referring court, the Benelux Court is . . . obliged to refer when the answer to a question referred depends upon the interpretation of a provision of Community Law. The only exception would be where the referring court has itself made a reference to this Court."). *Id.*