ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – SECOND PART

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THE COURT OF JUSTICE, GENUINE DISPUTES AND JURISDICTIONAL CONTROL: MAKING SENSE OF *FOGLIA II* IN LIGHT OF ITS *DOSSIER*

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ABSTRACT: The *Foglia* saga remains key to understanding the relationship between the Court of Justice of the European Union (CJEU) and domestic courts in art. 267 TFEU proceedings. By discussing the *dossier de procédure* of case 244/80 (*Foglia v Novello II* ECLI:EU:C:1981:302), this *Article* adds to the existing debates on the case. In doing so, it gives insights into the legal arguments of the different actors as found in the *dossier*, as well as into the way in which these were handled by the Court. Whereas their overall legal stance on the issue was clear from the outset, the most remarkable findings concern the arguments that were left unsaid in the final version of the judgment. These illustrate that, contrary to what the judgment seems to suggest, the case was as much about demonstrating the existence of a genuine dispute between the two parties in this specific case, as it was about the Court's appraisal powers. The material found is also in line with existing academic commentary which pointed to the influence of France in the judgment. Though these findings are not conclusive and do not purport to reveal the motives behind this enigmatic ruling, they nonetheless give fresh insight into this extensively discussed issue.

KEYWORDS: *Foglia II* – *dossier de procédure* – art. 267 TFEU – preliminary rulings – genuine disputes – jurisdictional control.

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I. Introduction

The archives of the CJEU were opened in 2015 in the Historical Archives of the European Union (HAEU). They have made available the *dossiers de procédure* for all cases after a 30-year wait period from the ruling dates. By analysing a selection of key cases, the Court of Justice in the Archives Project seeks to illustrate how and why these archives can be relevant for scholars of various disciplines.[1]

Though greatly polemic and widely criticised at the time, *Foglia v Novello* (hereinafter *Foglia II*)[2] remains key to understanding the relationship between the Court of Justice and national courts in preliminary ruling proceedings, as it was the first case in which the Court claimed jurisdictional control. In essence, art. 177 of the EEC Treaty (now 267 TFEU) was interpreted as permitting the Court of Justice to refuse to give judgment if it believed that the preliminary ruling would not be used to solve a genuine dispute, but rather an artificially constructed one. This meant that the Court of Justice could appraise the substance of the dispute in order to evaluate the need to answer the questions before it.

This *Article* adds to the existing debates on the case by delving into its *dossier*. Section II provides a general overview of the factual and legal antecedents leading to *Foglia II*, as well as a brief analysis of the case and its reception in the literature. Section III analyses its *dossier*, reflecting on the arguments of the various actors involved in the case as found in the raw submissions of the archive. It is contended that, contrary to what the Court suggested, litigation before the Luxembourg Court was largely about proving the existence of genuine litigation at the domestic level in this specific case. The information found is also compatible with existing debates which pointed to the influence of France upon the ruling.

II. The *Foglia* saga: towards jurisdictional control

II.1. *Foglia I* and the facts leading to *Foglia II*

If landmark EU law cases are often summarised in a succinct principle, the *Foglia* cases are commonly associated with the words *genuine dispute*.[3]

Foglia II derived from a previous Court of Justice case (hereinafter *Foglia I*),[4] the facts of which unfolded as follows.

[1] This *Article* is published in the framework of the research project "The Court of Justice in the Archives". For more information on the project, see D Ginés Martín, 'The Court of Justice in the Archives Project Analysis of the Foglia case (244/80)' (EUI Working Papers 03/2021).

[2] Case 244/80 *Foglia v Novello* ECLI:EU:C:1981:302 (*Foglia v Novello II*).

[3] See, among others: D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 164; HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International 2001) 247; A Kaczorowska-Ireland, *European Union Law* (Routledge 2016) 405.

[4] Case 104/79 *Foglia v Novello* ECLI:EU:C:1980:73 (*Foglia v Novello I*).

In 1979, Mr Foglia, an Italian wine merchant, was asked to deliver a shipment of liqueur wine to a person residing in France. To this end, Mr Foglia signed a contract with Mrs Novello, an Italian national, in which Mrs Novello's liability was restricted to "those taxes authorised by the Community provisions in force guaranteeing the free movement of goods".[5] Mr Foglia had recourse to Danzas S.p.A. for the transportation of goods, similarly stipulating that Foglia's liability would be limited to those charges paid in accordance with Community law. Having paid the bill for the dispatch of goods, Mr Foglia requested that Mrs Novello reimburse him, but the latter held that the bill included an unlawful tax paid at the French border and hence refused payment. The *Pretore di Bra* (Italian judge) considered that the solution to be given to the dispute was determined by the (in)compatibility of French legislation with Community law, and he therefore asked the Court of Justice whether the French tax at issue was in conformity with the free movement of goods, since the levy was based on objective criteria but seemed to favour French products over their foreign competitors.[6]

Interestingly, the Court refused to answer a question on Community law for the first time, claiming that there was not a genuine dispute between the parties, but rather one that was artificially built in order to obtain a ruling invalidating French laws so that neither Foglia nor Novello would be accountable for the charges at issue, despite there being no reference to the need for genuine disputes in the treaties. In the words of the Court, "[a] situation in which the Court was obliged [...] to give rulings would jeopardise the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty".[7]

In spite of the Court's reluctance to solve the preliminary questions, the *Pretore* again stayed the proceedings, offered clarifications on Italian procedural law to persuade the Court on the need to obtain a ruling (see *infra* section III.1), and raised five questions on the interpretation of arts 177 and 95 of EEC Treaty, inquiring again about the compatibility of French legislation with Community law.

II.2. *FOGLIA II*: MAIN FEATURES AND RECEPTION IN THE LITERATURE

Yet again, the Court declined jurisdiction to rule on the compatibility of French laws with the free movement of goods. The Court simply made reference to *Foglia I* in claiming that the submission of the *Pretore* did not provide new facts justifying a fresh appraisal of the Court's jurisdiction.[8] In other words, nothing had happened since *Foglia I* that made it necessary for the Court of Justice to have another look at its jurisdiction.

[5] *Ibid*. 747.
[6] *Ibid*.
[7] *Ibid*. para. 11.
[8] *Foglia v Novello II* cit. para. 34.

The Court noted that, even if it must place as much reliance as possible on the assessment of domestic courts, "it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court".[9] It further noted that it must display special vigilance when preliminary questions are referred to it by a national judge concerning the laws of another Member State.[10]

If the importance of a case is determined as much by its follow-up in the broader political, social and legal context as by the judgment itself,[11] the judgment of the Court of Justice in *Foglia II* was rapidly and widely criticised in the literature,[12] for two main reasons. Firstly, because it was said to trespass on the discretionary powers of domestic judges to evaluate whether a question of Community law was necessary for them to be able to give judgment.[13] Secondly, part of the scholarship seemed puzzled by the fact that such strict examination of the facts of the case took place in one that was, at least at first sight, an ordinary example of genuine litigation between two parties.[14]

Academic critiques were followed by erratic Court of Justice jurisprudence, which led some authors to describe the *Foglia* judgments as "isolated",[15] or even as a "jurisprudential iceberg",[16] due to its inconsistency with the very liberal preceding jurisprudence,[17] but also with its own successive rulings. Indeed, neither the "genuine dispute" concept,[18] nor the suggestion that there was something wrong in challenging the laws of a Member

[9] *Ibid*. para. 21.

[10] *Ibid*. para. 30.

[11] MP Maduro and L Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) xiii.

[12] Along these lines read, among others: A Barav, 'Preliminary Censorship? The Judgment of the European Court in *Foglia v Novello*' (1980) ELR 443; G Bebr, 'The Possible Implications of Foglia v. Novello II' (1982) CMLRev 421; TC Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press 2014) 301; D Anderson, 'The Admissibility of Preliminary References' (1994) Yearbook of European Law 179, 194.

[13] HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* cit. 248.

[14] TC Hartley, *The Foundations of European Union Law* cit. 301.

[15] HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* cit. 248.

[16] G Bebr, 'The Possible Implications of Foglia v. Novello II' cit. 441.

[17] In *Costa*, the Court went as far as extracting the correct questions from inappropriately framed references (case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66 593). In *Rewe-Zentrale*, where the preliminary questions were irrelevant to the litigation, these were answered by the Court solely because it could become a test case for similar cases (case 37/70 *Rewe v Hauptzollamt Emmerich* ECLI:EU:C:1971:15).

[18] The concept was disregarded by the Court in cases in which the genuineness of the dispute was arguably more patent than in *Foglia*. This can be seen in other cases adopted by the Court immediately before *Foglia II* (e.g. case 140/79 *Chemial Farmaceutici* ECLI:EU:C:1981:1; case 46/80 *Vinal v Orbat* ECLI:EU:C:1981:4), as well as in subsequent cases (see: case C-412/93 *Leclerc-Siplec v TF1 and M6* ECLI:EU:C:1995:26; case C-144/04 *Mangold* ECLI:EU:C:2005:709).

State in front of the tribunals of another Member State have aged well.[19] It is noteworthy that, to the author's knowledge, the claim that the Court of Justice "must display special vigilance when [...] a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community Law"[20] has only been used again by the Court of Justice once. The Court however did so in a case where the dispute could be easily solved without British courts interpreting French laws, and therefore the national court had clearly failed to explain why it needed a reply to its questions to give judgment.[21]

And yet, although often recognised for its narrow interpretation of the "genuine dispute" rule, *Foglia's* legacy goes well beyond it. As Craig and de Búrca note, the case is also "about the primacy of control over the Article 267 procedure and the nature of the judicial hierarchy, involving EU and national courts [...] *Foglia* reshaped that conception. The ECJ was not simply to be a passive receptor, forced to adjudicate on whatever was placed before it".[22] In short, *Foglia* was the seminal case for the principle of jurisdictional control by the Court. The reference to "genuine disputes" was merely one such manifestation, and arguably not a very fortunate one. After a lethargic period, it was in the 1990s that the principle came back to life.[23] The current articulation of the principle was summarised by the Court of Justice in *Filipiak*:

> "[T]he Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 Foglia [1981]) [...] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it".[24]

Foglia II however remains a disconcerting judgment. Decided against the criteria of both parties, the domestic judge, the Advocate General (AG) and the Commission, the

[19] For example, in *Parfümerie-Fabrik*, not long after *Foglia*, the Italian government requested the inadmissibility of the reference based on both the lack of a genuine dispute and the fact that the parties were questioning the rules of a Member State before the courts of another Member State. The Court of Justice however clarified that "the Court may provide the criteria for the interpretation of Community law [...] when it is to be determined whether the provisions of a Member State other than that of the court requesting the ruling are compatible with Community law" (case C-150/88 *Parfümerie-Fabrik 4711 v Provide* ECLI:EU:C:1989:594 para. 12).

[20] *Foglia v Novello II* cit. para. 30.

[21] Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* ECLI:EU:C:2003:41 paras 43-44.

[22] PP Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 490.

[23] See case C-343/90 *Lourenço Dias v Director da Alfândega do Porto* ECLI:EU:C:1992:327 para. 20.

[24] Case C-314/08 *Filipiak* ECLI:EU:C:2009:719 paras 41-42.

case left various questions unanswered. The following section of the paper aims to partially untangle some of these issues by delving into the *dossier* of the case.

III. PATHS NOT TAKEN: REFLECTING ON THE *DOSSIER* AND ITS VALUE

The *dossier de procédure* of *Foglia II* does not provide valuable information regarding the actors involved in the case or the core interests pursued by them. Yet, by looking at the submissions of the *Pretore*, the parties, the intervening Member States and the Commission in full, and based on what was left unsaid in the final judgment, it is possible to reflect on the way in which the Court handled the submissions and take a fresh look at the possible motives behind this ruling in context.

III.1. A (LACK OF) GENUINE DISPUTE?

If one goes back to the Court's ruling in *Foglia I* (see *supra* section II.1), three main conclusions could be extracted from the judgment: firstly, that the Court had the power to rule on its own jurisdiction; secondly, that it would refuse to answer questions arising in the context of artificial and abusive disputes; and thirdly, and most importantly for our purposes, that the dispute in the main proceedings between Mr Foglia and Mrs Novello was indeed an artificially constructed one. Whereas *Foglia II* refined the position of the Court as regards the first two issues (see *supra* section II.2), it did not further clarify its position on the third. Conversely, it declined to rule on the validity of the French tax on the basis that there were no new facts available to justify a fresh appraisal of the Court's jurisdiction.[25] And yet, a close look at the *dossier* reveals that the arguments of the parties and the domestic judge were primarily focused on demonstrating that there was a truly genuine dispute between the parties in this specific case. The magnitude and scope of these arguments were visibly undermined in the final judgment. Some (but not all)[26] of the key arguments put forward by the *Pretore*, Foglia, and Novello along these lines are as follows.

Firstly, the *Pretore* and Foglia noted that, in the domestic proceedings that followed *Foglia I*, Mr Foglia had held that the ruling of the Court of Justice was a tacit recognition of the conformity of the French tax with Community law and thus Mrs Novello should bear the costs attached to the shipment. On the contrary, Mrs Novello insisted on the lack of a ruling on the matter.[27] This factual information, which shows clearly contradictory positions held by both the parties and is hence key to determine the existence of a "genuine dispute", was neither included in the summary of the judge rapporteur nor in the final judgment.

As regards domestic procedural law, the *Pretore* noted that in Italy it was common that, following the plaintiff's claim (in this case, that Mrs Novello should have paid the sum owed),

[25] *Foglia v Novello II* cit. para. 34.

[26] These are dealt with in more depth in a larger report see D Ginés Martín, 'The Court of Justice in the Archives Project Analysis of the *Foglia* case (244/80)' cit.

[27] *Dossier de procédure original* affaire 244/80 *Pasquale Foglia v Mariella Novello* HAEU CJUE-4421 4-5.

the defendant, in responding to it, submitted an autonomous claim for a declaratory ruling. From the moment that the defendant took this procedural position, she gave rise to a specific type of procedure that put the focus not only on the controversy, but also on certain circumstances of fact and law surrounding it – inasmuch as these were necessary to solve the litigation at hand. In this context, Mrs Novello's claim on the incompatibility of the French tax with Community law was to a certain extent an autonomous one, but it was brought up in the context of a litigation and it was certainly of relevance to solve it. According to the *Pretore*, this did not unveil the artificial nature of the dispute but simply evidenced a type of dispute which was characteristic of Italian law.

In an argument that was central for the *Pretore*, Foglia and Novello, it was contented that the Court should have differentiated between the presence of a dispute at the domestic level, and the fact that both parties agreed on the interpretation of Community law before the Court of Justice. This by no means involved an artificially constructed case, but simply that two parties with conflicting interests held a similar view on the interpretation of Community law in a preliminary ruling proceeding which was purely about law. These arguments, ignored by the Court, seemed to convince the Advocate General, who argued that "[i]t does not, in my view, matter for this purpose that the parties adopt the same position on the point of Community law. The crucial matter is not whether the parties are agreed: it is whether the judge considers that the question has to be determined for the purposes of giving judgment".[28]

In sum, the *dossier* shows that the arguments of the *Pretore*, Foglia and Novello not only sought to demonstrate that the Court had gone beyond the powers conferred to it by the treaties by evaluating the substance of the facts leading to the case (as the final judgment seems to suggest), but primarily that, even if grounded on the premise that the Court held these powers, *Foglia v Novello* was an example of genuine litigation. These arguments seemed to convince the Advocate General as well as the legal service of the Commission, which stated that "there now appears to be no doubt that [...] there is a conflict of interest between the parties in the main action the scope of which is entirely new".[29]

The Court however addressed the relationship between domestic courts and the Court of Justice in preliminary ruling proceedings *in abstracto*, but it did not even make an attempt to rebut any of the above-mentioned arguments that dealt with the genuineness of the dispute at issue. These arguments were at best partially accounted for, and sometimes simply eliminated from the summary of the judge rapporteur, and completely ignored in the Court's reasoning in the final judgment. The omission of this entire line of reasoning, now available through the *dossier de procédure*, can be easily explained as it clearly contradicted the Court's narrative that there were no new circumstances justifying the need for a fresh appraisal of its jurisdiction.

[28] *Foglia v Novello II* ECLI:EU:C:1981:175, opinion of AG Slynn 3071.
[29] *Foglia v Novello II* cit. 3051.

III.2. FRANCE AS THE LEGAL *ENTREPRENEUR* IN *FOGLIA II*?

The *dossier* also adds to the scholarship that highlighted the will to protect France as a hidden cause leading to this ruling, and it might also point at France as the legal entrepreneur in *Foglia II*.[30] This was not only suggested by part of the literature (see *supra* section II.2), but the *dossier* shows that it was also mentioned by the *Pretore* in its submission for a preliminary ruling, and by Foglia and Novello in their submissions. It is worth noting that these arguments go largely unreported in the judgment. In this regard, Foglia's lawyers wondered whether all the "inquisition" into the merits of the case owed to the Court's concerns about having an Italian court ruling on French legislation, rather than to a correct interpretation of art. 177.[31] In the case of Mrs Novello, this very same argument has a residual place in the judge-rapporteur's report despite being the central claim in her observations.[32]

Whereas the overarching legal stance of France was clear from the outset, having access to its submissions in full makes it possible to observe its influence in terms of arguments and legal reasoning in a clearer manner. Indeed, the French government contended that the jurisdiction issue had been solved in *Foglia I* and that there was no new information justifying a fresh appraisal of the facts,[33] and put forward a teleological interpretation of art. 177 according to which the provision was not envisaged to deliver advisory opinions for fictional or hypothetical disputes, but to solve jurisdictional ones.[34] This claim, which is not transcribed in the official reports, is however adopted, almost word for word, by the Court in the judgment.[35] It must be remarked, again, that there were numerous arguments that sought to demonstrate the existence of a dispute between the parties, none of which were challenged by the French government or the Court.

The case of *Foglia* remains a puzzling one, nonetheless. Might it now be prudent to consider France as the unique architect behind the *Foglia* judgments? Given that it was Advocate General Warner in *Foglia I* who contested the jurisdiction of the Court prior to France doing so in *Foglia II*, this seems highly unlikely. Interestingly, however, Jean-Pierre Warner was born and educated in France and, although also trained in common law, was a French-speaking lawyer before joining the Court of Justice as the first British AG.[36] This

[30] On the concept of legal entrepreneurs in EU case law, see A Vauchez, 'The Transnational Politics of Judicialization. *Van Gend En Loos* and the Making of EU Polity' (2010) ELJ 1.

[31] *Dossier de procédure original*, affaire 244/80 *Pasquale Foglia v Mariella Novello* HAEU CJUE-4421 cit. 79.

[32] *Ibid*. 91-101.

[33] *Ibid*. 52 (in French) and 62 (in Italian).

[34] *Ibid*. 54-55 (in French) and 64-65 (in Italian).

[35] Case *Foglia v Novello II* cit. para. 18. A more comprehensive analysis of the arguments put forward by the French government and their similarities with the reasoning of the Court is provided in a larger report of the *dossier* published as an EUI Working Paper, D Ginés Martín, 'The Court of Justice in the Archives Project Analysis of the *Foglia* case (244/80)' cit.

[36] R Greaves, 'Advocate General Jean-Pierre Warner and EC Competition Law' in N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford University Press 2007) 183-184.

likely made him familiar with the civil law concept of *abuse de droit*, on which the notion of genuine dispute is inspired. Sir Gordon Slynn, who sat as AG in *Foglia II*, was likely more common law oriented than AG Warner, and it is therefore reasonable to assume that he would possibly see the Court's approach in *Foglia I* as a bizarre self-limitation on its power of judicial review.

In any event, whether the intention of the Court was to protect the interests of Member States whose laws were challenged in the tribunals of another Member State, to shield itself from artificial disputes, or simply to show its capacity to rule on its own jurisdiction, the case turned out to be inconsistent with previous and subsequent rulings (see *supra* section II.2), at least until the 1990s when the Court began to claim again jurisdictional control. In addition, the Court already had, and would have, better occasions to make these points. The inconsistency of the case law is however compatible with the idea that the ruling was given with the interests of France in mind, as it seems that whatever historical, political, or other reasons that made it impermissible for an Italian court to decide on French laws, ceased to exist later on. This makes clear the need to separate the (possible) motivations of the Court from what the case became later on. As Vauchez notes, the meaning of a case is not settled by virtue of a judge's decision, but depends on a subsequent process of "meaning-building".[37] This is particularly so in the case of *Foglia*, where the conditions under which the Court can refuse to give judgment are today very different to those it originally envisaged, even if the notion that the Court of Justice is the ultimate decision-maker of its own jurisdiction remains.

IV. Conclusions

Archival research into the Court of Justice seeks to open up a space for research that looks at cases, not for what they may have become after decades, but as a resource that provides a deeper understanding of what they were about at the time, giving additional insights into the micro-history of case dynamics.[38] Though this contribution does not go as far as revealing the motives behind this perplexing ruling, it has nonetheless sought to give fresh insights into it.

By reflecting on the material found in the *dossier* and the Court's way of handling the submissions, this paper has provided some thoughts on what the Court left unsaid and on the possible roots of what the Court did indeed say. These are consistent with the arguments of the *Pretore*, Foglia and Novello (again overlooked in the final judgment) and part of the early scholarship, which pointed at the Court as siding with the French government. This plausible account of the ruling cannot possibly explain the jurisprudential developments in the decades that followed but can historically and politically make sense

[37] A Vauchez, 'EU Law Classics in the Making' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 30.

[38] *Ibid*. 22.

of a decision that does not flow logically from a legal perspective. And yet, it might be unrealistic to point at the role of France as the unique "legal entrepreneur" behind this EU law story, particularly considering that it was AG Warner in *Foglia I* who urged the Court to abstain from giving judgment. The *dossier de procédure* of *Foglia I* would certainly provide valuable insights on this matter.