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The Use of the Preliminary Ruling Procedure by Czech Courts: Historical Retrospective and Beyond[1]

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Abstract: *The article analyses the use of the preliminary ruling procedure by the Czech courts in the 15 years of the Czech membership in the European Union. It presents statistics of cases lodged to the EU Court of Justice and refers to the most important decisions. The article compares the practise of both lower courts as well as courts of last instance, namely the Supreme Court and the Supreme Administrative Court. It also outlines the attitude of the Czech Constitutional Court towards this procedure.*

Keywords: *Court of Justice of the European Union, Czech Constitutional court, Czech courts, preliminary ruling procedure*

[1] A previous version of this article was partly published in Stehlík, 2019b, pp. 347–366.

1. Introduction

The cooperation between the EU Court of Justice (hereinafter referred to as 'Court of Justice') and national courts via the preliminary ruling under Article 267 of the TFEU has become crucial for the current *visage* of the European integration. It was this procedure through which the Court of Justice shaped the EU market freedoms and individual policies and increased the impact of the EU law in the legal orders of the EU Member States (Sehnálek & Týč *et al.*, 2016, p. 171). The aim of this procedure is to ensure uniform and correct application of the EU legislation by national courts (Schermers & Waelbroeck, 2001, p. 227).

The following study aims to analyse the practice and the main trends within the first 15 years of interaction between Czech courts and the Court of Justice. Primarily, the article will focus on the selected milestones of the first years of the Czech membership to the EU. Secondly, it will give statistics of the preliminary rulings initiated by Czech courts with an emphasis on the supreme courts' position and, lastly, the article will refer to the relevant case-law of the Czech Constitutional Court.

2. Czech preliminary rulings

2.1 Preliminary rulings—milestones and an overview of cases

A basic premise is that EU law is applicable only in cases that arose after the accession of the Czech Republic to the EU (cf. the case of *Ynos kft v. János Varga* [2006], para. 38), and, consequently, it was first used by courts of lower instances. Historically, the first preliminary ruling of Czech courts was the case *Jan Vorel v. Nemocnice Český Krumlov* [2007][2] that was initiated by the District Court in Český Krumlov in 2005. The case—decided in 2007—concerned the interpretation of the concept of "working time" (namely, the working time of doctors/physicians) with regard to the relevant EU directives (Council Directive 93/104/EC, pp. 18–24; Directive 2003/88/EC, pp. 9–19). The Court of Justice read the provisions of the EU directive so that the working time includes also on-call duty of the doctors present at their workplace, even though they do not need to engage in actual work. Besides the importance of the substance itself, it was a "testing" case where—for the first time—the Czech courts experienced the institute of cooperation with the Court of Justice.

[2] For more information about the case and the subsequent development see, for example, Forejtová, 2017.

In the subsequent year, three other procedures were initiated, namely *Telefónica O2 Czech Republic a.s. v. Czech On Line a.s* [2007] by the District Court for Prague 3, *OSA* [2007] by the City Court in Prague[3] and *Skoma-Lux sro v. Celní ředitelství Olomouc* [2007] by the Regional Court in Ostrava. Out of these, the *Skoma-Lux* case is the most important for the EU (constitutional) law since it concerned an obligation to publish EU law in all EU official languages (for a commentary see Bílková, 2013, pp. 9–12; Bobek, 2011, pp. 124ff). According to the Court of Justice, the EU regulation which was not dully published in the EU *Official Journal* in the language of a Member State cannot be applied in cases concerning the rights of individuals in the Member State concerned (see *Skoma-Lux sro v. Celní ředitelství Olomouc* [2007], para. 61 of the judgement). This judgment was of a great significance not only for the Czech Republic but also for several other new Member States as they too experienced the same problem—missing "translations" of the EU legislation. The decision in the *Skoma-Lux* case, for example, contributed to the change of the decision-making practice of Estonian courts. At the same time the Estonian courts later contributed to the refinement of the conclusions of the Court of Justice in the *Skoma-Lux* case (Evas, 2016; *Balbiino AS v. Põllumajandusminister and Maksu- ja Tolliameti Põhja maksu- ja tollikeskus* [2009]).

In 2007, the Czech courts lodged two references to the Court of Justice. Interestingly the first reference in case *Reisebüro Bühler* [2007] was initiated by the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic. Before the Court of Justice could have decided the case, the request was withdrawn (for a commentary see Žondra, 2010, p. 285). The formal reason was the wish of the parties of the case. However, one can seriously doubt whether such a request by an arbitration court would be found admissible by the Court of Justice. The arbitration court lacks an obligatory jurisdiction that is one of the conditions for a body to be a court for the purpose of Article 267 of the TFEU (see case *Nordsee* [1982], paras. 10ff). The second case referred in 2007 was *RLRE Tellmer Property sro v. Finanční ředitelství v Ústí nad Labem* [2009] which originated in the Regional Court in Ústí nad Labem and was one of the first preliminary rulings concerning taxes, namely the Sixth Council Directive 77/388/EEC.[4] Interestingly, the preliminary rulings concerning taxes comprise approximately a quarter of all preliminary ruling procedures initiated by Czech courts and, when narrowed to the Supreme Administrative Court, they account for more than a third of all references.

[3] The request for preliminary ruling was withdrawn as the question had been solved in another judgement of the Court of Justice.

[4] Special edition in Czech: ch. 9, vol. 1, pp. 23–62.

In 2008, the first preliminary ruling procedure was initiated by a supreme court, namely the Supreme Administrative Court. The case *Milan Kyrian against Celní úřad Tábor* [2010] dealt with the enforcement of EU customs rules and, in that regard, the interpretation of the provisions of EU secondary law (Council Directive 76/308/EEC, pp. 18–23). Particularly it concerned the jurisdiction of national authorities to review the enforceability of a warrant of execution (based on the excise duty) issued by an authority of another Member State. It was especially contested whether such a notification to the individual must be given in the official language of the Member State in which the executing authority is situated (in Czech in the case concerned).

The Supreme Administrative Court was very active also in 2009 when it lodged four out of five preliminary rulings originating from the Czech courts. Whereas the court withdrew the case *DAR Duale Abfallwirtschaft und Verwertung Ruhrgebiet* [2010], other three cases ended with a decision of the Court of Justice. It was the case *Skoma-Lux II s. r. o. v. Celní ředitelství Olomouc* [2010] dealing with the classification of wine according to the common customs and statistics nomenclature and then the case *Bezpečnostní softwarová asociace-Svaz softwarové ochrany v. Ministerstvo kultury* [2010] concerning the graphic user's interface and the copyright protection of computer programmes. However, a case of a great significance was the decision in *Marie Landtová v. Česká správa sociálního zabezpečení* [2011].

In the *Landtová* case—via the "European way"—the Supreme Administrative Court tried to overrule the disputed Czech rules concerning the so-called Czechoslovak pensions. The core of the case rests in the history of the Czech Republic as it was part of Czechoslovakia until 1993. In the times of the common state it was not rare that for a certain period Czech employees worked for their companies in Slovakia. A problem appeared after the split of Czechoslovakia at the end of 1992 in relation to these workers who later retired and stayed in the Czech Republic. Due to their former work in Slovakia with less income than in the Czech Republic their retirement pension was lower. However, according to the Czech law—based on the settled case-law of the Czech Constitutional Court—they got the right for financial compensation so that their pension would be as if they had worked in the Czech Republic for the whole time. The Supreme Administrative Court was not sure whether the Czech law would not be in breach of the EU law as this financial compensation was paid only to Czech nationals who formerly worked in Slovakia. Nationals of other countries in the same situation were excluded from such a compensation. In the *Landtová* case, the Court of Justice confirmed the existence of discrimination prohibited by the EU citizenship (see *Marie Landtová v. Česká správa sociálního zabezpečení* [2011],

para. 45), and, thereby, supported the opinion of the Supreme Administrative Court.

However, in the case *Holubec*, the Czech Constitutional Court (2012), explicitly denied the application of the EU law based on the interpretation of the Court of Justice as it found it *ultra vires* (Hamuľák, 2014). This was historically a first open denial to apply EU law as interpreted by the Court of Justice and as such resonated in European academia (see also Bobek, 2014). Afterwards, the open dispute between the Constitutional Court and the Supreme Administrative Court (and the Court of Justice) was resolved by the change of the Czech legislation (Špottová, 2016, pp. 62–63). Despite some critical and disagreeing reactions (Komárek, 2012, pp. 323–337; Král, 2012, pp. 28–33; Stehlík & Hamuľák, 2014, p. 52; Craig & de Búrca, 2015, p. 308) the case has become a part of the EU constitutional law discourse on the principles for application of the EU law in the Member States. For the purpose of this paper it is also necessary to emphasise the fact that irrespective of the obvious EU law dimension of the case the Constitutional Court did not refer a question for a preliminary ruling and, thus, failed to resolve the problem directly in the judicial dialogue with the Court of Justice.

In 2010, a request was lodged by the County Court in Brno concerning the protection of the competition in the case of *Toshiba Corporation and other v. Úřad pro ochranu hospodářské soutěže* [2012] and by the District Court in Cheb regarding the jurisdiction and enforcement of judicial decisions in civil and commercial matters in the case of *Hypoteční banka a.s. v. Udo Mike Lindner* [2011]. However, the year 2010 was exceptional especially because of the first preliminary ruling initiated by the Supreme Court. It was in the case of *Wolf Naturprodukte GmbH v. SEWAR spol. s r. o.* [2010] dealing with the applicability of the Brussels I regulation in relation to the execution of a claim that arose before the Czech Republic joined the EU. In its ruling the Court of Justice confirmed non-applicability of the EU law on disputes which had arisen before the Czech Republic became the EU member (*Wolf Naturprodukte GmbH v. SEWAR spol. s r. o.* [2010], paras. 31–32). This reference symbolically closed the first period, in which the use of the preliminary ruling procedure reached from the lowest courts to both supreme courts. It may be added that the High Court (standing between regional and supreme courts) lodged its first case to the Court of Justice a few years later.[5] The Constitutional Court, which has a special jurisdiction in constitutional matters and stands aside the hierarchy of ordinary

[5] The first High Court lodging a preliminary ruling was the High Court in Prague in case *Marián Baláž* [2013].

courts, did not refer, yet.[6]

After 2010, it is possible to trace several trends in the development of the preliminary ruling procedure. At first, the Supreme Administrative Court is very active. It lodged 33 requests in total: in years 2011, 2012, 2015, and 2018 it lodged 4 requests each year, in 2013 it lodged 3 requests, in 2014 record-breaking 5 requests, in 2016 and 2017 each year 2 requests and in the first quarter 2019—when this article was finished—it lodged 1 request. In average, the Court lodges 2 or 3 requests per year.

Beside this, as it has already been mentioned, the Supreme Court initiated its first preliminary ruling procedure in 2010, that means, two years later than the Supreme Administrative Court. The Supreme Court has lodged 10 preliminary ruling requests in total, i.e. in average 1 request a year. The court was most active in 2016, when it initiated 3 procedures. There have also been years in which it lodged no request at all (2011, 2012). The trend in the number of cases referred to the Court of Justice with both courts is consistent, even though the number of requests lodged by the Supreme Court is significantly lower than in case of the Supreme Administrative Court.

2.2 Preliminary rulings: area of legislation and level of courts in data

The preliminary rulings can be sorted out also in relation to areas of law covered in references. The article does not offer any official classification as it is actually not available. The survey is based on authors' own research which does not necessarily need to be rigid when looking at the subject matter of individual decisions. Still, such a classification can indicate developments in each field and provide a more transparent overview of the current distribution of references among courts according to their level of decision-making (lower x supreme courts).

Table 1. References of the Supreme Administrative Court

Field of law	Number of references	Decision of the Court of Justice[7]
Taxes	12	C-220/11, C-18/12, C-276/12, C-80/13, C-43/14, C-11/15, C-432/15, C-638/15, C-414/17, C-127/18, C-275/18, C-446/18

[6] The status of the Constitutional Court will be analysed later on.

[7] For the sake of length and clarity we provide only a numeric, not a full indication of the cases which may be found in the case-law database of the Court of Justice.

Field of law	Number of references	Decision of the Court of Justice
Asylum and aliens law	4	C-534/11, C-528/15, C-391/16, C-704/17
Freedom of establishment	3	C-318/14, C-405/14, C-405/18
Social security	2	C-253/12, (C-401/11), C-253/12
Agriculture	2	C-390/11, C-401/11
Free movement of services	2	C-508/14, C-311/19
Customs	2	C-233/08, C-339/09
Waste	1	C-299/09
Foodstuff labelling	1	C-299/12
Money laundering	1	C-676/16
Data protection	1	C-212/13
Free movement of workers	1	C-394/13
Copyright and computer programmes	1	C-393/09
In total	33	

Table 2. References of the Supreme Court

Field of law	Number of references	Decision of the Court of Justice
Jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001,[8] Regulation 1215/2012[9])	3	C-514/10, C-560/16, C-208/18
Jurisdiction and recognition and enforcement of judgements in matrimonial matter and in matters of parental responsibility (Regulation 2201/2003[10])	2	C-656/13, C-404/14
Enforcement of intellectual property rights	2	C-656/13, C-404/14

[8] Council Regulation (EC) no. 44/2001, pp. 1–23, special edition in Czech: ch. 19, vol. 4, pp. 42–64.
[9] Regulation (EU) no. 1215/2012, pp. 1–32.
[10] Council Regulation (EC) no. 2201/2003, pp. 1–29, special edition in Czech: ch. 19, vol. 6, pp. 243–271.

Field of law	Number of references	Decision of the Court of Justice
Prohibition of discrimination and working time determination	1	C-653/16
European order for payment procedure	1	C-21/17
Medical products	1	C-497/16
In total	10	

Table 3. References of courts of lower instances

Field of law	Number of references	Decision in the Court of Justice
Administrative law agenda		
Taxes	3	C-401/18, C-53/13, C-572/07
Customs	2	C-306/18, C-161/06
Transport	1	C-447/15
Competition law	1	C-17/10
Telecommunication	1	C-64/06
Social security (pensions)	1	C-166/12
In total	9	
Civil and criminal law agenda		
Regulation Brussels I (Regulation 44/2001)	4	C-215/18, C-11/09, C- 419/11, C-327/10
Consumer protection	4	C-679/18, C-377/14, C-502/18, C-315/15
Employment law	2	C-107/19, C-437/05
Commercial transactions	1	C-287/17
Agriculture	1	C-561/13
Copyright	1	C-351/12
Maintenance	1	C-680/18
European enforcement order	1	C-518/18
Court´s jurisdiction in criminal matters	1	C-60/12
In total	16	

Table 4. Bodies unauthorised to lodge a preliminary ruling reference

Request lodged by the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic	1	C-126/07, without any assessment of the merits by Court of Justice, withdrawn
References of the Industrial Property Office	1	C-49/13, without any assessment of the merit by Court of Justice, unauthorised national authority
In total	2	

2.2.1 Summary of the comparison

It is apparent that most references relate to the regulation of taxes (15 references in total—12 of them lodged by the Supreme Administrative Court). This area of law is followed by the EU rules on the recognition and enforcement of judgments (7 references in total—3 of them lodged by the Supreme Administrative Court), customs union (4 references in total—2 of them lodged by the Supreme Administrative Court) and, equally, consumer's rights (4 references of lower instance courts). Other areas are in only one or two digit numbers—e.g., copyright (2 references in total, 1 of them lodged by the Supreme Administrative Court), intellectual property rights (2 references lodged by the Supreme Court), etc.

The references of **supreme courts** (Tables 1 & 2) relate to the field of administrative law much more often than to the civil or criminal law matters (in a ratio of 33:10). This shows a more active role of the Supreme Administrative Court compared to the Supreme Court in favour of the administrative law adjudication. The active role is even more emphasised by the fact that the total number of cases lodged to the Supreme Court is twice higher than to the Supreme Administrative Court. The classic explanation is that the EU legislation is more frequent in the field of administrative law as it reflects the original outlay of the EU integration, but also includes recently quickly developing administrative law areas, such as asylum and immigration law. Consequently, one could expect more references in this area.

This conclusion might be weakened by the fact that the areas including the civil and criminal law matters developed mostly in the last two decades, and, as quite a new legislation, could also be a rich source of interpretative preliminary ruling references. In this regard it might be useful to consult the statistics of

the Court of Justice in relation to references from all Member States. They show that in 2018[11] most cases concerned internal market (77 out of total 760 completed cases), area of freedom, security and justice (74), equally intellectual and industrial property (74), taxation (58), social law (42), competition and state aid (41), transport (38) or environment (33). It seems to confirm a dominance of administrative law references also from courts of other Member States.

From this perspective, a comparatively more active role of the Supreme Administrative Court might be justified. The Supreme Administrative Court is also much more active than lower courts in cases dealing with the administrative law agenda. This is evident when we compare the references lodged by lower courts in administrative and civil/criminal law agendas (Table 3).

However, it is interesting to observe that in case of lower courts, the majority of the references fall into the field of civil/criminal law in comparison to the administrative law field (16:9). In general, the lower courts are more reserved when it comes to references to the Court of Justice in comparison with the supreme courts. Whereas lower courts have lodged 27 references (approx. 40%), the supreme courts have lodged 43 (approx. 60%). As to the number of lower courts,[12] we could expect significantly higher amount of the references on their side. (Table 3)

2.2.2 Possible reasons for differences

First of all, the main argument for a the number of references is that the supreme courts are the last instance courts with an obligation to initiate preliminary ruling, while lower courts do not always have that obligation. On the other hand, this rather formal argument cannot be the only relevant explanation of differences. The development of the courts' initiative may be influenced *inter alia* by the willingness of courts to accept the supranational law and its impact in the national law. However, this is very difficult to measure as it is influenced predominantly by the personality of the judge and requires also a detailed analysis of the decision-making process of the court in cases dealing with the European law dimension (for an empirical analysis relating to the approach of courts to initiate preliminary ruling procedures in Poland see Jaremba, 2014, pp. 90ff).[13] The activity of the parties of the dispute seems to be of great significance

[11] For details see CJEU, 2019.

[12] There are 74 district courts, 7 regional courts and 2 high courts in the Czech Republic, for details see Ministry of Finance, 2016.

[13] Urszula Jaremba emphasises *inter alia* the knowledge of EU law, willingness to proactively enforce EU law, or rather the willingness to cooperate on the common European project, see Jaremba, 2014, p. 112.

since they might use strong arguments based on their conviction of possible impact of the EU law on the case and the necessity to lodge the reference. Such an approach may persuade the judge to do so.

At the same time, it may be emphasised that the referral primarily depends on the case itself, especially on the question which EU legislation is applicable, whether it is recent and less clarified by the Court of Justice, or the legislation is contestable by its nature. The decision of the judge can also be affected by the fact that the referral of the case to the Court of Justice will result in a significant prolongation of the procedure. Thus, the judge may tend to limit the use of 267 procedure only to inevitable or clearly disputable cases taking into consideration the principle of efficiency of the procedure.[14] It is also difficult to evaluate the possibly more proactive approach of individual senates of the courts, nor can we conclude whether the differences could result from the actual field of law and ambiguity of the EU legislation. All these will play a certain role, however, it is neither possible to conduct a more detailed analysis based on purely statistical data, nor is it actually the aim of this article to provide a detailed answers to these questions.

We might add one more comment from a different perspective. For the party of the dispute lodging the request by the last instance court may be belated and may not be fully in line with the requirement of good and quick administration of justice. In other words, if possible, the problematic interpretation of the EU legislation in question should be solved by the lower instance before the case reaches any of the supreme courts. Still, one must respect that the optional initiation of the preliminary ruling procedure with lower courts is set up directly by the EU law in Article 267 of the TFEU that stipulates the obligation to lodge the reference to the courts of the last instance. In this regard, one should not forget that the court of last instance could be even a lower court (e.g., a regional court), depending on the type of proceedings. This would be rather exceptional in the Czech procedural rules[15] and—with regard to the case law of the Court of Justice (cf. *Criminal proceedings against Kenny*

[14] The importance of the length of the preliminary ruling procedure was stressed also by the Czech Constitutional Court in the case of *Československá obchodní banka* [2018], especially para 23.

[15] The Czech legal order excludes the recall to the Supreme Court in some civil law cases according to para. 237(2) of the Law no. 99/1963 on the civil procedure. This covers cases with low monetary claims, in most disputes regulating family issues, in cases concerning international abduction of children. A recourse to the Supreme Administrative Court in administrative procedures is excluded in disputes in public elections disputes (such as to the Parliament). For more in relation to the Czech legal order see, Tomášek & Týč *et al*., 2013, pp. 390–391.

Roland Lyckeslog [2002], para. 16)—the last instance courts will be mostly and definitively supreme courts.

2.2.3 Czech statistics vis-à-vis other Member States

A short comparison of statistics relating to other EU Member States seems remarkable as well. This concerns particularly those Member States that joined the EU together with the Czech Republic, i.e. in 2004. Whereas the Czech courts have lodged approximately 70 references, courts from substantially smaller countries have lodged more references compared to the ratio of the population of that country. For instance, Slovak courts have lodged 50 references, Latvian courts 65, Lithuanian courts 61, and Estonian courts 27 references in total. Some of the abovementioned states have a significantly lower number of population than the Czech Republic and a potentially lower number of disputes (and courts); consequently, one would automatically expect a lower number of references. The difference is even more visible with Hungary—a country comparable to the Czech Republic—the courts of which lodged the record-breaking 187 references, a vast majority thereof was lodged by lower courts (the Hungarian Supreme Court has lodged 28 references).

As mentioned previously, one cannot conduct a deeper comparative analysis of the reasons for (not) initiating the 267 procedure based solely on the statistics. However, it is evident that the Czech courts are more reserved compared to some other states that became EU members in the same period. In addition, let us resume that the Czech statistics are substantially "improved" mainly by the Supreme Administrative Court which authored nearly half of the cases.

3. The Czech Constitutional Court and Article 267 of the TFEU

3.1 Reflection of Article 267 in the case-law

While ordinary courts, including the supreme ones, initiate the preliminary ruling procedure or have a clear obligation to do it, the constitutional judiciary is far more complicated in this regard. Some constitutional courts actively co-operate with the Court of Justice,[16] others are more hesitant in this regard. Some of the constitutional courts denied their formal role to initiate the procedure in a long time perspective, but they have changed their approach in recent years.[17]

[16] For instance, the Belgian *Cour constitutionnelle* with its 38 references.

[17] For a more detailed analysis see Navrátilová, 2008, p. 702. The analysis of the first preliminary ruling references lodged by the French, Spanish or Italian Constitutional Courts see for example Kustra, 2013, pp. 159–182.

For example, the German Federal Constitutional Court has lodged 3 preliminary ruling requests, the same stands for the Italian Constitutional Court. The French, Spanish and Polish Constitutional Courts have lodged one request each.[18]

One of the reasons for a greater reservation of the constitutional courts is the perception of the constitutional courts as guardians of constitutionality even *vis-à-vis* EU law. EU law may be regarded as standing outside their decision-making framework. Moreover, the constitutional courts might have a fear that by initiating the preliminary ruling procedure, they would be obliged to conform (in a full extent) to the interpretation given by the Court of Justice including the fundamental principles and values which they should guard. The fear of the necessity to unconditionally subordinate to the conclusions of the Court of Justice is unjustified, though.[19] For instance the preliminary ruling request can serve as the last resort chance for the Court of Justice—based on the compelling argumentation—to review the impact of EU law on fundamental values rooted in the constitutional rules of the Member States and by doing so to avoid the disapplication of the EU legislation in the Member State concerned. This is apparent from recent German[20] and Italian cases.[21]

The position of the Czech Constitutional Court is so far unequivocal as it has not submitted any reference yet. Its case-law regarding the question whether it is the court under Article 267 of the TFEU or not is rather unclear (Hamuľák, 2011). The first time where it expressed its opinion on the initiation of the preliminary

[18] The statistics is available in the annual report of Court of Justice activities, see CJEU, 2018.

[19] An example thereof could be also the decision of the Czech Constitutional Court in *Holubec* (Slovak pensions case) as was indicated above.

[20] This was the case of the preliminary ruling request lodged by the German Federal Constitutional Court in case *OMT – Programme of the ECB (EZB)* [2016], which led the Court of Justice to the case *Peter Gauweiler and Others v. Deutscher Bundestag* [2015]. See more Hamuľák, Kopal, Kerikmäe, 2016, pp. 115–141; or Georgiev, 2018, pp. 165ff..

[21] The Italian Constitutional Court—by forming its preliminary ruling request (Resolution of 23 November 2016, n. 24/2017) with a strong and detailed argumentation based on fundamental rights that form a part of constitutional values—forced the Court of Justice to review its approach in so called *Taricco* saga. The Court of Justice in its subsequent reply (*Criminal proceedings against M.A.S. a M.B*. [2017]) mentioned its opinion in relation to the unconditionality of the EU law application (the obligation to effectively protect financial interests of the EU under Art. 325 of the TFEU), which results from its previous case-law (*Criminal proceedings against Ivo Taricco and Others* [2015]) and admitted an exception based on the principle of protection of fundamental rights (particularly the principle of legality of criminal repression). See, for instance, Piccirilli, 2018, pp. 814–833; or Budinská & Vikarská, 2017.

ruling was the case of *Cukerné kvóty* (Constitutional Court of the Czech Republic, 2006). The Court stated that a reference to the Court of Justice might be legitimate particularly in the abstract constitutional review proceedings.[22] Despite that, it did not initiate the procedure in this case. The same is true also for subsequent cases. One of the justifications the Constitutional Court uses, and which was indeed used in the case *Cukerné kvóty* in order to evade the contact and dialog with the Court of Justice, is to proclaim the matter *acte clair* in the sense of CILFIT decision since if the interpretation is obvious, there is no need to ask the Court of Justice.

Later in the *Pfizer* case[23] the Constitutional Court, in order to avoid the conclusion that it had a duty to refer a question for a preliminary ruling, emphasised the distinctive nature of constitutional-review proceedings initiated by individuals. According to this approach, the Constitutional Court is not a court within the meaning of Article 267 of the TFEU as it does not apply the EU law, nor does it provide a binding interpretation thereof. According to the Constitutional Court the first task must be done by ordinary courts, the second task is achieved through the Court of Justice.

This approach was confirmed in *Československá obchodní banka* (Constitutional Court of the Czech Republic, 2018) in which the Czech Constitutional court stated that it may carry out a detailed review of the application and interpretation of the EU law by any other Czech court. Nevertheless, its task is not to look for correct application of the EU law or even to interfere with the competence of the Court of Justice by authoritatively interpreting the contents of the EU law. The Constitutional Court examines exclusively whether the application of EU law by ordinary courts was arbitrary or unsustainable and it does so solely from the perspective of the Czech constitution.

3.2 Article 267 and a right to statutory judge/fair trial—an evaluation

The cases analysed above clearly indicate a "political", rather than a legal motivation on the part of the Constitutional Court not to refer questions for a preliminary ruling. This makes sense as, in a multipolar judicial system lacking a clear hierarchy of institutional relations between national and EU courts, the

[22] Such as a review of constitutionality of a legislative act lodged to the Constitutional Court by a group of the MPs.

[23] According to *Pfizer* decision a non-referral in breach of the CILFIT criteria is a breach of the Czech Charter of Fundamental Rights and Freedoms and can be subject to the constitutional complaint, see Constitutional Court of the Czech Republic, 2009; Stehlík, 2011, pp. 6–25; Grmelová, 2014, pp. 102–120.

preliminary ruling procedure imposes such a hierarchy through the introduction of a binding and authoritative interpretation of the EU law (see also Kustra-Rogatka, 2019).

Such an approach, however, neglects the fact that has been established more than 50 years ago in famous decisions *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] and *Flaminio Costa v. E.N.E.L.* [1964], according to which EU law is not sub-constitutional—i.e., subordinate—law, but autonomous. It is a legal system in which the founding treaties act as a "parallel constitution" with which national law must comply. The constitutional law is no exception (Malenovský, 2019, p. 195). Correspondingly from the perspective of EU law, the Constitutional Court without any doubt is the court in terms of Article 267 of the TFEU.

A certain reluctance on the part of the Constitutional Court in referring matters for a preliminary ruling is contrasted with its approach to the procedure in general. This is a reason why it would not be correct to interpret the above as an evidence that the Czech Constitutional Court is Eurosceptic and unwilling to engage in a judicial dialogue with the Court of Justice. The Constitutional Court may not be inclined to communicate directly, but it does consider the preliminary ruling procedure an important part of Czech justice, to such a degree that it has included it in the Czech constitutional framework.

In the above-cited decision in *Pfizer*, the Constitutional Court indicated its interest that ordinary courts refer matters for a preliminary ruling (Malenovský, 2019, p. 195). The Constitutional Court noted that while the referral of a question for a preliminary ruling is a matter of EU law, a failure to do so might constitute violation of the constitutionally guaranteed right to a statutory judge. Such right is not violated only if none of the parties sought to refer the matter for a preliminary ruling (Constitutional Court of the Czech Republic, 2014).

However, such an approach is rather problematic for two reasons. First, it is for a court to decide whether it is necessary to initiate preliminary ruling procedure, not for a party to the court proceedings. Thus, it is the court itself who has to be certain about the correct interpretation. Second, such an approach does not take into account the autonomous nature of EU law and its primacy over national constitutional law. The measure of correctness of interpretation of EU law should always be based on Article 267 of the TFEU (Malenovský, 2019, p. 194) and not on national law, not even on national constitutional law since such an approach poses a risk of inconsistent application of Article 267 of the TFEU in different Member States, depending on the scope of human

rights protection established by national constitutional law (Malenovský, 2016, p. 71).

Furthermore, in the judgement of the abovementioned case of *Československá obchodní banka*, the Constitutional Court (2018) responded to a situation where EU law was interpreted inconsistently at different judicial instances and concluded that a mere difference in interpretation does not automatically create a duty to refer a question for a preliminary ruling. The Constitutional Court thus established non-referral for a preliminary ruling in such cases as a general rule (for a detailed commentary see Stehlík, 2019a). This is contrary to an opinion of the Court of Justice declaring that the general rule is to refer such matters for a preliminary ruling (*João Filipe Ferreira da Silva e Brito and Others v. Estado português* [2015]).

The Constitutional Court also stated in the cited decision in its *obiter dictum* that it does not make sense to burden the Court of Justice with references in minor cases, with no greater impact on EU law or in cases that are unique in their nature.[24] One cannot fully agree with the reasons given by the Constitutional Court. Looking at the history of EU law, it is obvious that even cases that were small in relation to the contested claims or very specific at first sight led to decisions of great importance for the further development of the EU law doctrine. However, these conclusions of the Constitutional Court should be regarded more as a recommendation for lower courts that are primarily bound by Article 267 of the TFEU including conditions for references set up by the Court of Justice. Still, such a recommendation may have an impact on the willingness of the Constitutional Court to (positively) decide about the constitutional complaints against not lodging the preliminary ruling reference by ordinary courts such as was in the case at issue.

4. Conclusions and closing remarks

This paper did not aim to provide a holistic analysis of the practice of preliminary ruling procedure by the Czech courts. Still, it reached several generalising conclusions.

At first, the Czech courts started to use preliminary ruling procedure quite early after the Czech accession to the EU; the first references naturally originated

[24] This approach was based on the opinion of Advocate General Francis Jacobs expressed in case *Wiener S. I. GmbH v. Hauptzollamt Emmerich* [1997], para. 50.

from lower courts. However, in the long-time perspective it is evident that the activity of lower courts is significantly minor to that of supreme courts. Among other things, this can be caused by the fact that in a vast majority of cases lower courts are not the courts of last instance.

Comparing the two supreme courts, it is obvious that the Supreme Administrative Court lodges considerably more references and in numbers surpasses also the lower courts. There may be various reasons behind that, including the dominance of the EU regulation in the administrative law or a possible greater openness to cooperation with the Court of Justice. Lower courts may also consider the procedural implications of lodging a reference, prolongation of the dispute and corresponding effects for the parties. The statistical comparison with other Member States confirms that the Czech courts are less active, especially the lower courts.

Any further development in this field is difficult to predict since the decision to lodge the reference lies on the court deciding the case and the parties of the dispute cannot directly enforce it. In this regard, the threat of subsequent constitutional review and proclaimed infringement of the Czech Charter of Fundamental Rights (the *Pfizer* case) might do a good service. However, the recent decision of the Czech Constitutional Court in *Československá obchodní banka* has decreased the applicability of this procedure. The question is whether—regarding the *obiter dictum* of the Constitutional Court in this case—this decision will have a substantial impact on the willingness of ordinary courts to refer cases to the Court of Justice. We are convinced that its impact will be limited in practice as conditions set in this decision are rather vague, will be further tested by the parties in constitutional complaints and, thus, would probably be effective in a limited number of cases. Be as it might, the Constitutional Court does not regard itself as a court under Article 267 of the TFEU in complaints on the breach of the right for statutory judge as guaranteed by the Czech constitutional rules (Art. 26, para. 1 & Art. 38, para. 1 of the Czech Charter). In this regard it is up to ordinary courts to initiate a preliminary ruling procedure.

The Constitutional Court made it clear that the refusal of its competence under Article 267 of the TFEU does not automatically apply to other areas of law or types of proceedings. We assume that a reference will be desirable especially in cases where the Constitutional Court would tend to decide on non-application of the EU legislation because of the interference with the material core of the Constitution—a procedure which would be advisable in the *Holubec* case mentioned earlier in this text (see also Hamulak, 2015). In such a situation, the Court should consider the constitutionality of the contested EU act based on

its authoritative interpretation given by the Court of Justice. The fact that the Constitutional Court has not done so yet, does not preclude a different approach in future.

The pro-active approach of the Constitutional Court to the preliminary ruling procedure and its interest that common courts refer cases for a preliminary ruling contrasts with the attitude that the Constitutional Court has towards its own duty to refer a question for a preliminary ruling. However, a change of attitude is likely, as the Constitutional Court may decide to follow the successful examples of other constitutional courts including those who were reluctant in the past and who have just recently changed their approach towards the preliminary ruling procedure.[25] If the preliminary ruling procedure is to be understood as an opportunity for a dialogue between courts, then not initiating such a procedure means a voluntary resignation on the opportunity to communicate with and influence the Court of Justice (Zemánek, 2016, p. 65). This is not always the best strategy, as shown, e.g., in the outcome of the *Holubec* case.

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[25] A clear example of a successful judicial dialog between a constitutional court and a Court of Justice is the *Taricco saga* (*Criminal proceedings against Ivo Taricco and Others* [2015] and *Criminal proceedings against M.A.S. and M.B* [2017]).

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