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Reference for a preliminary ruling procedure as an (in)effective tool of judicial harmonisation of European Union law

Written in Czechia in 2018 by:

Jan Gregor

Pavel Kupka

Veronika Marušáková

team tutor: Klára Babičková

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INTRODUCTION

Preliminary ruling procedure was adopted to improve access to justice for EU citizens, to allow uniform application of EU law throughout the member states and to ensure that harmonisation of EU law is acquired (not only by legislature and executive but also) through judiciary. As had been shown in past decision making of the CJEU (and ECJ before it) it is an instrument of great value regarding the answers on interpretation and validity of EU law. However, the mechanism of preliminary ruling procedure does not seem to be quite frequently used. The aim of this paper is to describe this key tool of EU law and to analyse data showing the frequency of its use by national courts as part of their civil procedure. Eventually, attention shall be drawn to the possible obstacles hampering the more effective application of the preliminary ruling procedure by national judges, such as the length of procedure as well as lack of knowledge of the mechanism and EU law as a whole. In conclusion, the thesis offers possible suggestions of bettering the cooperation between national judges and the CJEU that might lead to more effective application of EU law by the ones responsible for its first-hand application and enforcement.

WHAT IS IT?

The original legal foundation of judicial body of today's European Union ("EU") happened in 1952 through the Treaty of Paris which established the European Coal and Steel Community comprising six countries when it composed of seven judges[1]. More than fifty-five years and much deliberation, negotiation, legislation and socio-geo-political evolution later the Court of Justice of the European Union ("CJEU", "Court") stands and serves to ensure uniform interpretation and application of EU law in all of 28 member states and to settle legal disputes between countries, individuals and EU institutions. CJEU is divided into the General Court and the Court of Justice and in total nowadays consists of 75 Judges and 11 Advocates General. Specific competencies of the two divisions of the CJEU and procedural aspects of their agendas are explained in the Treaty on the Functioning of the European Union ("TFEU", "Treaty")[2] adopted in 2007, Protocol on the Statute of the Court of Justice of the European Union ("Statute") and Rules of Procedure.

1 Article 31 of the Treaty of Paris (1951).

2 The Treaty on the Functioning of the European Union (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT) or the Lisbon Treaty entered into force on 1 December 2009.

The preliminary ruling procedure ("PRP"), a mechanism of cooperation between national courts and CJEU, was first enshrined in the Treaty of Rome[3] which came into effect in 1957 and since the Lisbon Treaty is to be found in article 267 of TFEU[4]. What actually does the importance of the preliminary ruling lie in and why is PRP considered a keystone of the legal system of EU[5] as well as a spine of the EU judiciary[6]?

The references for a preliminary ruling took up 72 percent of total amount of new cases at CJEU in the last year[7]. This fact of course shows only the scope of usage of PRP, but not the reason why, however, this has not always been the case. In the early years of existence of the PRP Court had to advertise and encourage countries into referring for the preliminary ruling[8] and the first ever made reference in 1961[9] was celebrated with clinking glasses.[10] Much have changed since then. At first slowly, then rapidly. In 2017 CJEU recieved 563 references for preliminary ruling and PRP is often called a victim of its own success[11].

WHY SO SIGNIFICANT?

Preliminary ruling procedure is a mechanism widely used in development of the EU law. The most remarkable concepts of EU law, such as supremacy of communitary law[12] and direct effect,[13] had been unwinded in preliminary rulings. *Article 267 (ex 234, ex 177) has been of*

3 This is not entirely true. Forerunner of PRP came in art. 41 of the Treaty of Paris. Preliminary ruling procedure as we know it now appeared in art. 177 of the Treaty of Rome (1957), moved to art. 234 with the Treaty of Nice (2001) and to the present-day art. 267.

4 Wording of the Article 267 of TFEU:

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

(a) the interpretation of the Treaties;

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where 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.

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

5 Former Judge of the Court of Justice Federico Mancini calls PRP a keystone in an edifice where doctrines of direct effect and supremacy are twin pillars of the Community's legal system in his essay The Constitutional Challenges Facing the European Court of Justice published in: Mancini F.: Democracy and Constitutionalism in the European Union: Collected Essays, Bloomsbury Publishing, 2000, p. 18-19.

6 That is a view of Attorney General Michal Bobek expressed in an exhaustive monographic handbook on PRP. See Bobek M., et al. Předběžná otázka v komunitárním právu. Praha, Linde Praha, 2005, p. 1.

7 Court of Justice of the European Union. *Annual Report 2017. Judicial activity*. Luxembourg, 2018. P. 102.

8 Horspool M., Humphreys. M. European Union Law. 6th ed. New York, Oxford University Press, 2010. P. 96.

9 Case 13/61. De Geus en Uidenbogerd v.Bosch (1962).

10 Barnard, C., Sharpston. B. The Changing Face of Article 177 References. [1997] 34 Common Market Law Review. P. 1117

11 This fitting term was first used by Koopmans T. in his 1987' essay La procédure préjudicielle - victime de son succès? - via Bobek, 2005, p. 405.

12 Case 6/64. Costa v ENEL (1964)

13 Case 26/62 Van Gend en Loos (1963).

seminal importance for the development of Community (now EU) *law*[14]. Through preliminary ruling procedure CJEU indeed does play a pivotal role in the european integration.

The significance of preliminary ruling procedure in EU legal system is immense. The main purpose is to ensure uniform interpretation of EU law in all member states. For this reason the rulings of CJEU are understood as precedentary and generally binding. Without it the peculiarity of legal system of the European Union in which autonomous countries naturally tend to interpret different legal terms in their indepedent and various ways. This helps to achieve not only uniform interpretation of EU law by national courts but mainly their uniform application. It is the national courts who stand in the first line and who communicate with parties and who are responsible for the very application of EU law. CJEU itself does not have a power to enforce correct application which is why national courts or tribunals against whose decisions there is no judicial remedy under national law are obliged to bring matter in question before the Court.

Reference for a preliminary ruling is the only way for the national judges to get in direct touch with the Court. The relationship between national courts and CJEU tends to be described as cooperation-like where judges applying EU law in practice are merely lent a helping hand by judges sitting in Luxembourg's Palais de Justice in the matters of interpretation or validity of EU laws. The procedure provides an invaluable link between national legal systems and EU law. It helps the CJEU control how the national courts apply EU law and also gives national courts a chance to affect the uniform interpretation of EU law.

Preliminary ruling procedure also serves as an instrument for time-unlimited indirect control of validity of EU laws. As opposed to the procedure for review of legality which has to be launched within two months of the publication of questioned measure.[15]

Last but not least the preliminary ruling procedure ensures protection of subjective rights of individuals provided by EU laws. It allows both natural and legal persons to access CJEU via, albeit through national courts in procedure where their position is only secondary.[16]

14 Craig, P., De Búrca, G. EU Law. Text, cases, and materials. 3rd ed. New York, Oxford University Press, 2003. P. 433.

15 Article 263 of TFEU.

16 Kaczorowska, A. European Union Law. Abingdon, Routledge-Cavendish, 2009. P. 252.

WHO IS A COURT OR TRIBUNAL?

Which national authorities are bound by the Article 267? In the first step one has to make comparative linguistic exercise of the Treaty, we can recognize that Article 267 indicates "court or tribunal". It does not have the same meaning in all mutations of the Treaty.[17] This different designation describes broader meaning then just for bodies as a part of judiciary branch and it has been proved by case law of CJEU. Case law of CJEU determine meaning "court" a number of factors, "*such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rule of law and whether it is independent.*"[18]Case law show some examples of non-court body.[19]

The purposes of a procedure which entitle courts and tribunals in EU countries, under Article 267 of the TFEU to refer to the Court of Justice of the EU (CJEU) for a preliminary ruling. This procedure is used in cases where the interpretation or validity of an EU law is in question, and: *where a decision is necessary for a national court to give judgment*; or *when there is no judicial remedy under national law*.

The Court of Justice and the national courts are equivalent judicial bodies. Therefore, the preliminary ruling proceedings are not characterised by hierarchy but by cooperation which requires the national court and the Court of Justice - each within its own jurisdiction – to make direct contributions to achieve a decision that guarantees uniform application of EU law in all Member States. The Court of Justice only rules on the interpretation or validity of the relevant dispositions of EU law. It falls to the national court to assess the legality of the legal rule or legal act for domestic law, in light of the Court's response to the preliminary question (Case 16/65, Schwarze).

The most important function of the preliminary ruling proceedings is to ensure a uniform interpretation of EU law. Secondly it supposed to be helping tool providing resolving the problems that sometimes arise from application of EU law. Thirdly, the preliminary ruling proceedings may serve as a means to protect the rights that citizens derive from EU law.

17 For example "court or tribunal" in French is „juridiction", in Italian „giurisdizione", in Czech "soud", in German „der Gericht" and only the German translation has the equivalent meaning with the English term.

18 C-416/96 El-Yassini (1999), para 17, see also C-61/65 Vaassen-Goebbels (1966); C-54/96 Dorsch Consult (1997), para 23, and C-393/92 Municipality of Almelo (1994), para 21

19 Well known examples are bodies of profesional chambers, for instance General Medicine Appeal Commission which referred C-246/80 Broekmuelen (1981), or arbitration courts, as in C-102/81 Nordsee (1982).

In general the national court or tribunal before which a dispute is brought takes sole responsibility for determining both the need for a request for a preliminary ruling and the relevance of the questions it submits to the CJEU.

Courts submitting a referral should, among other things: be established by law and be permanent; have compulsory jurisdiction; apply the rules of law; and be independent.

Ties between CJEU and national courts: binding relation or friendly cooperation?

Principle of legal certainty and maintaining the unity of the rule of law are crucial demands of the decision in the case International Chemical Coorporation (ICC). We definitely agree with author‘s interpretation.[20] CJEU made a decision as a smart frenzy. On one hand court made a ruling that legal act[21] regarding regulation purchasing of skimmed milk were abolished and recognized as invalid. Parties of previous dispute get damages as a response to this invalid regulation. On the other hand ICC wanted damages too but it had not been part of previous dispute (*inter partes)*. So there was a question. Has ICC right for damages based on the decision which was made before and without it as a party of dispute? CJEU said but not directly: "*It follows therefrom that although a judgement of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly adressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgement which it has to give*."[22] Judgement opened the way of interpretation by simplicity. It seems that courts are bounded voluntarily but it is not right idea. When another national court would brought the matter before the Court in same case (reason), response of CJEU will be pointing judgement which was settled.[23] So it means that national courts has to follow previous judgement without any option. A different situation will occur if the decision does not affect the validity of the EU law. Then there is a possibility to start new preliminary ruling based on another reason. On the end of this section it is necessary to mention, preliminary ruling aiming on validity of the EU regulation has no same result as ruling based on the Article of 263 of Treaty. Invalid regulation declared by the process of preliminary ruling is invalid *inter partes*. Invalid has to be technically for national courts in same reason but generally, regulation of the EU is still valid. In that case European institutions whose act has been declared void of whose

20 Bobek, M., Komárek, J. Koho vážou rozhodnutí ESD o předběžných otázkách? 19 Právní rozhledy (2004). P. 6.

21 Council Regulation (EEC) No 563/76.

22 Case 66/80 SpA International Chemical Corporation (1981), para 13

23 Pursuant on the Article 99 of Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012 (available: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf)

failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with judgement of CJEU based on the Article 266 of Treaty.[24] Action based on the Article 263 has different consequences. The process ends with a decision declaring the regulation void and revoking the regulation (ruling has consequence *erga omnes*). The main meaning is that it has effect only to parts of dispute and national court but with force of precedent it is actually binding to all materially identical cases, not like procedure under Article 263.

Subject matter and scope

Importantly, a referral must concern the interpretation or validity of EU law not national law nor issues of fact raised in the main proceedings. The CJEU may only give a ruling if EU law applies to the case in the main proceedings. The CJEU does not itself apply EU law to a dispute brought by a referring court, as its role is to help resolve it; the role of the national court is to draw conclusions from the CJEU's ruling. Preliminary rulings are binding both on the referring court and on all courts in EU countries.[25]

The Court may be asked to interpret the Treaty and all of the acts – without exception – of the European institutions and the European Central Bank (Case C-11/05, Friesland Coberco Dairy Foods, para. 36). The term "acts" also covers the international agreements concluded by the European Union (Case C-192/89, Sevince, para. 8-10).

The Court of Justice is the only court with jurisdiction to rule on the validity of acts of the EU institutions, i.e. regulations, directives and decisions. In preliminary ruling proceedings concerning the validity, all the grounds for declaring such acts void (Article 263 TFEU – former Article 230 EC) may be put forward, i.e. lack of competence; infringement of an essential procedural requirement; infringement of the treaty or any rule of law relating to its application; and misuse of powers.

In addition, the Court of Justice may review the validity of acts in the light of general principles of EU law which are binding on the Union and which have direct effect (Joined cases C-300/98,

24 The principle of equal treatment which was established by CJEU by judgments of 19 October 1977 in Ruckdeschel and Others (117/76 and 16/77, EU:C:1977:160, paragraph 8), of 19 October 1977 in Moulins et huileries de Pont-à-Mousson und Société cooperative Providence agricole de la Champagne (Cases 124/76 and 20/77, EU:C:1977:161, paragraph 18) and of 25 October 1978 in Royal Scholten-Honig and Tunnel Refineries (Cases 103/77 and 145/77, EU:C:1978:186, paragraphs 28 to 32)

25 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14552 25/04/2018

Parfums Christian Dior SA, para. 42). A national court may reject the grounds of invalidity, but it has no power to declare EU decisions to be void.

However, if a national court has serious doubts as to the validity of an act of an EU institution on which a national law or decision is based, the court may, in special cases, suspend the application of such act or may order any other interim relief with regard to such act. The national court should subsequently refer the question of validity to the Court of Justice, setting out why it believes that the Community act must be considered invalid.[26]

Interpretation of european legal acts

This part is a crucial for whole preliminary ruling. Definite opinion was made by a decision CJEU, parties of dispute are bound (*inter partes*). Court recognised interpretation as a center of decion making. It was said directly by the Court: *"A judgment given by the Court under Article 177 is binding on the national court hearing the case in which the decision is given."*[27] This is obvious, but how much is court which is asking for preliminary ruling bound by a judgement of CJEU? Bounded by the decision of CJEU is not just court which is asking for preliminary ruling, this decision has to be "inviolable" for all sorts of national courts in that case (courts of appeal and highest courts and constitutional courts[28]). Very problematic is a situation when the Court (CJEU) is overruling its position which was made by Primary law. It has made by two ways. First, CJEU is answering on a question which nobody asked. Second way is more delicate, CJEU is answering more broadly but main point stand. This overruling means that EU regulation is interpreted very broadly because it can make more space for the extension fo authority of CJEU.[29]In this part there was written how preliminary ruling affect parties of dispute and courts which are part of this procedure (*inter partes*). What about others (*erga omnes*)?

Continental lawyers would be a little bit shocked. Binding power (*erga omnes*) of a decision of CJEU in a case of EU law is not included in any acts (any primary law, treaties). Very bright idea was mentioned by authors Bobek and Komárek who made comparison "*national courts are saying, we are respecting your case law but you cannot mention that it is binding us generally.*"[30] With this view we have to agree. This pragmatic way has made armistice between

26 Kenner, J.:European Union Legislation 2011-2012, Routledge 2013, P. 255

27 Case 29/68 Milchkontor (1969), para 2.

28 The most famous case in that is Case Solange II (decision 22th October 1986 of Federal Constitutional Court, BvR 197/83).

29 The most famous overruling decision was made in the case 145/79 Roquette Frères v. France (1980) ECR 2917,

30 Bobek, M., Komárek, J., Koho vážou rozhodnutí ESD o předběžných otázkách?, Právní rozhledy 19/2004, page 9

courts and CJEU. Authors of article pointed just on one case where was a hint of shifting trend. It was mentioned in a opinion of advocate general in a case *Manzoni*.[31] This position is not frequent in discourse. But, why Article 267 of Treaty exists? Reason is simple – to uniform interpretation and aplication of EU law.

What if the CJEU already made a decision, must the preliminary reference be placed again? The judges answered this query in the Da Costa case.[32] In the case, a Dutch court approached the CJEU with an identical question to the one given the court regarding Van Gend Loos. As it was a court of final appeal, it was obliged to turn to the CJEU according to Article 234 Paragraph 3 TFEC. In this case the court stated that if it has already made a ruling on an identical matter, there is no need to make a preliminary reference.[33]

TO ASK OR NOT TO ASK?

The obligation to refer is not absolute, naturally the ECJ evolve a safeguards in preliminary ruling otherwise whole system could collapse due to overload of national courts´ questions. According to its wording, Article 267(3) requires all national courts of last instance to refer questions for preliminary rulings in all situations where a case gives rise to a question of the interpretation or validity of EU law. However, the obligation to make such a reference must be understood in the light of the purpose behind Article 267, which is to ensure the uniform and correct application of EU law by the national courts.[34] This has considerable importance, not least today where EU law covers so many areas that there would inevitably be an excessively large number of cases referred if every court of last instance were to make a reference every time it was faced with a case that contained elements of EU law.

A national court of last instance within the meaning of Article 267(3) does not have a duty to refer a question on the interpretation of EU law to the Court of Justice if the ruling of the Court

31 Opinion advocate general Werner in case 112/76 Manzoni v. Fond National de Retraite des Ouvriviers Mineurs (1977) ECR 1647, page 1662 a 1663: "The role of this Court is in many ways sui generis. But I think that, in so far as any analogy is here relevant, that of the House of Lords is closer than that of the Bundesverfassungsgericht or of the Italian Constitutional Court. A decision of the House of Lords is, under the doctrine of stare decisis, binding upon, and must be followed by, all other Courts throughout the United Kingdom (in so far of course as the law it declares is applicable throughout the United Kingdom), but the House of Lords itself — and it alone — may reconsider and depart from the decision in a subsequent case. If it does so, it is the new decision of the House that becomes binding on other Courts."

32 Cf. Bobek, M., Komárek, J. Koho vážou rozhodnutí ESD o předběžných otázkách? 19 Právní rozhledy (2004). P. 9.

33 Da Costa, p. 38, paraphrase of Bobek, M., Komárek, J. Koho vážou rozhodnutí ESD o předběžných otázkách? 19 Právní rozhledy (2004). P. 10. It becomes an "acte éclairé" according to the CJEU doctrine.

34 Broberg, M., Fenger N.: Preliminary References to the European Court of Justice. Second Edition. Oxford University Press 2014. P. 230

would have no bearing on the final decision in the main proceedings. All national courts are precluded from making a reference if the question is not relevant.[35]

The next situation when national court is not obliged to refer is application of Acte Éclairé doctrine, which means a materially identical questions has already been the subject of a preliminary ruling. Even where a previously referred question and a question which a national court of last instance is considering referring are not identical, the answer to the earlier question can mean that the law has been so unambiguously explained that there is no obligation to make a reference under Article 267(3). This concept is known as Acte Clair. Both situations arise from CILFIT case. The national court is still able, in formal terms, to refer a matter to the ECJ, even where the ECJ has ruled on the issue. However, it is clear that such a application must raise some new factor or argument. If it does not do so, then the Court will be strongly inclined to restate the substance of the earlier case. The Da Costa case initiated what is in effect a system of precedent[36], the CILFIT case develop those seeds. In other words, the first and the second of the abovementioned exceptions for courts of last instance to refer arguably do not involve any substantial risk that national courts will apply EU law inconsistently. It is, however, more problematic to allow courts of last instance to refrain from making a reference for a preliminary ruling where a decision on the main proceedings requires an interpretation of EU law and the Court of Justice has not ruled on the issue. This entails a risk of different national courts, including supreme courts, coming to mutually conflicting conclusions. Furthermore, there will be a risk that the right to refrain from making a reference will be abused by national courts that wish to exclude the Court of Justice when they decide certain cases. The aim of article 267 is to uniform interpretation of EU law, so when there is no doubt about correct interpretation it seems to be inappropriate to require a reference to preliminary ruling.

So as mentioned above in case the court wish to use a right to refrain to refer for preliminary ruling, the court has to be convinced that its interpretation of EU law is correct, but also that the matter is obvious to the courts of the other member states and to Court of Justice, or materially identical question was solved, which is not easy task and presumes the knowledge of ECJ case law or at least very good research skills, because search tools of EU institutions are not very user friendly. However, the strict conditions following application of the acte clair doctrine should minimize a risk of adopting a wrong interpretation by national courts. Observing those requirements on websites of EU institutions (e.g. ECJ) you can find some

[35] Available at: https://lawexplores.com/when-are-national-courts-obliged-to-refer-questions/ 30/04/2018

[36] Craig, P., De Búrca, G. *EU Law. Text, cases, and materials.* Third Edition. Oxford University Press, 2003. P. 440.

helping features for example EU legislation or cases are drafted in different language versions and you can even compare them.

HOW TO ASK?

The judgment or order in which the court submits a question for a preliminary ruling should contain a brief statement of the reasons as well as all the information necessary for the Court of Justice and for those on whom the judgment must be served (the Member States, the Commission and, when appropriate, the Council and the European Parliament) for a proper understanding of the factual and legal framework of the case (Case C 338/04, Placanica, para. 34).

The national court has an initiative and stays master of the case but national court is absent in the procedure before the ECJ but remains the partner in dialogue. So very first question is: Are you a „court" within the meaning of Article 267 para 2, 3? Is EU law applicable in your case? In this point it is necessary to make thorough research of ECJ´s case law considering CILFIT criteria. If you have stated that you are really court than you have to decide if it is the right time to refer, it is after both sides have been heard on the issue (fair trial, defence rights) and at a point in time when factual and legal framework is determined. When draft is made it should content: *relevant facts*, *legal context* (domestic law as relevant national law provisions, relevant ECJ's case law), *reasons* (necessity, indication of view of the referring court (optional).

ECJ is not a fact-finding body, therefore facts presented by the national court are essential for the interpretation to be given in a case, ECJ relies entirely on it. Court has to explain which reasons prompted the court to inquire about interpretation and why judgment given in the particular case can solve the dispute.[37]

National court cannot ask hypothetical questions or questions which are not linked to the case, ECJ cannot interpret domestic law. The questions should be self-contained and self-explanatory, should be specific and related to particular case. Court should not exceed more than five questions and avoid too many sub-questions. If national court believes there are grounds for expedited procedure under article 105 or urgent procedure under article 107, such a opinion needs to be reasoned. No standard form is imposed, it can be any form allowed by national legislation. The title of the document supposed to be order, ordinanza or incheiere. The

[37] Available at: http://www.ejtn.eu/Documents/About%20EJTN/Administrative%20Law%202016/AD201605%20Preliminary%20Ruling%20ERA%2019-20%20Sept/Ramascanu_PPT_Refering_questions_CJEU.pdf 30/04/2018

style of order should be simple, clear and in short sentences, paragraphs and pages numbered, typewritten and at most 10 pages long.

THE CZECH EXPERIENCE

Since accession of the Czech Republic to the EU on 1 May 2004 Court of Justice recieved 61 new references for a preliminary ruling. Is that too much or too little in comparison with other members of EU? Should the number perhaps be higher in order to achieve better judicial harmonisation of EU law? And what are the key factors?

The total number of 10 149 requests for preliminary ruling had been cast on the Court between 1962 and 2017. In 2017, the number crossed the five hundred bar when a total of 533 cases had been brought by 28 member states[38]. The amount is growing bigger every year and not due to the growing number of member states. The reasons are various. In times like these when numbers of preliminary ruling cases that Judges of CJEU have to take care seem very high it is especially soothing to read in a book co-authored by two members[39] of the Court that „*the Court of Justice is not overladen*.[40]"

The champion of referrals is Germany, followed by Italy, the Netherlands and France. The United Kingdom, whose judges and lawyers work with precedents on day-to-day basis, unlike continental lawyers to whom a doctrine of precedent, much emphasized by CJEU in its rulings, is all Greek. Hungary, population-wise comparagle to Czechia, referred for preliminary ruling in a fourteen years of its membership in EU at least 100 more times then did the Czech courts in the time span. The reason for the usage of PRP by individual countries remains unknown and requires deeper analysis which we dearly encourage.

Let us look into the Czech referrals made in civil proceedings. There have been at least 18[41] referrals made during the membership of the Czech Republic in EU. Three were made by courts in criminal proceedings and the rest by administrative courts. None of the civil referrals had been made to question validity of EU acts, all of them aimed for interpretation of legal acts. Vast majority of them was successful and ended with a judgment. From this point of view,

[38] CJEU: Annual Report 2017. Judicial activity. P. 122.

[39] Jiří Malenovský, Judge of the Court of Justice, and Irena Pelikánová, Judge od the General Court.

[40] TOMÁŠEK, M., TÝČ V., et al. Právo Evropské unie. 2nd ed. Praha: Leges, 2017. P.390.

[41] The exact number remains unknown. CJEU does not publicly reveal identity and nature of cases until the proceeding is over (as of the closure of this paper there are four cases in progress before the CJEU that could or could not be referred by civil courts) and Czech courts are hesitant in providing needed information to public.

Czechia has been doing fairly well. The array of cases contains both substantive and procedural legal issues.[42]

The most important of Czech would be *Radlinger and Radlingerová*[43] in which the Court dealt with power of national courts in the context of insolvency proceedings. and basically concluded that courts in insolvency proceedings are premitted to examine legality of terms of credit ex officio. The Court provided a sufficient reasoning for its stance. Nevertheless, not everyone seems to feel bound by Courts judgment. The national court which posed the question, applied the freshly acquired binding interpretation of european directives, and ruled in favour of the Radlinger spouses. However, czech court of appeal did not agree with the verdict of lower court who in opinion of the court of appeal did not interpret the CJEU's court ruling correctly and ruled in favour of the credit company, who was a defendant in the original dispute. Subsequently, the lower national court changed his decision and in his ruling favourised the creditor[44].

Another interesting case was posed by the Czech Supreme court[45]. Mrs. Svobodová[46] is a judge at a small disctrict court where judges are not deemed employers in the sense of the Czech Employment Act and do not recieve remuneration in respect of working duty out of normal working hours. Supreme court, obliged to do so as a court against whose decisions there is no judicial remedy under the national provisions, referred to CJEU with a question regarding the equal treatment in the sense of Council Directive 2000/78/EC. The Court issued and order in which it found the question for preliminary ruling inadmissible for its insufficient description of facts and relevant national law. Only as part of *obiter dicta* did the Court explain to the Czech Supreme court that the Directive in question lays down a general Framework for combating discrimination on the grounds of religion or beleif, disability, age or sexial orientation as regards employment and occupation. As there was no mention of these grounds for discrimination in the case of Mrs. Svobodová the Directive was in no way applicable to the case. This is a clear example of the Courts practice of issuing an order of inadmissability in case where the answer is so clear that the Court simply refuses to deal with the merit.

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[42] List of results of questions referred for a preliminary ruling by the Czech Republic at search form of caselaw the Court of Justice. Available at: http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=CZ%252C&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=251191 (06-05-2018).

[43] C-377/14. Radlinger and Radlingerová. (2016)

[44] See insolvency proceeding at „Krajský soud v Praze" under KSPH 39 INS 2983/2013.

[45] „Nejvyšší soud České republiky" is a third level instance in the Czech judicial system and in most cases the court of last resort (in some cases the appeal to the Supreme court is not permisible) in civil proceedings.

[46] C-653/16. Svobodová v. Czech Republic. (2017)

In general, PRP is initiated by lower courts who need an answer from CJEU in order to apply EU law in the right manner in the first instance or the aforementioned Supreme court. Czech Constitutional court never submitted a reference for a preliminary ruling. Czech Constitutional Court has not yet ruled out possibility of its referral to CJEU but at the same time did not confirm that it would cooperate with CJEU through preliminary references[47]. The Czech constitutional court is not a part of standard judicial system. It is a body whose main task is to protect constitutionality and abiding with human rights. The Czech Constitutional Court posseses an exceptional command of EU law[48]. Even though this possibility still exists, for example in hypothetical constitutional conflict regarding the Charter of Fundamental Rights of the European Union, the chances that Justices of the Constitutional Court would ask CJEU are low – simply because the Constitutional court believes that it is able to interpret EU law better than CJEU itself.

Pešková and Pešek[49] had a tiny dispute with Travel service – Czech airline regarding a compensation to passengers in the event. of long daly of flights due to a collision between a plane and a bird. District court ruled in favour of plaintiffs. The defendant brought the claim to the Constitutional Court which upheld the appeal and ruled that defendants fundamental right to a fair hearing and the fundamental right to a hearing before the proper statutory court had been infringed, because district court, as a court of last instance in this case, was obliged to and di not refer a question for a preliminary ruling as to answer a question regarding „extraordinary circumstances." Let this be an example of how the Constitutional Court while not referring to the Court itself moves the czech judiciary towards a more effective usage of preliminary references.

To conclude this section, Czech courts do request for preliminary ruling scarcely but they do. Less then other countries (such as Austria or Hungary) but still more than other ones. It is impossible to point out a general trend. The reasons may be many. Starting with language barriers (not all decisions of the Court have been translated yet), through pride of national courts and reluctance of national judges against having their decision made by decentralized Luxembourgish authority, to lengthiness of procedure.

[47] HAMUĽÁK, O. Právo Evropské unie v judikatuře Ústavního soudu České republiky. Praha: Leges, 2010. P.169.

[48] This has been shown in one of civil law cases referred to the CJEU (C-315/15

[49] Case 315/15. Pešková and Peška. (2017).

WHY THE BAD PRACTICE?

As mentioned above, the procedure is quite lengthy. National courts do usually stay the national proceeding in order to refer to the CJEU for preliminary ruling. This intermission does mean a violation of a fair trial, however, effectively stopping any procedure for in average 16.5 months[50]. The lenghtiness is largely caused by translation of documents to other languages[51]. Luckily, as has been mentioned above, CJEU developed its very own filtration mechanisms (inadmissability, irrelevance, acte clair, acte éclairé) and judges of the Court keep the load off their backs. After all, it needs to be kept in minds that a year and a half of waiting for a decision that might change course of European Union at least help better protection of rights of individuals in numerous future cases is a very small price to pay. Duration of proceeding is not the problem.

Could the problem perhaps lie on the side of national judges then? It could indeed. Referring to the Court puts extra demand on judges' backs which are already burdened enough with all the workload and responsibilities for correct application of law and justice. However, as aforementioned, it is the national judges who are to apply the EU law in the first lane. Not referring to the court could constitute violation of fair trial and even a states' liability for damage caused (as was implied in the case of Mr. Köbler) or perhaps a reason for a claim towards the European Court of Human Rights /"ECtHR"/[52].

According to us, the main issue is insufficient language skills, bad notion of the preliminary ruling procedure and lack of knowledge of the EU law. Even though reference for preliminary procedure is to be made according to national procedural rules in official language of the judges' country, there is not much information on how the whole procedure works. Furthermore, national judges' knowledge of European law is poor - that is the case especially with older judges in newly accessed member states and it is only natural for they were not taught about European law and, honestly, had no reason (being apart from the European communities) to care. But times had changes and in these *ignorantia legis europeanorum neminem excusat,* especially not judges. Avoidance of referring to the CJEU, whatever the reason, are able create major problems. Judges are often creative in using interpretative methods and in effect use interpretations *contra legem.* The court can reinterpret domestic law in accordance with EU law

50 CJEU: Annual report 2017. The year in review. P. 33.

51 Although even here, in the most expensive department of the Court, progress is being made.

52 In the case of Ulles de Schooten and Rezabek v. Belgium (Applications nos. 3989/07 and 38353/07) ECtHR had not found a violation of article 6 para 1 of the European Convention of Human Rights. ECHR respects division of powers between ECtHR and CJEU and acknowledges the exceptions to the obligatory referrals as developed by CJEU. This does not mean that the position of ECtHR cannot be, in a more serious violation of fundamental right to fair trial, changed.

through various means (eg. using teleological reduction). An example of such a decision *contra legem* in the Czech Republic is the Supreme Court's ruling from 31 March 2009, file no. 33 Cdo 2894/2008,[53] which definitively decided a litigation regarding the authority to adjudicate a specific dispute regarding a contract of telecommunication services provision.[54] The court applied a teleological interpretation (based on an explanatory memorandum) and through EU-conform interpretation (indirect effect) basically rewrote the legal provision in question.[55] As shown by this example, the avoidance of preliminary reference does not always lead to the ideal application of EU law.

The extend of the whole EU law is problematic as well. There are simply too many legal acts and judges' can be acquainted with only so many. That is why not only judges, but all lawyers, and especially attorneys defending parties at court, should be more educated in European law. Attorney's hinting in the right direction (towards the European law and reference for a preliminary ruling) should not be frowned upon but openly listened to by judges for this might lead to the new pivotal decision.

WAYS TO IMPROVE

As follows from the aforementioned, we believe that the limits to improvement of the usage of preliminary ruling procedure to its full possibility lies on the side of national judges. On their hesitance to learn and to communicate with CJEU. Legal issues evolve in line with the needs of society. It is necessary for judge, as the person who decide on the legal aspect of society's needs, to be educated, modern-minded, person with extensive knowledge of the law, both legal and applicative in relation to the institutes at stake and the content of the essential decisions.

Each person develops, the judge is also only a human being and has learned certain ways of conducting a litigation. If a judge wants to be a good judge, he must be able to re-evaluate the development of legal standards. Legal standards are no longer just national laws. Within the European Union, we are discussing the approximation of sub-legal orders (national) with the

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53 Published under no. R1/2010.

54 The core of the issue lay in the legal provision of § 129 paragraph 1 sentence 1 of law no. 127/2005 Sb., Electronic Communications Act; disputes between entities providing communication services (§ 7) on the one hand, and participants or users, on the other hand, according to the proposal by either party of the dispute, if the dispute is related to obligations prescribed by this law or based on it.

55 *"[…] doslovné znění § 129 odst. 1 je ve zjevném rozporu s jeho smyslem a účelem, jak vyplývá z důvodové zprávy k návrhu tohoto zákona. Zatímco jazykový výklad tohoto ustanovení svědčí ve prospěch názoru prosazovaného žalobkyní, že pravomoc ČTÚ je vymezena nejen věcnou charakteristikou sporů, ale zároveň i osobní charakteristikou stran sporů, jeho smyslem a účelem je, aby ČTÚ rozhodoval spory týkající se plnění povinností stanovených zákonem č. 127/2005 Sb."* English translation: "[…] the literal wording of § 129 paragraph 1 is in clear contradiction with its sense and intention, as is intimated by the explanatory memorandum for the proposal of this law. Whereas the linguistic interpretation of this provision speaks in favour of the opinion promoted by the prosecutor, that the authority of the CTO [Czech Telecommunications Office] is delineated both by the factual nature of the dispute and by the personal nature of the parties to the dispute, its sense and intention is for the CTO to arbitrate disputes related to the fulfilment of obligations prescribed by law no. 127/2005 Sb."

European Union's legal order, where key issues are governed by separate directives and regulations. Knowledge of insititues and their applicability is one of the basic pillars of the proper functioning of the judiciary across the European Union.

Given the fact that national legislation is, in principle, subject to or derived from the legislation of the European Union, it is imperative that questions be dealt with in preliminary questions which can not only positively/adversely affect the development of the law of the Member State concerned, the orders of other countries.

There are ways of enhancing judge‘s education both at national and European level. Each Member State has its own self-governing body which provides and organizes training for judges. The number of these training courses suggests that the number of organized trainings is more than generous. It is, however, on everyone's approach to using the training. The compulsory aspect of such training is absent, so if the accusation is not on the judge's side, it is not possible to evaluate the benefits of such training accurately.

Another training method which is possible to use is forming a podcast[56]. Podcast in our way will be audio and it will simplify access of judges to breakthrough cases in regular time period, e.g. monthly. These podcasts will be translated into all official languages and will be send via email to all judges. Judges could listen to them when they travel via car or by train. The access to written form of cases is not always user friendly and for judges it could seem to be difficult. We see this form of education like a nonviolent way to keep in touch with newly released case law.

European Justice Training Network does great deal of work in educating national judges. However, one thing is missing. A good handbook. One in which everything would be explained Step by step. We have a lot of instruction how to do this and how to do that. But we all know that there are a lot of gaps in these instructions. Therefore, judges need something which doesn’t let them doubt about the procedure. Something very elaborated. Translated into all official languages.

CONCLUSION

Preliminary ruling procedure has played a major role in development of European communities and European Union. It is a major instrument not only in direct cooperation between national courts and the Court of Justice of European Union but also, albeit indirectly, between national

[56] Podcast is a digital audio or video file which can be available on the Internet typically in series.

courts of the whole Union. Decision made upon reference made by court in Greece may change the way laws are applied in British Isles. CJEU have made easily comprehensible rules that, if followed, lead to decision in merit. The reference is not difficult to make. CJEU has enough room for more references and these should be made. Now it is up to the national judges to ask for more. There ways to make preliminary reference procedure better than ever before.

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