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EU procedural rules and Czech Constitutional order: the case of preliminary ruling procedure

JUDr. Václav Stehlík, LL.M., Ph.D.¹
JUDr. PhDr. Robert Zbírál²

Abstract:

The discussion paper focuses on the application of the EU procedural rules in the Czech constitutional order; namely on the obligation of courts of last instance to initiate the preliminary ruling procedure under art. 267 of the Treaty on the Functioning of the EU. First the paper gives a basic survey of the ECJ's perception of this obligation. Then, it focuses on the relevant case-law of the Czech Constitutional Court that, under certain conditions, considers the violation of this obligation to be a breach of the right to one's statutory judge; this right being protected by Czech Charter of Fundamental Rights and Freedoms. Consequently, the paper shows that the obligation of Czech courts to use the preliminary ruling procedure under art. 267 TFEU and conditions for its application and enforcement are based both on the EU and Czech law.

Key words:

preliminary ruling procedure, right to one's statutory judge, Court of Justice of the European Union, Constitutional Court of the Czech Republic, Czech Charter of Fundamental Rights and Freedoms, Treaty on the Functioning of the European Union

1. Introductory remarks³

The preliminary ruling procedure under art. 267 TFEU⁴ has been an extraordinarily important part of the EU judicial framework. In this procedure the Court of Justice of the European Union (further only "European Court of Justice" or "ECJ") formulated the fundamental principles for the application of EU law⁵ in the legal orders of Member States (such as the direct effect of EU law or supremacy of EU law over conflicting national law) and gave its seminal interpretative judgments that greatly contributed to the present *visage* of the EU (not only

¹ Senior lecturer of EU law at the Department of European Law, Faculty of Law, Palacký University in Olomouc, Czech Republic; contact: vaclav.stehlik@upol.cz.

² Senior lecturer in the European Studies at the Department of political sciences, Faculty of Law, Palacký University in Olomouc, Czech Republic; contact: robert.zbiral@upol.cz. Dr. Zbírál prepared the Addendum in Chapter 7 of this paper.

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⁴ Treaty on the Functioning of the European Union; by the Lisbon Treaty revision since 1 December 2009, it replaced the former EC Treaty. Consequently the present article 267 TFEU corresponds to the former art. 234 TEC. Where appropriate, we will refer also to the old numbering; this concerns especially the pre-Lisbon case-law of both the ECJ and Czech Constitutional Court.

⁵ Before the Lisbon Treaty revisions the term "Community law" or "EC law" was used; we preserve it when referring to the pre-Lisbon case-law. After Lisbon Treaty revisions the EC law principles apply to all EU law.

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economic) integration.⁶ Under art. 267(2) TFEU a court of lower instance may initiate the preliminary ruling procedure if it considers that a decision on the question of EU law is necessary to enable it to give a judgment in the case concerned. In case of courts of last instance the art. 267(3) TFEU formulates an obligation to initiate this procedure.

One of the crucial points in the integration process was the interpretation and enforcement of art 267(3). We may analyze the nature of this obligation from the perspective of both the ECJ – the supreme authority for the interpretation of EU law – and the national courts of last instance and especially the supreme or constitutional courts of the Member States – supreme authorities for the interpretation of national (constitutional) law.

In this paper we will give a basic outline of the ECJ's perception of art. 267(3) TFEU. Then, we will focus on the decision of the Czech Constitutional Court⁷ that concerned the duty of Czech courts to initiate the 267(3) TFEU procedure. Last but not least, we will make a short note on a counterpart decision of the Slovak Constitutional Court.⁸

2. The ECJ and the exceptions to the use of 267(3) procedure

Formally, the article 267 TFEU distinguishes between the optional (courts of lower instances) and obligatory (courts of last instances) initiation of the preliminary ruling procedure on the questions of interpretation or validity of EU law. The decision if there is the obligation to initiate the procedure and if there are some exceptions from this obligation was of a great constitutional concern. The ECJ could not let the use of this procedure unguarded and leave the interpretation to the national level as the main *raison d'être* of the preliminary ruling procedure is the uniform application of EU law, especially the internal market rules, in all Members States. Simultaneously the procedure helps to maintain the supreme authority of the ECJ itself as far as the interpretation/validity of EU law is concerned. Therefore, the ECJ wanted to keep “the reins in its hands”.

On the other hand, the necessity to formulate basic limits of the obligation to initiate the procedure was quite a “practical” matter as it was not desirable that national courts would be forced to ask questions also in relation to clear or already clarified issues. It was the task of the ECJ to set up reasonable limits that would still preserve the main *raison d'être* of the procedure as mentioned above.

⁶ For details see most recently, f.e. Broberg, M., Fenger, N.: Preliminary reference to the European Court of Justice, Oxford University Press, Oxford 2010; in the Czech legal monographs Bobek, M., Komárek, J., Passer, J., M., Gillis, M.: Předběžná otázka v komunitárním právu (*Preliminary questions in Community Law*), Linde, Praha 2005 or Stehlík, V.: Řízení o předběžné otázce v komunitárním právu (*Preliminary ruling procedure in Community Law*), UP Olomouc 2006.

⁷ II. ÚS 1009/08, decision of 8 January 2009.

⁸ IV. ÚS 206/08-50, decision of 28 July 2009.

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Therefore, in a very early case *Da Costa*⁹ the ECJ concluded that the authority of the decision already given by the ECJ may deprive the obligation of its purpose and thus empty it of substance. Such is the case especially where the case is **materially identical** with a case which has already been subject of a preliminary ruling in a similar case.¹⁰ Though the case concerned proceedings before different national courts and with different parties, the circumstances and questions raised in *Da Costa* case were materially the same as in the previous case *Van Gend en Loose*.¹¹ Based on this approach the ECJ stated that there was no *rationale* why to initiate the preliminary ruling procedure and reinterpret the Treaty articles concerned; all other EC courts are bound by the interpretation already given by the ECJ (*acte éclairé theory*).¹²

A similar conclusion was made by the ECJ two decades later in a seminal case *CILFIT*¹³ in relation to situations when its previous decision had already dealt with a **point of law** in question though the cases were otherwise (materially) dissimilar.¹⁴ However, unlike the case *Da-Costa*, the ECJ formulated more precisely conditions under which the application of Community law may be obvious as to leave no scope for any reasonable doubt how the manner is to be resolved. Consequently, the national court of last instance is not obliged to initiate 267 TFEU procedure if convinced that the matter is equally obvious to courts of other Member States and to the ECJ itself (*acte clair theory*).

To make this conclusion the national court must take into consideration characteristic features of Community law and particular difficulties to which its interpretation gives rise. Specifically, the national court:

- must compare official versions of Community law;¹⁵
- must bear in mind that:
 - Community law uses its own terminology;

⁹ 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* [1963] ECR 31.

¹⁰ Comp. para 38 of the decision.

¹¹ The questions concerned the direct effect of the prohibition to raise customs duties in the European Community in the transitional period before their total abolition in 1968; for more see 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

¹² However, it does not mean that the national court could not use the preliminary ruling procedure again if it finds it necessary; it may also try to persuade the ECJ to change its interpretation of the EU law provisions; see f.e. C-267/91 a C-268/91 *Criminal proceedings against Keck and Daniel Mithouard* [1993] ECR 6097; for more see Toth, A., G.: *The Authority of Judgements of the European Court of Justice: Binding Force and Legal Effects*, Yearbook of the European Law, Clarendon Press, Oxford 1984, pp. 19-20; Stehlík, V.: *Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce (Effects of the decision of the ECJ in the preliminary ruling procedure)*, Právní obzor č. 4, 2005, 312-334.

¹³ 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415.

¹⁴ Comp. para 14 of the judgment. Still, even then the national courts are free to bring the matter to the ECJ if they find it necessary.

¹⁵ The importance of this comparison may be seen already in case 29/69 *Stauder v. City of Ulm* [1969] ECR 419, para 3.

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- legal concepts do not necessarily have the same meaning in EC law and national law – this requirement reflects the autonomous character of EC law;
- every provision of Community law must be interpreted contextually and in relation to Community law as a whole.

Although it might have seemed that the ECJ opened a legal way for the national courts to evade the use of this harnessing procedure, the **conditions were formulated so strictly** that it was problematic to satisfy them even for national high or supreme courts.¹⁶ The main *rationale* for the ECJ to endorse these conditions was the fact that the national courts (especially supreme courts) would reject to use the 267 TFEU procedure and respect the authority and unique function of the ECJ. Therefore, the conditions formulated in CILFIT were to make pressure on national (supreme) courts to use the preliminary ruling procedure and accept the ECJ authority.^{17,18}

It is hard to statistically evaluate whether the tactics of the ECJ was successful; still, as we will see below in the decision of the Czech Constitutional Court the use of the 267 procedure in the light of CILFIT criteria was part of the judicial review before national constitutional courts and their enforcement of 267(3) obligation.

In this context let's add that the enforcement of the obligation under 267(3) was supported much later in case Köbler.¹⁹ Therein, the ECJ declared that the national courts' violation of the obligation to refer a question to the ECJ is a breach of EU law for which Member States may be found liable and individuals who suffered damage may bring the liability action to national courts. This will be possible only in case of a sufficiently serious and flagrant breach of this obligation and with respect to specificity of judicial functions.²⁰

¹⁶ For recent discussions on the use of the CILFIT criteria and their possible reformulation, see. f.e. Broberg, M.: *Acte clair* revisited: Adapting the *acte clair* criteria to the demands of the times, Common Market Law Review, no. 45, 2008, p. 1383 et seq.

¹⁷ See Mancini, G., F., Keeling, D., T.: From CILFIT to ERT: The Constitutional Challenge Facing the European Court, Yearbook of European Law, Clarendon Press, Oxford 1991, p. 3, Blanchet, D.: L'usage de la théorie de l'acte clair en droit communautaire: une hypothèse de mise en jeu de la responsabilité de l'état français du fait de la fonction juridictionnelle?, Revue trimestrielle de droit européen, no. 2, 2001, p. 396-438, Bobek, M.: Porušení povinnosti zahájit řízení o předběžné otázce podle čl. 234(3), C.H.Beck, Praha 2004, p. 39.

¹⁸ The binding force of the ECJ judgement in the preliminary ruling procedure was formulated also in relation to the rulings on validity of EU law; see case 66/80 SpA International Chemical Corporation v. Amministrazione delle Finanze dello Stato [1964] ECR 1191.

¹⁹ See C-224/01 Gerhard Köbler v. Republik Österreich [2003] ECR I-10239. Commentary on this case see f.e. Wattel, P., J.: Köbler, CILFIT and Welthgrove: We can't go on meeting like this, Common Market Law, Review, no. 41, 2004, p. 177 et seq., Classen, C., D.: Case C-224/01, Gerhard Köbler v. Republik Österreich, Common Market Law Review, no. 41, 2004, p. 87 et seq.

²⁰ Comp. esp. para 53 of the judgment. For a recent enforcement action of the Köbler liability rule see C-379/10 Commission v Italian Republic, an action brought on 29 July 2010. Possibly the EU Commission could initiate infringement proceedings under art. 258 TFEU also against a Member State whose court breached the obligation in art. 267 TFEU; this procedure has not been used yet.

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To summarize the preceding paragraphs, it is clear that the obligation to initiate the preliminary ruling procedure is rooted in the EU law. In several seminal decisions the ECJ formulated limits of this obligation rather strictly. Its main motivation was the necessity to keep its exclusive competences in the EU judicial architecture and, thus, through its case-law to ensure the uniform application of the EU legal system in all Member States.

Moving from the EU to national level, the main issue is how the obligation under 267(3) and, consequently, the necessity to reflect the CILFIT exceptions from this obligation was reflected in the national legal orders of Member States, namely in the Czech legal order. The ECJ's jurisprudence was scrutinised in the decision of the Czech Constitutional Court (further referred as "CCC").²¹ In the following chapter we will briefly summarize the CCC's decision in case "Pfizer" and draw attention to the basic conclusions related to the preliminary ruling procedure.

3. Reflection of CILFIT criteria in the decision of the Czech Constitutional Court in case Pfizer²²

3.1. Basis of the case

The case concerned a commercial company Pfizer that made a complaint to the Czech Constitutional Court for the breach of **art. 36 par. 1** of the **Charter** of Fundamental Rights and Freedoms (further referred to as the "Czech Charter") which forms a part of the Czech constitutional order and guarantees the **right to fair process**. Pfizer argued that it was denied the opportunity to be a party to the administrative proceedings on the registration of a medical product of the company Zentiva, the registration being done by making a reference to complainant's registration data for its own medicinal product.

According to the final decision of the Supreme Administrative Court (further referred as "SAC") Pfizer could not be a party to these administrative proceedings as the Act on Medications valid at the time of registration process did not give affected companies any special standing and, thus, the Pfizer's *locus standi* was definitely refused.²³

However, under the complainant's view if there was no special standing under the Act on Medications, the SAC should have applied the Administrative Procedure Code which is a general code in the administrative procedure. Under the Administrative Code, read together with the CCC's case-law, in order for a legal or natural person to have the **status of a party** to an

²¹ Let us remind that the Czech Republic entered the EU in 2004 and after its accession it had to develop its own attitude formulating the application of EU law in the Czech legal order. Many of these issues were decided in the „old“ Member States much earlier.

²² II. ÚS 1009/08, decision of 8 January 2009. Here we offer the crucial excerpts of the judgment; the full English translation of the CCC's decision can be found on the CCC's website <http://www.concourt.cz/view/726>.

²³ Comp. para 3 of the decision.

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administrative proceeding, it is sufficient that there be a mere supposition that they have rights, legally protected interests or obligations which should be considered in the matter.²⁴

Further, the company argued that there was a breach of the 9th paragraph of the Preamble to Directive 2001/83/EC which emphasized the necessity to protect innovative firms from being disadvantaged in the registration process. Therefore, Pfizer argued that its **right to own property** protected under art. 11 of the Czech Charter was breached as it is the owner of the information and data of pre-clinical and clinical tests which the complainant provided to the registrar; thus, it has an interest in seeing that its property is used in conformity with law so that it may see whether its property rights were restricted beyond the limits of the law.²⁵

According to the **SAC** there were **no grounds for referring a preliminary question** to the ECJ. It did not find any provision in the Directive which would be necessary to interpret for the purposes of adjudicating the complainant's participation in the registration proceedings. The article 10 of the Directive delineates cases where the results of pre-clinical and clinical tests of the original medicinal products can be used for registration of generic products. That provision does not serve to protect rights of industrial and commercial property of the producers of the original medicinal products. Thus, there is nothing establishing its right for participation.²⁶

3.2. The division of judicial competences and the preliminary ruling procedure

Before analyzing the application of article 234 TEC (now art. 267 TFEU), the CCC focused on the **nature and effects of EC law** (now EU law) in the Czech legal order. The CCC had a chance to rule on these issues in its previous judgments where it based the authority of the EC law on the provisions of the Czech Constitution.²⁷ The EC law does not form a part of the Czech

²⁴ Comp para 14 of the then valid Act no. 71/1969 Sb., the Administrative Procedure Code; the Czech Constitutional Court decision no. Pl. ÚS 547/02.

²⁵ For more see para 6 of the judgment.

²⁶ See para 10 of the decision.

²⁷ Namely art. 10a of the Czech Constitution. See especially "Sugar Quotas Regulation" judgment - Pl. US 50/04 - decided 8 March 2006; "European Arrest Warrant" judgment - Pl. US 66/04- decided 3 May 2006, "Lisbon Treaty I" judgment Pl. ÚS 19/08 - decided on 26 November 2008. For more see Kühn, Z.: Rozšíření Evropské unie a vztahy šestadvaceti ústavních systémů (*Enlargement of the EU and relations of twenty six constitutional systems*), Právník, č. 8, 2004; Bartoň, M.: Role ústavního soudnictví při posuzování souladu vnitrostátního práva s evropským právem (*The role of the constitutional judiciary in reviewing the compliance of national law with EU law*), Conference proceedings of the conference: „European Challenges of present legal developments“, Faculty of Law in Trnava, Trnava 2005; most recently Hamuřák, O.: Právo Evropské unie v judikatuře Ústavního soudu České republiky: reflexe členství a otázek evropského práva v ústavní judikatuře (*EU law in the case-law of the Czech Constitutional Court: a reflection of the Membership and issues of EU law in constitutional jurisprudence of the Czech Constitutional Court*), Leges, Praha 2010; Stehlík, V.: Lidská práva jako limit aplikace práva EU v judikatuře Ústavního soudu ČR (*Human rights as a limit for application of EU law in the case-law of the Czech Constitutional Court*), Conference proceedings, Faculty of Law, Trnava, 2010, in print.

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constitutional order, it is ranked among the sub-constitutional law and the CCC is not competent to interpret that law.

The CCC accepted the EC law impact on the formation, application, and interpretation of national law. Still, it is a task for both Czech supreme courts – Supreme Court and Supreme Administrative Court – to ensure the unity of jurisprudence within the Czech Republic. In principle it is a matter **for ordinary courts**²⁸ to review the application of EC law and, in certain cases, to refer questions to the ECJ. The CCC doesn't belong to the system of ordinary courts; it is a judicial body responsible for the protection of constitutionality; that is conformity of laws with the Czech Constitutional rules.²⁹ The CCC rules especially on constitutional complaints against interventions by public authorities in the constitutionally guaranteed rights and freedoms.³⁰

Therefore, primarily ordinary courts are bound to apply the EC law and it is also the task of supreme courts, due to **hierarchical relations**, to unify case-law of lower courts and also to ensure its conformity with EC law through preliminary ruling procedure.³¹

3.3. The nature of obligation to initiate preliminary ruling procedure and the general arbitrariness rule

The CCC assessed the nature of the obligation to initiate the preliminary ruling procedure rooting its **analysis in the case-law of the ECJ**. It referred to cases CILFIT and Hoffmann-La Roche³² and pointed out that the aim of art. 234 TEC is the uniform interpretation of EU law in all Member States.

Although the referral of preliminary questions is the EC law matter, the failure to make a reference, in certain circumstances, may also cause a violation of the constitutionally guaranteed **right to one's statutory judge** as formulated in art. 38 para 1 of the Czech Charter. This is so if the Czech court applies EC law but fails, in an arbitrary manner, to refer a preliminary question to the ECJ. The Constitutional Court asserts that it deems as an **arbitrary action** such a conduct by a court of last instance applying a norm of Community law where:

²⁸ In the Czech Republic the system is represented by a hierarchy of local, regional, high and two Supreme courts.

²⁹ Comp. art. 83 of the Czech Constitution; the Czech Charter of Fundamental Rights is part of the Czech Constitutional order.

³⁰ Comp. the art. 87 par. 1 let. d) of the Czech Constitution. Further, it may be asked to decide on constitutionality of an envisaged international treaty which the Czech Republic is going to ratify. The CCC used it recently twice in relation to the Treaty of Lisbon and its constitutional conformity – see “Lisbon Treaty I” decision of 26 November 2008, Pl. ÚS 19/08 and “Lisbon Treaty II” decision of 3 November 2009 Pl. ÚS 29/09.

³¹ In that respect, the CCC referred also to the jurisprudence of the German Federal Constitutional Court in that respect; this comparative method is frequent - especially in relation to decisions of GCC.

³² 106/77 Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH [1977] ECR 957.

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- the court has **entirely omitted** to deal with the issue whether it should refer a preliminary question to the ECJ or
- the court has **not duly substantiated** its failure to refer and in that respect has **not assessed the exceptions** formulated in the ECJ jurisprudence.³³

According to the CCC the **improper substantiation** will appear especially if:

- the court expresses a bare opinion that it considers the interpretation of the given problem as obvious; such an assertion does not suffice, particularly in a situation where the court's opinion has been contested by a party to the proceeding;
- the court fails duly to explain how and why the solution chosen complies with the purpose of the Community legal norm.³⁴

In formulating the concept of the right to one's statutory judge and the arbitrary omission to initiate 234 TEC proceedings the CCC was inspired by the jurisprudence of the German Federal Constitutional Court whose decisions it refers to. Interestingly, it is done not with a direct referral to the decisions of the German Court concerned, but through the relevant Czech legal literature.³⁵

3.4. Practical application of the "arbitrariness rule" – deficient substantiation of the decision

Requirement of proper teleological and systematic interpretation

In the CCC's opinion, the SAC did not deal in a sufficient manner with the interpretation of the aims pursued by the Directive concerned. The purpose of a Directive is pivotal as the teleological and systematic interpretation is far more common than grammatical interpretation in EC law and, as a rule, is of greater relevance. It follows from the legal character of the Directive that the national measures implementing it have to ensure the objectives pursued by the Directive, whereas the choice of means remains at the national level.

The SAC did not give a sufficient interpretation of the Directive because:

- it merely **transcribed certain aims** contained in the Directive's Preamble in conjunction with the Act on Medications, without embarking on a more in-depth interpretation of them;

³³ That is especially CILFIT case mentioned above; comp. para 21 of the judgment.

³⁴ Comp. para 22 of the judgment.

³⁵ Comp. para 23 of the judgment. For the most recent decisions of the German Federal Constitutional Court on the obligation under art. 267 TFEU see especially part II of the decision of 25 February 2010, 1 BvR 230/09, and part III of the decision of 6 July 2010, 2 BvR 2661/06.

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- it **ignored other aims of the Directive** (para 9 of the Preamble and art. 10 of the Directive), according to which the registration of generic products should not affect the legal protection of industrial and commercial property;
- therefore, it **did not deal with the interpretive alternatives** which would take into account also the other above-designated aims; the SAC ignored especially the acknowledged participation of the complainant in the administrative procedure – an alternative supported by the Swedish Supreme Court case-law.

Deficiency in the work with the case-law of the ECJ and other courts

In the CCC's view, the SAC's fundamental error was the fact that in interpreting Community law:

- it shed **no light on the jurisprudence of the ECJ**. It did not ascertain in any way whether or how the ECJ has held on the given issue; consequently, the SAC's decision cannot be considered as properly substantiated;³⁶
- it resolved the issue of participation in the proceedings by the mere quotation of the provisions of the Directive and their implementation, **without attempting to interpret them**, much less seek out their intent;³⁷
- it made **no reference to the exceptions** from the obligation to initiate the 234 TEC procedure – that is the criteria laid down in CILFIT case;
- it made **no reference to the jurisprudence of courts** of other Member States; specifically it did not take into consideration the argument made by the complainant based on the jurisprudence of the Swedish Supreme Court under which the complainant would get a *locus standi* in the proceedings.

Thus, the CILFIT criterion, that the issue must be clear also to courts of other Member States, is not fulfilled and the SAC's conviction in this respect was not well-founded. A different conclusion would lead to an undesirable variance in interpretation of the intent of the Community norm at issue within the EU area, which is in conflict with the principle of **legal certainty** (including the requirement that the law be foreseeable throughout the entire territory in which it should be applied).³⁸

Therefore, the CCC concluded that it would be appropriate to become acquainted with the ECJ's jurisprudence, and should it not prove possible to find a response therein, it **would be necessary to refer a preliminary question to the ECJ**.

Critique of the practice of Czech courts

³⁶ Comp. para 25 of the judgment.

³⁷ Comp. para 26 of the judgment.

³⁸ Comp. para 27 of the judgment.

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Last but not least, the CCC added a critique on the practice of Czech courts which have rarely addressed themselves to the ECJ with a preliminary question. As can be seen from the statistics in the ECJ Annual Report for 2007, neither the Supreme Court nor the Supreme Administrative Court have ever addressed itself to the ECJ with a preliminary question, although, on the contrary, the limited experience with Community law in the Czech legal order should lead to a larger number of references.³⁹

Decision of the CCC

The Czech Constitutional Court concluded that the SAC, as the court of last instance, has **violated complainant's right to its statutory judge**, which is guaranteed by art. 38 para 1 of the Czech Charter, when it arbitrarily (that is, in conflict with art. 2 para 3 of the Constitution of the Czech Republic in conjunction with art. 4 para 4 of the Czech Charter) failed to address itself to the ECJ with a preliminary question regarding the complainant's participation in the given proceedings. The Constitutional Court quashed the SAC's decision.⁴⁰

4. A short excursion to the decision of the Slovak Constitutional Court

Before we draw final conclusions to Pfizer decision let us make a brief glimpse at the counterpart decision of the Slovak Constitutional Court that was decided a few months after the Czech case.

In **case "N.P."**⁴¹ the Slovak Constitutional Court (further "SCC") reviewed the prohibition of discrimination on the termination of the employment contract. The complainant in the proceedings before the regional court referred to a number of decisions of the ECJ on the subject matter of the procedure. She also supposed that the regional court was presumably a court of last instance in her case and, as such, it should have initiated the preliminary ruling procedure under art. 234 TEC. The regional court did not deal with the questions raised. She made a constitutional complaint and claimed that her right to fair process was breached.

The SCC made an analysis of the Slovak Code of Civil Procedure which contains a provision enabling the national court to decide on the referral of questions to the ECJ. It emphasised that this decision is fully in competence of the court concerned and the parties can only make proposals in that respect. The decision of the court not to initiate the preliminary ruling procedure may be appealed by the party concerned.

The SCC analyzed the character of the preliminary ruling procedure under art. 234 TEC. It is a task of the national court to decide on the necessity to initiate the 234 TEC procedure and the

³⁹ Comp. para 29 of the judgment. For annual reports see http://curia.europa.eu/jcms/jcms/Jo2_7032.

⁴⁰ There was one separate opinion according to which a breach of 267(3) TFEU results not in a violation of the right to statutory judge, guaranteed in art. 38 para 1, but must be classified as a breach of the right to a fair trial under art. 36 para 1 of the Charter.

⁴¹ IV. ÚS 206/08-50, decision of 28 July 2009.

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relevance of the questions referred; it is an obligation of the ECJ to decide.⁴² Consequently, when interpreting the EU law, the **statutory judge** is both the national court and also **the European Court of Justice**. The ECJ has not only a duty to interpret the EU law, but also the right to do so and cannot be circumvented with the exception of the criteria formulated by the ECJ itself. In this respect the SCC refers to **CILFIT** case. Then, it also refers to Köbler case and the liability of Member States for the breach of their courts of the obligations to initiate the 234 TEC procedure.

Therefore, similarly to the Czech Constitutional Court, the SCC concluded that the breach of art. 234(3) TEC is the **breach of the right to one's statutory judge**. To insure the observance of this obligation it is primarily the obligation not of the Slovak Constitutional Court but of the Slovak Supreme Court – whose task is to insure the uniformity of lower courts' case-law, the 234 TEC references included.⁴³

To summarize and conclude, the attitude of the SCC was very similar to the Czech Constitutional Court. One of the differences is that the SCC did not formulate in detail the conditions under which it is not necessary to refer a case and just referred to the ECJ's decision in CILFIT. Further, it likewise referred to decisions of other EU courts, namely the German Federal Constitutional Court; surprisingly it did not mention the counterpart case of the Czech Constitutional Court delivered few months before. Equally, the SCC strongly emphasised the role of ordinary courts and especially the Supreme Court whose task is to unify the interpretation practice of lower courts. Essentially, the result is the same – the breach of the obligation in the art. 234(3) TEC constitutes a breach of the right for one's statutory judge contained both in the Slovak Constitution (and sub-constitutional law) and also in the European Convention for the Protection of Human Rights.⁴⁴

5. Further comments

In the following we will add further comments and generalisations especially on the Pfizer decision (and *mutatis mutandis* valid also for the attitude of the Slovak Constitutional Court in its counterpart decision). They do not stand for full-argument theoretical conclusions; they should summarize and supplement the already presented conclusions and are primarily meant as a means for the workshop discussion.

CCC applies primarily the Czech constitutional rules

⁴² There the SCC refers to the ECJ's case C-13/05 Chacón Navas Administration [2006] ECR II-85.

⁴³ The SCC admitted that even the SCC may have an obligation to initiate the preliminary ruling procedure in some cases.

⁴⁴ The European Court of Human Rights recently admitted that an arbitrary failure to refer questions under the preliminary ruling procedure might lead to the breach of art. 6 of the Convention. For details and commentary on the case-law see f.e. Broberg, M., Fenger, N.: Preliminary reference to the European Court of Justice, Oxford University Press, Oxford 2010, p. 271-272.

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The CCC is called to apply the constitutional rules and it is sovereign and independent to give a binding interpretation of the Czech Charter which is a part of the Czech constitutional order. The CCC founded its decision on the breach of Czech constitutional rules as they form the basis for its review of constitutionality. Therefore, the constitutional order is the main criterion for the review of the application of EU law by Czech courts.

CCC is inspired by other courts

By its decision in case Pfizer the Czech Constitutional Court decided a question which was open since the date of the accession of the Czech Republic to the EU. In the Czech legal literature it was suggested that the CCC might follow the attitude of supreme courts of other Member States – specifically in Germany and Austria – in these countries the breach of the obligation to refer a case to the ECJ constitutes a breach of constitutionally guaranteed rights. The inspiration especially by the German model was evident and also supported by express referrals of the CCC.⁴⁵ Still, one would imagine a more detailed comparative analysis of the CCC including the case-law from other Member States (esp. Austria) or the CCC should have reasoned why it chose to follow up the German model. A similar deficiency can be found in the counterpart Slovak decision.

CCC refers to the EU rules and ECJ's case-law

At the same time when formulating the constitutional right to one's statutory judge, the CCC refers to the interpretation given by the ECJ. It not only refers to it but also takes it as a basis of analysis and also requires that other Czech courts do the same and properly use it. The CCC analysis is **not just a formal referral** to the ECJ's case-law but it makes a deeper scrutiny of its application in the case concerned.

In individual cases it will much depend on **the activity of the parties** of the proceedings and their ability to argue the case using the EU law. This is applicable in proceedings before both lower and higher courts. This fact was reflected in the decision of the CCC as it stressed out that the SAC ignored the complainant's referral to the case-law of the Swedish Supreme Court. Formally, in applying the CILFIT criteria it is a task of the national court deciding the case to make an investigation into the jurisprudence in other Member States. However, in reality and with respect to the capacity of courts the "research" done by the legal advisors of the parties will be significant – particularly in proceedings before lower courts.

CCC uses the euro-conform interpretation

Although the CCC accepts the authority of the ECJ and the criteria formulated in CILFIT, at the same time it gives its **own interpretation** of the meaning of the right to one's statutory judge

⁴⁵ In practice the influence of the German Federal Constitutional Court and its jurisprudence is quite common also in other decisions of the CCC. So the referral in case Pfizer could also be expected.

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contained in the Czech Charter and also its own notion of arbitrariness. The rules of EU and Czech legal order are of a different origin and purpose; they have to coexist as the legal basis for the application of EU law is contained in the relevant provisions of the Czech Constitution.⁴⁶

Nevertheless, it was apparent in Pfizer case that the CCC was ready to interpret the rights guaranteed by the Czech Charter as far as possible in conformity with the EU law rules concerned (as interpreted by the ECJ). This may serve as an example of **the euro-conform interpretation** of Czech constitutional rules – a principle formulated in other seminal decisions in relation to the application of EU law in the Czech legal order.⁴⁷

CCC requests the use of ECJ's interpretative methods

The CCC requires that the national courts of last instance when applying the EU law employ the **interpretation methods used by the ECJ**. More than the grammatical interpretation and strict follow-up of the wording of the legal rule concerned, the ECJ employs the teleological and systematic interpretation. Due to the appellation principle these interpretative methods must be used not only by the Supreme Administrative Court (and Supreme Court) but by **all Czech courts** which are part of the system of Czech judiciary. Even though they may not be courts of last instance with the obligation to initiate the preliminary ruling procedure, they have the obligation to apply the EU law fully and correctly and in case of failure they may expect their decision to be quashed by the appellate court.⁴⁸

The question is how much in its future practice the CCC would require a respect for exclusivity of the ECJ in the interpretation of the EU law and how deep it will scrutinise whether Czech courts interpreted the EU law in breach of the teleological and systematic interpretation. The case Pfizer helps us only partially and further development is open. It was evident that the arguments of the party were based on the fact that there was an apparent inconsistency of case-law of supreme courts in Europe. In that respect the CCC could find the omission of the SAC as flagrant and predictable.

CCC calls for more frequent use of the 267 TFEU procedure

The CCC criticized the fact that **Czech courts hesitate to initiate the preliminary ruling procedure**. The 267 TFEU procedures initiated so far did not concern primarily courts of last instance that would be obliged to refer questions. From 2004-2008 that is before the Pfizer

⁴⁶ See art. 10a of the Constitution.

⁴⁷ For euro-conform interpretation see esp. „European Arrest Warrant“ and „Lisbon I“ decisions; commentary to the euro-conform interpretation see Hamulák, O.: *Právo Evropské unie v judikatuře Ústavního soudu České republiky: reflexe členství a otázek evropského práva v ústavní judikatuře (EU law in the case-law of the Czech Constitutional Court: a reflection of the Membership and issues of EU law in constitutional jurisprudence of the Czech Constitutional Court)*, Leges, Praha 2010, pp. 117-128.

⁴⁸ This may lead the national courts to the conclusion that they should initiate the procedure rather than go into the „unknown“ area of the EU law by means of their own “unauthorised” interpretation.

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judgment, only 7 preliminary ruling procedures were initiated: 1 in 2005, 3 in 2006, 2 in 2007 and 1 in 2008. Only the last one was initiated by the Supreme Administrative Court⁴⁹ and no question at all was asked by the Supreme Court. Reasons for this hesitance could vary; one of them may be the length of proceedings before the ECJ⁵⁰ and the pressure on national judges to decide and close cases; the latter argument could reflect the lack of “domestication” of EU in the Czech legal order⁵¹ or simply the fact that before the case gets to the Supreme Court it must go through the whole judicial hierarchy and, therefore, lower courts have a better chance to initiate the 267 TFEU procedure. Be it as it may, the decision of the CCC opened the door to a **more frequent application** of the procedure under the 267 TFEU in the Czech legal order. Interestingly, the SAC initiated more cases after the decision of the CCC in case Pfizer.⁵²

CCC as a court under art. 267 TFEU?

Though the CCC stands apart the system of ordinary courts, the question is **whether the CCC may itself initiate the preliminary ruling procedure** and whether it would potentially be the court of last instance with the obligation under 267(3) TFEU. In legal systems with special tribunals dealing with the review of constitutionality the situation varies. The German Federal Constitutional Court accepted its jurisdiction to initiate the proceedings but has never used it;⁵³ on the other hand, the Austrian *Verfassungsgerichtshof* finds no *a priori* obstacle to use art. 267 TFEU procedure.⁵⁴ Specific situation is in Italy where the *Corte Costituzionale* was initially hesitant to accept its competence to use the 267 TFEU procedure;⁵⁵ however, in 2008 it initiated the first preliminary ruling procedure.⁵⁶ Quite many cases were initiated by the Belgian *Cour constitutionnelle*;

⁴⁹ Case C-233/08 Milan Kyrián v. Celní úřad, decided on 14 January 2010, OJ C 63 of 13.03.2010, p. 6.

⁵⁰ The average length of the proceedings in 2007 was 19.3 months, in 2008 16,8 months, in 2009 17,1 months; for details see http://curia.europa.eu/jcms/jcms/Jo2_7032/; for further commentary see Bobek, M.: Learning to talk: preliminary rulings, the courts of the new Member States and the Court of Justice, Common Market Law Review, no. 45, 2008, p. 1642.

⁵¹ For discussion on various factors influencing national courts in their decision whether to refer a case to the ECJ or not see f.e. Broberg, M., Fenger, N.: Preliminary reference to the European Court of Justice, Oxford University Press, Oxford 2010, p. 41 et seq.

⁵² From the beginning of 2009 the SAC initiated these proceedings: C-299/09 DAR Duale Abfallwirtschaft und Verwertung Ruhrgebiet GmbH v. Ministerstvo životního prostředí, C-339/09 Skoma-Lux sro v. Celní ředitelství Olomouc; C-393/09 Bezpečnostní softwarová Asociace; C-399/09 Landtova v. Česká správa sociální zabezpečení. Still, there are no cases initiated by Czech Supreme Courts in 2010.

⁵³ For more see Claes, M.: The National courts' mandate in the European Constitution, Hart Publishing, Oxford 2006, p. 445.

⁵⁴ Till the end of 2009 the Austrian Verfassungsgerichtshof initiated 4 cases.

⁵⁵ For more see Claes, M.: The National courts' mandate in the European Constitution, Hart Publishing, Oxford 2006, p. 439-440.

⁵⁶ This competence will apply probably in limited cases, for more see f.e. Cartabia, M.: Europe and Rights: Taking Dialogue Seriously, European Constitutional Law Review, no. 5, 2009, p. 24.

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just one case from the Lithuanian *Lietuvos Respublikos Konstitucinis Teismas* and no cases from Central European Constitutional Courts of Poland, Slovakia⁵⁷ or Hungary.⁵⁸

On contrary, there seems to be no problem in legal orders where the constitutionality review is done by courts that are part of ordinary courts system. Thus, f.e. in Ireland and Denmark the constitutional adjudication is done by supreme courts.⁵⁹ This fact may be also relevant in considering whether these courts making the constitutionality review are themselves courts bound to initiate the preliminary ruling procedure.⁶⁰

The CCC came across the question in “Sugar Quotas Regulation” case; however, as the answer to this question was not crucial for its decision, it refused to rule on it and left the decision for later; no final decision has been issued yet.⁶¹

6. Concluding remarks

The aim of the paper was to present the recent case-law of the Czech Constitutional Court in relation to the obligation under 267(3) TFEU and put it in a broader constitutional discourse of the application of EU law in the Czech legal order with a comparative referral to developments in other Member States. We believe that further comments will come during the workshop discussions.

At this point we would like to add that even though it seems that the obligation to initiate the preliminary ruling procedure will be properly enforced both at the EU and national (constitutional) level, it represents only a procedural means for insuring a uniform application of EU law in all Member States, the Czech Republic included. A much broader debate may be led in relation to the content of the EU legal norm, its interpretation given through art. 267 TFEU and

⁵⁷ Though the Slovak Constitutional Court considers itself to be the court within the meaning of art. 267(3) TFEU; comp. III. ÚS 207/09-31, decision of 28 June 2009. For statistics of individual countries see http://curia.europa.eu/jcms/jcms/Jo2_7032.

⁵⁸ For a survey of the approach of the constitutional judiciaries see f.e. the paper given by the President of the ECJ Vassilios Skouris at the symposium Twenty Years of the Constitutional Court in Hungary – Skouris, V.: The relationship of the European Court of Justice with the national constitutional courts published at:

http://www.mkab.hu/index.php?id=vassilios_skouris__az_europai_unio_birosaganak_elnoke (last visited in October 15, 2010).

⁵⁹ Please see the numbers in relation to individual courts with constitutional jurisdiction prepared by Dr. Zbírál in the Addendum – Chapter 7 of this paper.

⁶⁰ For more see Claes, M.: The National courts’ mandate in the European Constitution, Hart Publishing, Oxford 2006, p. 436 et seq.

⁶¹ Comp. part VI A-1 of the „Sugar Quotas Regulation“ decision. For further analysis comp. Komárek, J.: European Constitutionalism and European Arrest Warrant: in search of the limits of “contrapunctual principles”, *Common Market Law Review* 44, 2007, p. 27; Zemánek, J.: The Emerging Czech Constitutional Doctrine of European Law, *European Constitutional Law Review*, 3: 418–435, 2007, p. 427; most recently Hamulák, O.: Právo Evropské unie v judikatuře Ústavního soudu České republiky: reflexe členství a otázek evropského práva v ústavní judikatuře (*EU law in the case-law of the Czech Constitutional Court: a reflection of the Membership and issues of EU law in constitutional jurisprudence of the Czech Constitutional Court*), Leges, Praha 2010, pp. 164-172.

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its consequent application in the Czech legal order. The question of full application of EU law forms a part of a separate discourse; according to the case-law of the CCC limits for full application of EU law are built in the Czech Constitution.⁶² The EU law, irrespective of its content and interpretation given by the ECJ through 267 TFEU, may not breach the material core and fundamental values on which the Czech Constitution is founded;⁶³ constitutional adjudication on human rights included.⁶⁴

⁶² Specifically art. 1 para 1 and 9 para 2 and 3 of the Czech Constitution.

⁶³ Comp. „Sugar Quotas Regulation“ decision; confirmed in „Lisbon I“ decision.

⁶⁴ The human rights limits for the application of the EU law were raised also in other cases, esp. on the „European Arrest Warrant“ and the „Treaty of Lisbon“ decisions. In the abstract review of constitutionality the CCC did not find any breach of the human rights guaranteed in the Czech Charter; however, it did not exclude such a decision for the future. For more see Stehlík, V.: *Lidská práva jako limit aplikace práva EU v judikatuře Ústavního soudu ČR (Human rights as a limit for application of EU law in the case-law of the Czech Constitutional Court)*, Conference proceedings, Faculty of Law, Trnava, 2010, in print.

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7. Addendum prepared by Robert Zbiral

Table: Number of preliminary questions posted by national courts with constitutional jurisdiction (1952-2009)

Country	Court	Number of PQ
Austria	Verfassungsgerichtshof	4
Belgium	Cour constitutionnelle	15
Bulgaria	ΚΟΝΣΤΙΤΟΥЦИОНЕН СЪД	0
Cyprus	Ανώτατο Δικαστήριο	2
Czech Republic	Ústavní soud	0
Denmark	Hojerestet	23
Estonia	Riigikohus	1
Finland	Korkein hallinto-oikeus	24
France	Conseil Constitutionnel	0
Germany	Bundesverfassungsgerichtshof	0
Greece	Ανώτατο Ειδικό Δικαστήριο	0
Hungary	Alkotmánybíróság	0
Ireland	Supreme Court	17
Italy	Corte Costituzionale	1
Latvia	Satversmes tiesa	0
Lithuania	Konstitucinis Teismas	1
Luxembourg	Cour constitutionnelle	0
Malta	Constitutional Court	0
Netherlands	Raad Van State	69
Poland	Trybunał Konstytucyjny	0
Portugal	Tribunal Constitucional	0
Romania	Curtea Constitutionala	0
Slovakia	Ústavný Súd	0
Slovenia	Ústavno sodišče	0
Spain	Tribunal Constitucional	0
Sweden	Högsta domstolen	13
United Kingdom	House of Lords	40

Source of data: 2009 Annual Report of European Court of Justice.

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Note: Due to differences in judicial systems among Member States not all noted courts could be subsumed under true „constitutional court“ category. In order to select relevant courts, taxonomy of Council of Europe was used (http://www.venice.coe.int/site/dynamics/N_court_links_ef.asp).

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