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Why Do So Few Preliminary Questions Come From Czechia?

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Keywords

preliminary ruling, preliminary question, definition of court, Court of Justice of the European Union, direct effect, harmonious interpretation, primacy of EU law, Directive 2012/34/EU, railway sector

Abstract

Although a substantial part of the body of laws of an EU Member State is founded upon European Union law and norms, the number of preliminary questions emanating from courts in the Czech Republic appears to be disproportionately low compared to other similar EU Member States. The aim of this article is to analyse and outline possible reasons for the lack of preliminary questions coming from the Czech Republic. In her analysis, the author identifies three possible factors underpinning the issue. These factors include attitudes towards the EU and a general lack of understanding of the relevance of EU laws and norms; the role of preliminary rulings; and the perception and recognition of courts. An integral part of this analysis is a critical commentary on the shifts in how courts and tribunals are perceived within the meaning of Art. 267 TFEU. Lastly, the author offers guidance to fellow legal professionals and academics for interpreting EU norms.

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I. Introduction

European Union law and its norms have been heavily assimilated into the legal codes of every EU Member State. The impact and extent of EU law on national statutes is exemplified by the following statement, which can be found in the foreword to almost every legislative act in the Czech Republic: 'this law incorporates relevant norms of the European Union.' The respective footnote thereto provides a list of directives the Czech act transposes and regulations to which it adapts. In 2022, the European Union adopted approximately 1,786 binding legislative and non-legislative acts.[1] Multiply this sample year by the more than 60 years of existence of the European Union and its forerunner the European Communities, and it is evident that the number of EU laws enacted into national law could run into the tens of thousands.[2] Recently the United Kingdom performed an audit of the EU laws on its statute books while removing EU laws as part of its internal Brexit process, and concluded that there were more than 1,400 additional EU laws embedded in the UK's body of laws that the UK government had not previously been aware of .[3]

The Court of Justice of the European Union (hereinafter referred to as the 'CJEU') is the final adjudicator on the validity and interpretation of EU laws.[4] Consequently, it would be expected that the number of preliminary questions to the CJEU would reflect both its role and the increased number of laws added by the EU. In contrast to the thousands of EU acts that have been passed, courts in the Czech Republic have on average only referred 5.5 questions per year to the CJEU.[5] The purpose of this article is to uncover and understand why so few preliminary questions come from the Czech Republic.

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1 These include basic and amending acts adopted by the European Parliament and Council, Council regulations, delegated acts of the Commission and implementing acts of the Commission or Council. Source: https://eur-lex.europa.eu/statistics/2022/legislative-acts-statistics.html?locale=en.

2 In individual years, the number of adoptions of new acts could differ substantially; subsequently, many of those could have either been repealed or amended.

3 Lisa O' Carroll, 'UK government finds extra 1,400 laws to scrap under Rees-Mogg's Brexit bill' (The Guardian, 8 November 2022) <https://www.theguardian.com/politics/2022/nov/08/government-finds-extra-1400-laws-scrap-rees-mogg-brexit-bill>.

4 See Art. 267 of the Treaty on the Functioning of the European Union (hereinafter referred to as the '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….'

5 Based on numbers from the annual reports of the CJEU; as of 2022, since the Czech Republic's accession in 2004, Czech courts have referred a total of 104 preliminary questions. Year 2022 actually helped to raise the bar to 5.5 questions per year as in 2022 the highest number of 13 preliminary questions was referred to the CJEU. Up to that point, it averaged only 4.7 questions per year.

First, I analyse the number of preliminary questions referred by Czech courts and how the Czech Republic stands in comparison to other Member States (section 2). Secondly, I try to extract three potential reasons for the low number of preliminary questions referred by Czech courts (section 3). Based on my own personal professional experience, and from analysis of the publicly available data, I conclude that these reasons may include lack of understanding of the relevance of EU law, the nature of preliminary questions, and the restrictive definition of a court or tribunal under Art. 267 TFEU.

Prior to concluding this article, I posit a question of whether the low number of preliminary questions coming from the Czech Republic is in any way to its detriment (section 4). I am of the opinion that it does not have to be a detriment, but only if national judges are able to interpret and apply EU law in a sufficiently due and correct manner. In this regard, I also outline guidance for national judges and legal professionals as they look to interpret EU law. Before I delve more deeply into the subject matter, I would like the reader to keep in mind the following caveat and adage, which has been reaffirmed by my research: a simple question does not reveal simple answers.

II. How does the Czech Republic Compare to Other EU Member States?

Based on the above-mentioned rate of 5.5 preliminary questions per year, in absolute numbers, it appears that the Czech Republic provides only a handful of questions to the CJEU. But can it be definitively established that the Czech Republic tables fewer preliminary questions compared to other EU Member States? EU Member States substantially differ in their geographic size, population, judicial systems, and culture, and these factors influence their respective absolute numbers. Therefore, it can be misleading to simply compare the number of preliminary questions coming out of EU Member States.

However, I am persuaded that a comparison partly based on nations of analogous criteria constitutes an important element of any assessment. I would not be able to confidently answer the question without first understanding whether the low number of preliminary questions emanating from the Czech Republic is an exception or a common occurrence in similar EU Member States. Therefore, to facilitate this comparative approach, I have decided not to evaluate all EU Member States, but to refine my focus to include those nations that most closely mirror the Czech Republic. Thus, the selection criteria for nations in this comparative group includes EU countries that are a part of the CEE Region and/or are nations that mirror the Czech Republic's terms of European Union accession and membership.

In the table below, I have compared statistics from 2017-2021 of EU Member States in the CEE Region that have a physical proximity to the Czech Republic.[6] Poland and Romania are difficult to compare, as their populations, at 40 and 19 million, respectively[7], are much larger than the Czech Republic's, which stands at 10 million[8]. However, the number of preliminary questions coming from these two states is much more significant than the difference between their respective populations. Hungary, Bulgaria, and Austria have similar overall population sizes to that of the Czech Republic. The number of preliminary questions coming from these EU Member States is substantially higher than those from the Czech Republic.[9] In contrast, the CEE nations of Croatia and Slovakia, which individually have less than half the population of the Czech Republic, each nation referred more than half of the number of preliminary questions between 2017 and 2021 than the Czech Republic did in that same period. The number of questions from these two EU nations is around two-thirds of the amount from the Czech Republic.

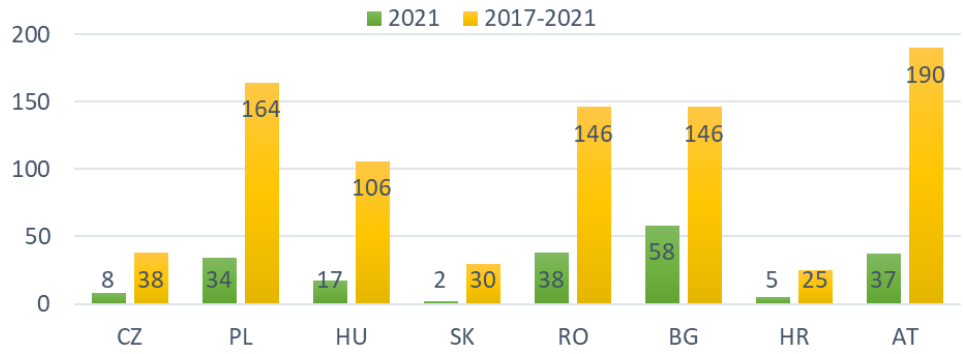

Figure 1: the CEE Overview for 2021 and for the 5 years between 2017 and 2021[10]

6 Figures for 2022 were not available at the time of submission of this manuscript.

7 For Poland, see Poland Population (2023) - Worldometer (worldometers.info) and for Romania see Romania Population (2023) - Worldometer (worldometers.info).

8 For Czech Republic, see: Czech Republic (Czechia) Population (2023) - Worldometer (worldometers.info).

9 The number of preliminary questions in Hungary is downright startling considering that disciplinary proceedings have been brought against national judges on the ground that they made a reference for a preliminary ruling. See Petra Bárd, 'An Analysis of the CJEU decision C-564/19 IS,' (*Verfblog*, 26 November 2021) <https://verfassungsblog.de/the-sanctity-of-preliminary-references/> or Ágoston Mohay, Á and István Szijártó, 'Criminal procedures, preliminary references and judicial independence: A balancing act? Case C-564/19 IS.' (2022) 29 *Maastricht Journal of European and Comparative Law*, 629–640. Despite those hurdles, in 2022, Hungarian judges referred 20 preliminary questions to the CJEU, which is a typical annual number of preliminary questions for that country. It is still a higher number than the number of preliminary questions coming from Czech judges, who nonetheless referred 13 preliminary questions that year – the highest number so far for the Czech Republic.

10 As the CJEU's annual report for 2022 had not been published until the deadline for submission of this article, data for 2022 were not included.

Austria, though it is located in Central Europe, has had a longer relationship with the European Union compared to the other CEE EU Member States in the graph, and this may dilute the rationale for its inclusion. However, I have additionally reflected upon how many preliminary questions emanated from Austria within the first 19 years of its membership to the European Union. Within the first 19 years of its membership, courts in Austria referred 429 preliminary questions to the CJEU, which averages to approximately 22.5 preliminary questions per year. This is in stark contrast to the 5.5 preliminary questions that Czech courts have referred per year.

One can argue that the preliminary questions referred by more established EU Member States cemented the path of interpretation and the application of EU law for newer EU Member States. This constitutes the *acte eclairé* and supports the position that Czech courts do not need to seek clarification from the CJEU, as clarity has already been provided.[11] Even though there may be an element of truth to this position, I do not fully agree with this perception and its conclusion. The body of European law is perpetually evolving, and despite attempts to enact better regulation, European Union institutions still produce large amounts of harmonised norms every year that require interpretation by the CJEU. Additionally, the CJEU's public approach and tone have demonstrated its ability to change its mind. This is exemplified by the Café Hag case,[12] in which the Advocate General Jacobs stated that '[t]he Court has consistently recognized its power to depart from previous decisions, as for example by making it clear that national courts may refer again questions on which the Court has already ruled.'[13]

As a next step, I have reflected upon on how the Czech Republic compares to other Member States that joined the European Union in 2004.

As set out in the graph above, I have found that among the nations that joined the EU in 2004, some of which have comparatively small populations, almost all have referred more preliminary questions per capita to the CJEU than the Czech Republic.[14]

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11 Judgment of the Court of Justice of 6 October 1982, CILFIT, 283/81, EU:C:1982:335, para 14: '[t]he same effect, as regards the limits set to the obligation laid down by the third paragraph of article 177, may be produced where previous decisions of the court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'

12 Judgment of the Court of Justice of 17 October 1990, Café Hag, C-10/89, EU:C:1990:359.

13 Opinion of Mr Advocate General Jacobs delivered on 13 March 1990, Café Hag, C-10/89, EU:C:1990:112, para 67. For further context, see the annual lecture by Vivien Judith Rose, Lady Rose of Colmworth, DBE, *1966 and All That: Changing Our Minds in a Post-Brexit World*. at King's College London, 23 May 2022 < https://www.supremecourt.uk/docs/ukael-lady-rose-speech-23-May-2022.pdf>.

14 For example, Lithuania and Latvia, which have one-third the population of the Czech Republic, referred disproportionately more preliminary questions. Even Estonia and Slovenia,

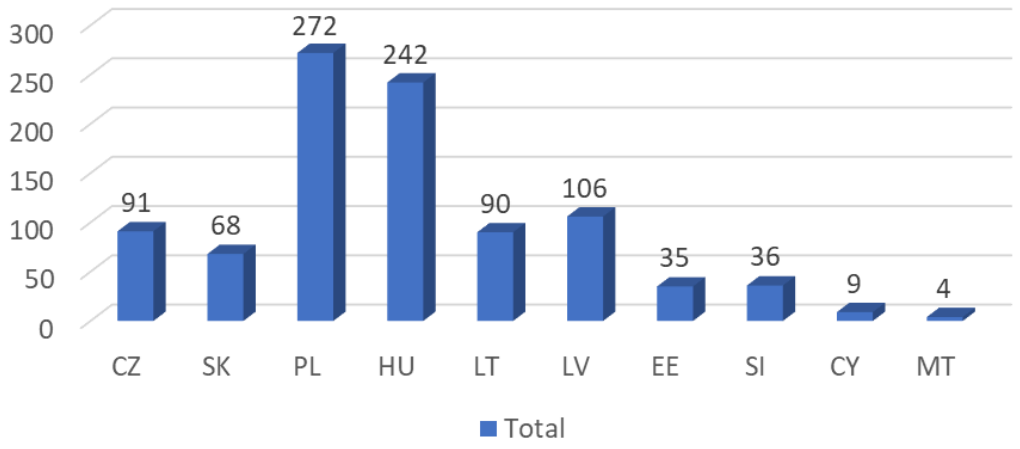

Figure 2: Number of preliminary questions (2004 - 2021) from EU Member States that joined the EU in 2004

From the overview above, it is conclusive that only a few preliminary questions have emanated from the Czech Republic compared to the other EU Member States that joined in 2004. I will now elaborate on the possible reasons for this phenomenon, which makes the Czech Republic atypical.

2.1. Overview of Czech Preliminary Questions in the Last Six Years

Before I present the reasons as to why so few preliminary questions come from the Czech Republic, I would like to first examine how questions arise in the Czech Republic, using a sampling of questions submitted by Czech courts between 2017 and 2022.

Table 1: Total number of preliminary questions referred to the CJEU from all Member States and the number of preliminary questions coming from the Czech Republic

Years	2017	2018	2019	2020	2021	2022
Total CJEU	533	568	641	557	567	?[15]
CZ	4	12	5	9	8	13

with approximately one-fifth the population of the Czech Republic or even less, referred approximately one-third of the number of preliminary questions referred by Czech Republic.

15 As of the deadline for submission of this article, the CJEU had not issued its annual report for 2022. I have derived 2022 numbers for the Czech Republic myself from the curia website.

In the course of the Czech Republic's 19 years of European Union membership, half of the total number of preliminary questions have been referred in the past six years.[16] Czech preliminary questions have predominantly dealt with taxation, transport, governing law, internal markets, and competition. Of the 51 preliminary questions, the vast majority have related to the interpretation of directives. Only a small number of these preliminary questions focused on the interpretation of EU Treaties.

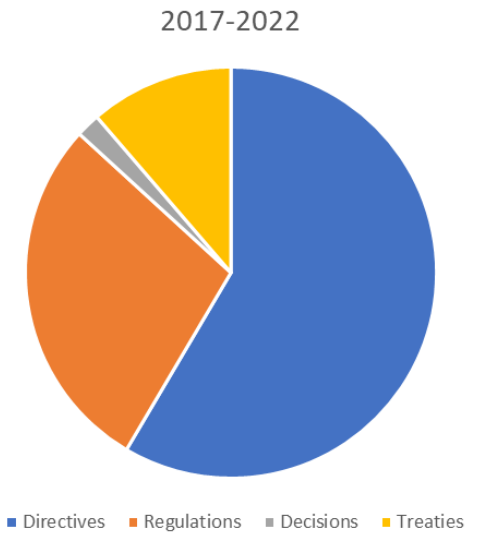

Figure 3: EU norms subjected to the preliminary questions coming from the Czech Republic in 2017-2022[17]

According to Article 267 of the TFEU, if a preliminary question is raised in a case pending before a EU Member State's court or tribunal, and there is no (*ad hoc*) judicial remedy against its decisions, that particular court or tribunal shall bring the matter before the CJEU. Therefore, it could rightly be assumed that the two Supreme Courts in the Czech Republic are the main bodies that refer preliminary questions. Although Czech Supreme Courts have been given the theoretical pride of place in this area, they share this pedestal with the courts of first instance in the Czech Republic.[18] If we compare Czech courts individually, the Supreme Administrative Court is court that refers the most preliminary

[16] 104 total Czech preliminary questions were referred to the CJEU between 2004 and 2022, out of which 51 preliminary questions were referred between 2017 and 2022.

[17] These numbers overlap, as some of the preliminary questions concern the interpretation of more than one EU norm.

[18] Altogether, both Supreme Courts and courts of first instance have each referred the same number of preliminary questions within the last 6 years – 23.

questions.[19] This seems to be the case in general, as during the last six years the Supreme Administrative Court has referred 14 out of the 51 preliminary questions coming from the Czech courts.[20]

III. Potential Reasons for the Lack of Preliminary Questions

Multiple polls have been conducted on attitudes towards the EU and its institutions; however, I have found no relevant polls examining attitudes about the role of the CJEU. What statistics and evidence can help explain the reasons as to why there are so few preliminary questions from the Czech Republic? As rightly stated by Vikarská and Dřínovská, an important factor is the *ad hoc* motivations of individual judges.[21] I look forward to the two authors' findings in their anticipated research on judicial dialogue within the European setting. This research will include interviews with Czech Supreme Court judges, who will share their experiences related to particular decisions that saw preliminary questions submitted, or not submitted, to the CJEU. Until this research is published, I admit that any potential explanation of the lack of preliminary questions coming from the Czech Republic might be slightly more anecdotal in nature and based on a subjective understanding of available data. Nevertheless, from my own research and professional experience, I have identified three potential factors, which I will focus on in the following paragraphs.

3.1. Lack of Appreciation or Understanding of EU Law's Relevance in the Czech Republic

In my more than 15 years of legal experience, as both an attorney and as an in-house legal practitioner, I have routinely found negative or at best lukewarm attitudes towards EU laws in most of my legal colleagues and clients. The Czech Republic is regarded as one of the most EU-sceptical EU nations, perennially appearing at the bottom of ranked surveys of general attitudes towards the EU.

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19 In the Czech Republic, Supreme Courts consist of the Supreme Court of the Czech Republic and the Supreme Administrative Court. The Supreme Court of the Czech Republic is the highest judicial authority in matters within the courts' jurisdiction in civil and criminal proceedings, except for matters that fall within the purview of the Constitutional Court or the Supreme Administrative Court. The Supreme Administrative Court is the supreme jurisdiction dealing with matters in the jurisdiction of administrative courts.

20 Even though in 2022 the Supreme Court of the Czech Republic actually referred more preliminary questions than the Supreme Administrative Court, I would not consider this to be a paradigm shift yet, but rather more of an interesting fact to keep an eye on.

21 Natalia Dřínovská and Zuzana Vikarská. Evropská zletilost českých (nejvyšších) soudů aneb prvních 18 let předběžných otázek z Brna. (2023) 31 *Časopis pro právní vědu a praxi* 9-45.

According to research published in 2019 by the Pew Research Center, '[w]hile more people see the EU in a positive light than not, in the UK, Greece, the Czech Republic and France, these countries also have sizable portions of the public – more than four-in-ten – that voice negative opinions.'[22] One of the key drivers of this negative attitude is the perception that there are no discernible benefits for Czech citizens from EU Membership.[23]

According to quite-recent polls, it seems that current events such as the COVID pandemic, the war in Ukraine and its related energy crisis, and the Brexit process and its impact on the United Kingdom have all led to an increase in positive attitudes about the EU in the Czech Republic.[24] However, this positive shift has not been tangible enough to alter the overall ranking of the Czech Republic in comparison to other EU Member States with regards to its attitudes towards the EU. This negativity manifests itself in individual actions, such as the removal of EU stickers, and in the media, with Czech tabloid stories that fuel anti-EU attitudes by portraying the EU as a destroyer of the Czech production of spreadable butter, Czech rum, and a provider of diktats on issues such as the permissible size of cucumbers.[25]

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22 'European public opinion three decades after the fall of Communism' (*Pew Research Center*, 14 October 2019), <https://www.pewresearch.org/global/2019/10/14/the-european-union/>

23 *Ibid.* While 41% mentioned that their country's membership in the European Union has been a good thing and 'only' 20% perceive it as a bad thing, a significant group – 41% – was undecided, replying 'neither,' 'both,' or 'don't know.'

24 According to the survey done by the STEM Analytical Institute, the vote to remain in the EU in a hypothetical referendum increased from 46% in February 2022 to 54% in May 2022. Kathrin Yaromich, 'Czechs and the EU: Does a 'Czexit' still have supporters?' (expats.cz, 2 May 2022) <https://www.expats.cz/czech-news/article/has-putin-brought-czechs-closer-to-eu-or-is-czexit-still-on-the-table>. Furthermore, the European Social Survey, led by the City, University of London, found that the support for leaving the EU across the bloc is still highest in the Czech Republic (29.2%), but has declined in that country by 4.5 percentage points since 2016-17. Source: Jon Henley, 'Support for leaving EU has fallen significantly across bloc since Brexit,' (The Guardian, 12 January 2023), <https://www.theguardian.com/world/2023/jan/12/support-for-leaving-eu-has-fallen-significantly-across-bloc-since-brexit>; or Eleanor Longman-Rood, 'How Brexit made the EU stronger' (The New European, 13 January 2023) <https://www.theneweuropean.co.uk/how-brexit-made-the-eu-stronger/>.

25 Neither the Czech 'butter' nor the domestic 'rum' correspond to what consumers in the European Union expect from products under these names. Judgment of the Court of Justice of 18 October 2012, European Commission v. Czech Republic, C-37/11, EU:C:2012:640, para 63: '[i]t must therefore be held that, by authorising pomazánkové máslo (butter spread) to be sold under the designation "máslo" (butter) even though that product has a milkfat content of less than 80% and water and dry non-fat milk-material contents of more than 16% and 2%, respectively, the Czech Republic has failed to fulfil its obligations under Article 115 of Regulation No 1234/2007 in conjunction with the first and second subparagraphs of point I(2) of Annex XV to that regulation and points 1 and 4 of part A of the appendix to that annex.' Similarly, Czech producers have had to change the name of their "domestic" rum. One of the most spread Euromyths, quite often originated in the British tabloids and still supported by the Eurosceptic Czech media, is that it dictates the size of cucumbers allowed to enter the Internal Market. The aim of the highly criticised Commission Regulation (EEC) No. 1677/88 of 15

Czech legal professionals, and their clients' knowledge and understanding of the EU, mirror the society from which they originate, and the extent to which this subject is taught at schools and universities. Simultaneously, understanding the relevance of EU law, and harmonising interpretations between the CJEU and the Czech judiciary (which have the same or slightly better levels of EU knowledge), conflicts with the need to refer preliminary questions to the CJEU.[26] Over the past 6 years, Czech preliminary questions were only referred to the CJEU after either the Czech Constitutional Court or the Supreme Administrative Court indicated that the lower courts should have originally referred them.[27] In their failure to engage with the CJEU from the beginning, they may have breached the constitutional right to a lawful judge and fair trial.[28]

EU law is understood to provide the bulk of most national laws; however, once an EU law is incorporated into Czech law, a perception arises that Czech law and jurisprudence take precedence.[29] This perception means that many falsely believe that once an EU law has been incorporated into Czech law, the role of the EU has been forfeited and can be ignored to a large degree.

June 1988, laying down quality standards for cucumbers, was actually more about their classification than banning any abnormally bent ones; it was repealed in 2009.

26 Under the Art. 267 TFEU, it is stipulated that '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 [*but it is not required to*].'

27 Preliminary references C-78/22: ALD Automotive, C-524/20: Vítkovice Steel, C-86/20: Vinařství U Kapličky, C-881/19: Tesco Stores ČR.

28 Czech Constitutional Court, II. ÚS 1009/08 of 8 January 2009, on the obligation of the general court to refer a preliminary question to the CJEU.

29 This perception might be also based on the restricted vertical direct effect doctrine of EU directives that can be invoked against a state only (except for the incidental horizontal effect, or in combination with other source of EU law, such as the Charter or general principles [e.g., Judgment of the Court of Justice of 22 November 2005, Mangold, C-144/04, EU:C:2005:709]) and thus is of limited use in practice. It is thus unsurprising that few authors have thus far called for horizontal direct effect of the directives. For example: Alan Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?' (2007) 9 *The Cambridge Yearbook of European Legal Studies* 81; Ceil Chenoy, '*Horizontal Direct Effect of Directives*' (April 21, 2015) <http://dx.doi.org/10.2139/ssrn.2597191>; Opinion of Advocate General Sharpston delivered on 22 June 2017, Farell, C-413/15, EU:C:2017:492, para 150: '[t]here are – essentially – three approaches that can be (and have been) used to fill the lacuna created by the absence of general horizontal direct effect: (i) a broad approach to what is an emanation of the State; (ii) taking the principle of "interprétation conforme" to its limits and (iii) as a fall-back, State liability in damages. From the perspective of giving effective protection to individual rights, the present situation is less than satisfactory. It creates complexity for plaintiffs and uncertainty for defendants. I should like to join earlier Advocates General in inviting the Court to revisit and review critically the justifications advanced in Faccini Dori for rejecting horizontal direct effect.' Even though I do not support that call, I must admit that it could help to increase the importance of EU directives in the national legal order and their perception by public.

An added objective of EU harmonisation was to institute a level playing field for rules in all EU Member States, with laws applied consistently no matter where an individual resides in the EU.[30] Such an aim expects and assumes that national legal orders will adapt to the new harmonised rules and adjust their own rules, national practices, and even legal thinking to that new system.

However, in reality, the opposite outcome has largely occurred. I have noted the tendency to adjust EU laws to fit the already existing national legal order, thus pursuing a 'national mindset' in the interpretation and application of EU law by legal professionals. In everyday life, EU directives are mostly overlooked, as they are perceived to lack impact until they are transposed into national law. Additionally, EU regulations and decisions are usually adapted to fit to existing national practices, and thus interpreted in a way in which a nation's body of laws is comprehended.[31] These misconceptions may explain why most Czech preliminary questions, at least within the past 6 years, have dealt with the interpretation of EU directives, even though the number of EU regulations is much higher.[32] It draws me to an interim conclusion that a preliminary question by the national court deciding on a matter is usually made when there is a noticeable discrepancy between the EU directive and its national transposed version, and/or when the national transposition is unclear.[33]

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30 For example, while using e-commerce services, the same level of consumer protection is applied regardless of residence. This entails a harmonised level of information on certain financial products offered in the EU, the same consumer rights for the passengers travelling within the EU and sometimes beyond, etc.

31 It is not unusual that the terms in EU directives are changed over the course of national transposition to better fit into the existing national practice. Even though I fully understand the practicality and aim to ease the transformation for the Czech audience as much as possible, it might than lead to certain difficulties in combining the application of EU and national rules and lead to misunderstandings. One of the examples is the eIDAS regulation (Regulation EU No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC). The Czech act No. 297/2016 Coll., adapting to some of the eIDAS stipulations, continues to use the existing Czech term 'recognised electronic signature,' which is a term unknown to the eIDAS itself.

32 We should not forget that many aspects are actually laid down in non-legislative acts, such as the implementation and delegation of the acts of the Commission supplementing the legislative acts of the European Parliament and of the Council. According to the data from eur-lex, in 2022, the Commission adopted 180 delegated acts and 928 implementing acts, in comparison to 73 adopted legislative acts of the European Parliament and of the Council, and 464 legislative acts of the Council. Out of those 1,108 non-legislative acts of the Commission, only 11 were adopted in the form of directives, the vast majority being regulations and decisions. Those Commissions' non-legislative acts are part of the EU law and embedded with primacy over the national law, and need to be understood and applied in a unified manner. Available online: https://eur-lex.europa.eu/statistics/2022/legislative-acts-statistics.html?locale=en.

33 See Figure Chart No. 3, exemplifying the number of different sources of EU law subjected to CJEU review in the Czech courts.

3.2. Preliminary Rulings 'Only' Interpret the EU Law

In conjunction with the previous factor, the second potential reason for low number of preliminary questions from the Czech Republic could be due to the understanding of the role and purpose of preliminary questions. According to Art. 267 TFEU, the purpose of a preliminary question is twofold. First, the question may address the interpretation of EU Treaties and/or the actions and acts of EU institutions, bodies, offices, or agencies. Second, preliminary rulings can decide on the validity of the acts by EU institutions, bodies, offices or agencies. The whole system is framed and functions around cooperation between national courts and the CJEU.[34] When a national court is deciding on a disputed matter, if the court finds that EU law applies and considers that a preliminary question is necessary to enable it to pass judgment, it may request that the CJEU provide a guiding ruling.[35] Once the CJEU answers a preliminary question, the national court reopens the proceeding and decides upon the dispute. The CJEU is not involved in the dispute and does not decide on the finality of the matter.

As Matthias Derlén and Johan Lindholm have pointed out, the division of labour between national bodies and the CJEU is, in theory, quite straightforward.[36] The role of the CJEU is 'to provide the national court with an answer which will be of use to it and enable it to determine the case before it.'[37] Such cooperation

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34 'The ECJ itself refers to "an instrument of cooperation" and even uses the term "dialogue," implying that there is a shared responsibility and a large degree of equality between both sides' (see Jasper Krommendijk, 'The interaction: dialogue or monologue?' In *National Courts and Preliminary References to the Court of Justice* [Edward Elgar Publishing 2021] 111). However, as Craig and Búrca stated, the original horizontal and bilateral conception of the relationship has shifted and become steadily more vertical and multilateral (see Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*. [UK version, 7th edn, OUP Oxford 2020] 516). For further context on the horizontal and hierarchical relationship see Jasper Krommendijk, 'Wide open and unguarded stand our gates: The CJEU and references for a preliminary ruling in purely internal situations,' 18 German Law Journal (2017) 1359.

35 See Art. 267 TFEU and further Opinion of Advocated General Bobek delivered on 15 April 2021, Consorzio Italian Management, C-561/19, EU:C:2021:291, para 23: '…Article 267 TFEU instituted direct cooperation between the Court of Justice and the national courts by means of a procedure, which is completely independent of any initiative by the parties. Thus, the mere fact that a party to the dispute in the main proceedings has raised certain issues of EU law does not oblige the court concerned to consider that a question has been raised within the meaning of Article 267 TFEU, rendering a reference mandatory. Conversely, that also means that a national court may submit a request for a preliminary ruling of its own motion.'

36 Mattias Derlén and Johan Lindholm, 'Serving Two Masters: CJEU Case Law in Swedish First Instance Courts and National Courts of Precedence As Gatekeepers' In: Mattias Derlén and Johan Lindholm (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing Ltds Swedish Studies in European Law 2018), 79-99.

37 Judgment of the Court of Justice of 12 January 2023, Regiojet, C-57/21, EU:C:2023:6, para 92. Further as Bobek pointed out, '…the overall purpose of the preliminary rulings procedure, is no doubt to assist national courts in resolving individual cases involving elements of EU law. That case-focused 'micro purpose' certainly serves, in the long run, the more systemic 'macro purpose' of the preliminary rulings procedure. It gradually builds up a system of

between the national courts and the CJEU requires the national court to understand the purpose of the preliminary question and its ability to correctly apply the interpreted EU law to the case before the court. In some cases, guidance can be quite clear, and so it is evident as to how the national court should proceed. However, in many cases, a rather thorough analysis of the preliminary ruling is required in order for the national court to decide how to apply it correctly.[38] The unifying function of uniform CJEU interpretation depends on the ability and willingness of national courts to correctly apply the CJEU's rulings.[39]

The arduous process of analysing preliminary rulings can be further complicated by the way CJEU judgments are structured, and meaning can be lost in translation.[40] The CJEU decides in chambers on the final text of the preliminary ruling, reflecting compromises reached during the court's deliberations.[41] This process means that it is not uncommon that with some preliminary rulings, it is not clear how the CJEU reached its conclusions.[42] In cases where the CJEU

precedents (or, in the language of the Court, established case-law), which helps to ensure the application of EU law uniformly across the European Union' (Opinion of Advocated General Bobek delivered on 15 April 2021, Consorzio Italian Management, C-561/19, EU:C:2021:291, para 55).

38 For example, in the above mentioned case C-57/21, the CJEU, among others, decided that 'Article 5(8) and Article 6(5)(a) and (9) of Directive 2014/104 must be interpreted as precluding national legislation which temporarily restricts, under Article 6(5) of that directive, not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority, but also that of all information 'submitted' for that purpose.' It is evident that the Czech transposition of the law is not in compliance with the respective directive as interpreted by the CJEU, and thus the national law will need to be amended. However, what does that mean for the national court deciding on the matter? The referring court needs to analyse the impact of that ruling, which cannot be done without comprehension of the effects of EU law, i.e., whether the directive could be invoked (in)directly, or whether the case will instead need to be decided in accordance with national law.

39 Mattias Derlén and Johan Lindholm, 'Serving two masters: CJEU case law in Swedish first instance courts and national courts of precedence as gatekeepers' in Mattias Derlén and Johan Lindholm (eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives*. (Hart Publishing Ltd. Swedish Studies in European Law 2018) pp. 79-99.

40 Former President Rodriguez further worried that lengthy delays in cases decisions by the CJEU might dissuade national courts from referring cases to the CJEU. Joshua C. Fjelstul, J.C., Matthew Gabel, and Clifford J. Carrubba, 'The timely administration of justice: using computational simulations to evaluate institutional reforms at the CJEU' [2022] *Journal of European Public Policy* 21. Such an issue is rather pan-European, and thus does not fully explain why the length of proceedings should particularly dissuade Czech judges. Therefore, I have not included it in my analysis. According to the CJEU's statistics, the average length of preliminary rulings in the last five years has fluctuated between 15.5 and 17.3 months.

41 See Art. 32 of the Rules of Procedures of the CJEU, according to which 'every Judge taking part in the deliberations shall state his opinion and the reasons for it,' and 'the conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court.'

42 No information about voting is ever made public. Further, the structure in which judges decide in chambers and the fact that 'all judges do not participate in all cases creates the possibility that the Court will not apply the consistently.' For analysis on the trade-off between productivity

follows the opinion of the Advocate General, their analysis serves as helpful guidance toward understanding the ruling itself. With preliminary questions, the language of the proceeding is in the same language of the referring court.[43] However, the decision is usually drafted in French – the language of the CJEU – and the language of the proceeding becomes a simple translation. As Michal Bobek aptly remarked, '[t]he equality of languages in the European Union is a myth. It has always been, be it in a Europe of six or in one of twenty-seven. It has been a noble dream, though: a political vision of Europe in which everyone speaks their own language but, at the same time, they are able to understand each other. Unfortunately, that dream already proved to be infeasible within the First Book of Moses.'[44] Even the best translation is not free from errors and misunderstandings, and the act of translation can dilute the nuance of what is being communicated. As CJEU Judge Sacha Prechal set out, 'approximately 30% of the time for delivering a judgement goes into translation. So basically, after deduction of the 'translation time,' a preliminary reference takes about 10 months. Language complicates life at the Court, that is for sure, in terms of time and in terms of understanding.'[45] When this issue is combined with the use of EU terminology, which is often not familiar to national legal professionals, preliminary rulings can sound cumbersome and not particularly user-friendly.

A second interim conclusion I have come to is that the reluctance to refer preliminary questions can be viewed as the result of the characteristics of the preliminary ruling, which can trigger an arduous process for national judges when they interpret and apply the ruling towards the facts of the case. Undoubtedly, this is not a factor only Czech judges have to deal with. However, it can noticeably contribute to the low numbers of Czech preliminary questions when combined with the first factor (to the low appreciation of the relevance of EU law and language, and the complexity of the content of the CJEU's judgments).

and consistency of the CJEU's decisions, see Joshua C. Fjelstul, 'How the Chamber System at the CJEU Undermines the Consistency of the Court's Application of EU Law' (2023) 11 *Journal of Law and Courts* 141-162. Similar effects could be seen in the diverging outcomes of the City Rail and Westbahn Management cases, as discussed further below.

43 Art. 37 (3) of the Rules of Procedure of the Court of Justice of the European Union.

44 Michal Bobek, 'The Binding Force of Babel: The Enforcement of EC Law Unpublished in the Languages of the New Member States,' 9 *The Cambridge Yearbook of European Legal Studies* (2007) 43. Even though his comment aims at the publication of legislative acts, it could be transferrable to the CJEU's judgments as well.

45 Nik de Boer, 'Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU' (*European Law Blog*, 18 December 2013) <https://europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/>.

3.3. Restrictive Notion of a 'Court or Tribunal'

Following on from the first two potential reasons, which were slightly more Czech-centric, the third issue can be seen across much of Europe and is related to how a court or tribunal has come to be defined for the purposes of preliminary questions and how that applies to authorities in EU Member States. According to Art. 267 TFEU, only a court or tribunal of an EU Member State is entitled to refer a preliminary question to the CJEU. It stems from the nature of preliminary rulings, which constitute indirect procedure, and its primary aim, which is to help national courts to correctly interpret EU law.[46] Even though Meyer argues that the CJEU does not claim a monopoly on the interpretation of EU law,[47] it undoubtedly unifies the interpretation of the EU body of laws in all EU Member States.[48]

Therefore, it was essential from the outset of the origins of the CJEU to define a national court or tribunal so that a preliminary question can be referred appropriately. The CJEU has established certain institutional criteria that a body must fulfil to be regarded as a court or tribunal within the meaning of Art. 267 TFEU. This includes criteria such as whether the entity is established by law, and whether is permanent; has compulsory jurisdiction; has *inter partes* procedure; applies the rule of law; and whether it is independent.[49] These factors have been consistently used on an *ad hoc* basis whenever the CJEU has had to decide on the

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46 The preliminary question may also ask on the legality of the Union, acts as only the CJEU can decide on the validity of EU norms, and no national court has such competence. It is settled case law that the national court either must regard EU norms as valid, or, in case of doubt, is obliged to refer the question to the CJEU. See Judgment of the Court of Justice of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452, para 15: 'On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 International Chemical Corporation v Amministrazione delle Finanze [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.'

47 Franz C. Meyer, 'The Ultra Vires Ruling: Decontructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 *European Constitutional Law Review* 733.

48 For example, the judgment of the Court of 13 May 1981, International Chemical Corporation v. Amministrazione delle fianze dello Stato, 66/80, EU:C:1981:102, para 11: 'The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which need to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.'

49 For example, the Judgment of the Court of Justice of 17 September 1997, Dorsch Consult, C-54/96, EU:C:1997:413, para 23: 'In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory,

admissibility of a preliminary question referred by a body that was not a 'typical' court or tribunal of an EU Member State.

The broadening of EU regulations, which today cover growing areas of often highly specialised fields – from financial services, to telecommunications, to energy, transport and so on – triggered the need for the establishment of specialised EU and national supervisory authorities that monitor and provide oversight on relevant stakeholders and their compliance with newly harmonised rules.[50] Of the 23 preliminary questions referred by Czech courts of first instance in the last 6 years, in 14 instances a specialized Czech national body, often including an appeal within that body, had itself previously decided on the matter. *De facto*, the national court deciding on the dispute then plays a role of second instance if the plaintiff is not satisfied with how the national supervisory body has set out to resolve the matter. Thus, it is not surprising that those national supervisory and regulatory bodies that usually first decide on matters and disputes within a particular field would also wish to refer to the CJEU a preliminary question on the interpretation of EU legislation.

It is evident that some national supervisory bodies do not fulfil all the key criteria, especially in regard to independence, meaning that they cannot be regarded as a court or tribunal under Art. 267 TFEU. However, with some national bodies, the issue of meeting the criteria is not so categorical. Recently the CJEU had to decide on the admissibility of a preliminary question brought by the Czech Transport Infrastructure Access Authority ('TIAA').[51] The request for a preliminary ruling in this case mainly concerned the interpretation of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012, establishing a single European railway area that regulates access to the EU train network and certain related facilities. The dispute arose between a railway-infrastructure entity in the Czech Republic, which had laid down conditions for access to the network and certain related facilities, and a railway undertaking CityRail, a.s., which challenged those conditions with the TIAA. The TIAA had doubts as to whether the conditions were compatible with Directive 2012/34/EU, and thus decided to pause the proceedings and refer preliminary questions to the CJEU. As the TIAA is not classified as a court within the judicial system of the Czech Republic, the CJEU had to decide on the admissibility of such a preliminary

whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.'

50 For example, the Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012, establishing a single European railway area established a single national regulatory body for the railway sector. In some areas, already existing national supervisory authorities broadened their supervisory powers to subsume the newly adopted Union regulatory requirements.

51 Judgment of the Court of Justice of 3 May 2022, CityRail, C-453/20, EU:C:2022:341.

question *vis-a-vis* whether the question had been referred by a court of tribunal within the meaning and criteria of Art. 267 TFEU.

The TIAA, as a national regulatory body for the railway sector, originates from Directive 2012/34/EU, which declares, 'this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.'[52] Further, 'Member States shall ensure that the regulatory body is staffed and managed in a way that guarantees its independence.'[53] Therefore, the TIAA considered itself to be in compliance with all the criteria defining a court or tribunal under Art. 267 TFEU. Simultaneously, it referred to the Westbahn Management case, in which the CJEU admitted a preliminary question from a similar regulatory body for the Austrian railway sector, the Schienen-Control Kommission (Railway Supervisory Board).[54]

However, the CJEU, via its Grand Chamber, reconsidered this, and further expanded upon the existing doctrine in relation to the determination of a court or tribunal for the purposes of preliminary rulings. As a result, the CJEU declared that to determine whether a body may refer a case to the CJEU, it needs to fulfil criteria relating both to the constitution of that body and to its function: 'In that regard, a national body may be classified as a 'court or tribunal', within the meaning of Article 267 TFEU, when it is performing judicial functions, but not when exercising other functions, inter alia functions of an administrative nature.'[55]

It is true that the request for simultaneous fulfilment of functional criteria is not a complete novelty,[56] but the decision-making practice of the CJEU has not been fully consistent in this regard, and this is exemplified especially in the decision in the Westbahn Management case, where the CJEU considered only the institutional criteria of the regulatory body in Austria.[57]

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52 See Art. 55 (1) of Directive 2012/34/EU.

53 See Art. 55 (3) of Directive 2012/34/EU.

54 Judgment of the Court of Justice of 22 November 2012, Westbahn Management, C-136/11, EU:C:2012:740.

55 Judgment of the Court of Justice of 3 May 2022, CityRail, C-453/20, EU:C:2022:34, para 43.

56 Order of the Court of Justice of 26 November 1999, ANAS, C-192/98, EU:C:1999:589; Judgment of the Court of Justice of 31 January 2013, Belov, C-394/11, EU:C:2013:48; and Judgment of the Court of Justice of 6 October 2021, W.Ż., C-487/19, EU:C:2021:798.

57 The Grand Chamber, between lines, reprimanded the First Chamber, which had decided on the Westbahn Management case by saying that '[i]n the judgment of 22 November 2012, Westbahn Management (C-136/11, EU:C:2012:740), relied on by the Authority, the Court,

Based on the judgment in the CityRail case, an administrative body wishing to refer a preliminary question to the CJEU must not only verify the institutional criteria, but also 'ascertain the specific nature of the functions which it exercises in the particular legal context in which it is called upon to make a reference' to the CJEU.[58] The first layer of an assessment is an examination to understand if the entity meets the basic criteria: whether the body is established by law, is a permanent body, has compulsory jurisdiction, has *inter partes* proceedings before it, applies the law, and/or is independent.

The second layer of an assessment considers the respective procedures before the institutions, in the context of when they wish to refer a judicial or administrative question for a preliminary ruling. However, the administrative and judicial functions of regulatory bodies cannot always be easily distinguished. Based on the guidance given by the Advocate General, the following questions may help an entity to conclude whether it can, in an *ad hoc* proceeding, be regarded as a body performing judicial functions, or if its functions are administrative in nature.[59] These guidelines include:

- Whether the body is empowered to act on its own accord;
- Whether its function is to review the legality of a decision, or to adopt a position, for the first time, on a complaint made by an individual;
- Whether it acts as a specialist administrative body, and if it can exercise power to impose penalties in matters falling within its competence and remit;
- Whether it can decide on matters by performing non-judicial functions, such as functions of an administrative nature;
- Whether its decisions can be appealed to its President;
- And lastly, whether the decisions of the body and its President are open to review before an administrative court in which the body would have the status of a defendant or an interested party.

when giving a preliminary ruling on a reference made by the Austrian Rail Supervisory Commission, examined only the criteria arising from the judgment of 30 June 1966, Vaassen-Göbbels (61/65, EU:C:1966:39), and thus did not examine whether that body exercised functions of a judicial nature in the context of the proceedings which gave rise to that request' (para 47 of the Judgment of the Court of the Court of Justice of 3 May 2022, CityRail, C-453/20, EU:C:2022:34).

58 Judgment of the Court of Justice of 3 May 2022, CityRail, C-453/20, EU:C:2022:34, para 44. The decision in case CityRail has been further confirmed by the Order of the Court of Justice of 26 October 2022, Regiojet, C-104/21, EU:C:2022:851.

59 Compare the guidance given by the Advocate General Campos Sánchez-Bordona in his Opinion delivered on 16 December 2021, CityRail, C-453/20, EU:C:2021:1018, para 45.

3.3.1. More Work for Traditional Ruling Bodies, and a Potential Catch-22

Based on the restrictive interpretation of a court or tribunal within the meaning of Art. 267 TFEU, it is apparent that the majority of preliminary questions are generally referred by traditionally defined courts established within the legal judicial system of an EU Member State. In principle, if a preliminary question concerns the interpretation of EU law and is referred by a court or tribunal of an EU Member State, the CJEU is obliged to answer. However, to do so, the CJEU needs to obtain specific information from the referring court, such as a summary of the subject matter of the dispute, and the relevant findings of fact; the tenor of national provisions applicable in the case; and a statement as to what prompted the referring court to refer the preliminary question.[60] As preliminary rulings are not supposed to be of a hypothetical nature, the CJEU cannot rule on a preliminary question if it does not have the factual, technical or legal knowledge that is required to provide a well-founded answer.[61] With that in mind, there is a complex question as to how much the CJEU can rely on the analysis of the administrative authority alone, and is inherently considered an 'expert' in its regulatory area, having dealt with the matter in the first place.

This issue was on display in relation to a matter once again concerning a railway dispute that was handled at first in front of the TIAA. The decision of the TIAA was subsequently challenged before a District Court in Prague 1. The TIAA proposed that the court refer a preliminary question to the CJEU, and supplemented that request with the formulation of a question and a statement of rationales, on which the court heavily relied and simply forwarded to the CJEU. The CJEU found such an approach to be inadmissible, stating that a 'document that was supposed to represent the justification of these questions, but in which it simply reproduces the argumentation presented by the Authority. …the referring court merely copied and forwarded to the Court a brief and lacunae summary of the applicable national law, which was additionally provided to it by an entity not participating in the proceedings before it' (translated from Czech).[62]

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60 Art. 94 of the Rules of Procedure of the Court of Justice of the European Union.

61 As CJEU's Judge Prechal stated, '[w]hat is also helpful is when national judges reflect in their reference on the questions related to EU law and explain why there is, in their view, a problem of Union law which needs to be resolved in order to decide the case before them. And if possible, and quite often the German jurisdiction do that, they should indicate what the solutions could be. All this type of information makes it easier for the Court to understand what the problem is. And in this way we can be more supportive and help the national court…' (see Nik de Boer, 'Interview with Judge Sacha Prechal of the European Court of Justice: Part I: Working at the CJEU' (*European Law Blog*, 18 December 2013) <https://europeanlawblog.eu/2013/12/18/interview-with-judge-sacha-prechal-of-the-european-court-of-justice-part-i-working-at-the-cjeu/>).

62 Order of the Court of Justice of 2 May 2022, Správa železnic, C-221/21, EU:C:2022:342, paras 9 and 37 (translated from Czech).

The CJEU argued that '[a]ccording to the Court's settled case-law, the procedure established by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the interpretation of EU law which they need to give in order to resolve the dispute before them. In the context of that cooperation, it is for the national court before which the dispute in the main proceedings has been brought, which alone has precise knowledge of the facts of the case and must assume responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.'[63]

With a view toward ensuring the impartiality of judicial proceedings from the actions of administrative bodies, I fully concur with the CJEU's rejection. Nevertheless, I would not conclude that parties to the main proceeding should not or cannot ask courts to refer preliminary questions and supplement their requests with the potential wording of the question and other vital information, which the referring court will need to provide to the CJEU. To me, the verdict simply means that in the end it is the referring court that remains responsible for the form and content of the preliminary question. Thus, the court cannot fully rely on the requests of others without its own proper assessment, especially if it is requested by an administrative authority deciding on the matter in the first instance.

But what role does this play in the lack of preliminary questions coming to the CJEU from the Czech Republic? As elaborated above, one of the potential ways to increase the number of preliminary questions is to improve understanding of EU law and its application at a national level in the Czech Republic. A better understanding could be achieved with the formation of specialized bodies focusing solely on national and EU regulation in particular fields. As mentioned, some bodies are established based on EU norms, such as the TIAA. However, these types of bodies will generally not be regarded as courts or tribunals within the meaning of Art. 267 TFEU when deciding on disputes, even when a relevance and need for the application of EU legislation exists.

I do not have a clear opinion as to whether administrative bodies should be entitled to table preliminary questions. On one hand, it may speed up the process for individuals if administrative bodies could obtain the required interpretation of EU law needed for *ad hoc* cases. However, any entitlement could also lead to an avalanche of requests to the CJEU and a shift in the distinction between executive and judicial powers. Under the current wording of Art. 267 TFEU, within the current understanding of preliminary rulings as an instrument of cooperation

63 Order of the Court of Justice of 2 May 2022, Správa železnic, C-221/21, EU:C:2022:342, para 29 (translated from Czech).

between the CJEU and national courts,[64] it does not seem feasible. However, the aforementioned cases, and the CJEU's decision limiting the ability of national bodies to raise preliminary questions, could help to solidify the general narrative in the contingent of the Czech Republic that is EU-sceptic or sees little merit in engaging with the CJEU.

3.3.2. Preliminary Rulings Are Not a Closed Game for Parties

At this point, I would like to briefly address one potential misunderstanding about preliminary rulings when Art. 267 TFEU is examined without any consideration of its context. As explained above, under Art. 267 TFEU, only a court or a tribunal of an EU Member State can refer a question and start a dialogue with the CJEU about the interpretation or validity of EU norms. However, a national court does not take an active part once the preliminary question is tabled. As van Gestel and de Poorter summarise, 'the preliminary reference procedure does not represent a dialogue going (much) beyond one side asking questions, while the other side tries to answer them,'[65] which in some aspects almost contradicts the proclaimed cooperation between the CJEU and national courts on which the preliminary rulings should be based.[66] Instead, the parties involved in the dispute that is before the referring court can play a vital role in shaping the CJEU's judgments. A party to the proceedings before the national court that refers a question for a preliminary ruling becomes a participant (defined as 'the party to the main proceeding') before the CJEU, and may submit written and oral observations on the question referred for a preliminary ruling.[67] Even though it is not the participant's responsibility to comment, to submit an observation is recommended for the following reasons:

The interpretation given by the CJEU will be binding on the referring court, which will then continue the proceedings to which the participant is a party. Although the CJEU mainly interprets EU law and does not deal with specific cases (which is the remit of the national court), its interpretation can provide clear guidance as to how the referring court should subsequently rule. The CJEU's

64 *Ibid*: *supra* reference 35.

65 Rob Van Gestel and Jurgen De Poorter, 'Trust and Dialogue' in *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019), 145.

66 *Supra* reference 35.

67 See Art. 23 of the Statute of the Court of Justice of the European Union and Art. 96 of the Rules of Procedure of the Court of Justice as of 25 September 2012.

preliminary ruling is binding *erga omnes*. With its interpretative power, the CJEU effectively completes EU law.[68]

Further, the interpretation is binding on all EU Member States. If, for example, it may be inferred from the preliminary ruling that a transposition of a relevant directive in an EU Member State does not correspond to the interpretation made by the CJEU, the EU Member State should remedy this situation post-haste.[69]

Finally, there is a propensity for international bodies like the CJEU to become isolated from events at a national level. The facts of a case are provided by the referring court, which should be more fully informed about it due to its localized setting. It is therefore appropriate for parties to the main proceeding to indicate to the CJEU harmful and or unintended results that could come from an only partially-informed interpretation of EU law.

IV. Is An Increase in Preliminary Questions Even Warranted?

When considering the reasons for the low number of preliminary questions from the Czech Republic, one may question whether there is a need for an increase in the first place. One of the main purposes of a preliminary ruling is to unify the interpretation, and correspondingly the application, of EU law in all EU Member States.[70] Without the interpretative monopoly of the CJEU, national courts and bodies would almost certainly come to understand EU laws differently, especially against the background of diverse national legal frameworks and cultures. In a way, the Köbler doctrine was developed to prevent divergence in judicial decisions based on questions of EU law.[71]

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68 For this reason, the Commission (plus, where appropriate, the EU institution that adopted the law) and the Member States are always informed on all preliminary questions and have the opportunity to submit their observations, which they often do.

69 In particular, if it would not be possible to bridge the contradiction by an either direct effect or harmonious interpretation, the persons concerned could theoretically claim damages against the Member States, and therefore it is also in the interest of that Member State (besides its Treaties derived obligation to implement EU law correctly) to remedy this situation as soon as possible.

70 According to the Opinion of the Court of Justice of 18 December 2014, Adhésion de l'Union à la CEDH, 2/13, EU:C:2014:2454, para 176, '…the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.'

71 Based on the Judgment of the Court of Justice of 30 September 2003, Köbler, C-224/01, EU:C:2003:513, in which the CJEU inferred that Member States are obliged to make good damage caused to individuals by infringements of EU law where the alleged infringement

It does not mean that national courts and bodies cannot interpret and apply EU law in and of themselves. On the contrary, the basic principles of EU law, such as direct effect and harmonious interpretation, apply to all national bodies bound by EU law due to its primacy. I agree with Vikarská and Dřínovská, who observe that the lack of preliminary questions coming from the Czech Republic could actually mean that Czech judges have a high level of insight into EU norms, so that any help from Luxembourg would be superfluous.[72] It follows, however, that providing an accurate assessment of EU law its application in *ad hoc* cases requires a profound comprehension of EU law system, its specific nature, and its interpretative methods.

Should lower courts in EU Member States wish to avoid referral of preliminary questions while assuring the due application of EU law, judges could consider the following checklist when looking to interpret EU norms.[73] Due to the theoretically-equal 24 official languages in the EU, linguistic interpretation cannot have primacy, even though it is commonly used in Member States when interpreting the national rules.[74] The determining factor is to understand the aim and purpose of the relevant EU norm.[75] When interpreting EU norms, it is imperative not to forget the Preamble and Recitals as potentially informative about their aim and purpose. Even though they are not binding, they provide priceless insights into the need and rationale for harmonisation, and norms' relationships with other EU laws. Every EU norm must refer to its legal basis (the article of Treaties in case of legislative acts, or the secondary/tertiary EU norm in case of non-legislative acts), which provides the framework and limits to its adoption, and thus to its interpretation as well. Any norm of lower legal authority can never contradict a norm of higher authority and its aims.

stems from a decision of a court adjudicating at last instance, for example, by not referring the preliminary questions.

72 Natalia Dřínovská and Zuzana Vikarská. 'Evropská zletilost českých (nejvyšších) soudů aneb prvních 18 let předběžných otázek z Brna' (2023) 31 *Časopis pro právní vědu a praxi* 9.

73 The presented checklist shall be understood more as a guidance than as any binding instruction.

74 Sometimes language versions differ, and thus the preferable interpretation is the one looking for *effet utile* of the norm. As the CJEU pointed out, 'the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part' (see Judgment of the Court of Justice of 29 April 2015, Léger, C-528/13, EU:C:2015:288, para 35).

75 For the *effet utile* doctrine: Urska Šadl, 'The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8 *European Journal of Legal Studies* 18.

Basic principles stemming from Treaties or the Charter can provide further guidance in the interpretation of norms. Judgments from the CJEU are one of the main sources for interpretation of EU norms. The relevance of CJEU judgements does not relate to the particular provision in question, but to the whole piece of legislation or the regulated area, as EU law does not exist in a silo. Finally, yet importantly, historical context can be an important factor and guide. A comparison of the original and newly adopted EU norms with those they replaced can illuminate the direction the EU started from and is moving toward.[76]

V. Conclusion

Undoubtedly, EU law is becoming more and more prevalent in EU Member States as it becomes intertwined and embedded with national law. As many national laws originate in EU norms, a nation's ability for amendment is constrained. As a result, unified comprehension and interpretation of EU law is vital. Still, the number of preliminary questions coming from Czech courts seems disproportionately low when compared to similar EU Member States. There may be many reasons for this phenomenon, even related to the *ad hoc* circumstances of a case. In my analysis, I have extracted three possible overarching factors encompassing the overall trend, such as the lack of understanding of the relevance of EU law, the role of preliminary rulings, and the notion of a court within the meaning of Art. 267 TFEU. To paraphrase Kierkegaard, hypothesis must be made forward, but can only be understood looking backwards. Thus, only time will tell if I was right or wrong in my above conclusions.[77]

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[76] For example, many regulated areas have experienced a shift toward the strengthening of consumer protections.

[77] The original quote: 'It is really true what philosophy tells us, that life must be understood backwards. But with this, one forgets the second proposition, that it must be lived forwards' (Soren Kierkegaard, 1843).

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