THE PRELIMINARY RULING BEFORE THE CONSTITUTIONAL COURTS

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Abstrakt v rodném jazyce
V souvislosti s předběžnou otázkou jsou ústavní soudy konfrontovány s dvěma okruhy problémů. Prvním je otázka sankce za nesplnění povinnosti položit předběžnou otázku ze strany obecného soudu. Porušení této povinnosti je zjišťováno pomocí kritérií stanovených Soudním dvorem v rozsudku Cilfit a pomocí specifických kritérií vytvořených ústavními soudy. Nesplnění povinnosti předložit předběžnou otázku je zpravidla hodnoceno jako nerespektování práva na zákonného soudce. Druhým problémem je otázka, zda Ústavní soud je soudem, jenž stíhá povinnost položit předběžnou otázku; obvykle je odpovídáno kladně.

Klíčová slova v rodném jazyce
Evropský soudní dvůr, rozsudek 283/81 Cilfit, porušení povinnosti předložit předběžnou otázku, Ústavní soud, právo na zákonného soudce, právo na soudní ochranu, právo na přístup k soudu, rozsudek Solange II., rozsudek Kloppenburg, rozsudek Rinke, nález Pl. ÚS 50/04 Cukerné kvóty, usnesení IV. ÚS 154/08, kvalifikované porušení, svévole, usnesení I. ÚS 71/06.

Abstract
Concerning the preliminary ruling, the Constitutional Courts are confronted with two problems. Firstly, it is the question of the sanction for failure to make a preliminary reference by a general court. The violation of the obligation is assessed by means of the criteria set by the Court of Justice in the Cilfit judgement and own specific criteria created by the Constitutional Courts. The failure to fulfill the obligation is usually qualified as the violation of the right to lawful judge. The second problem is the question whether the Constitutional Court is the court obliged to make a preliminary reference; the answer is generally positive.

Key words
Court of Justice, judgement 283/81 Cilfit, violation of obligation to make preliminary reference, Constitutional Court, right to lawful judge, right to judicial protection, right of access to court, Solange II judgement, Kloppenburg judgement, Rinke judgement, judgement Pl. ÚS 50/04 Sugar quotas, resolution IV. ÚS 154/08, qualified violation, arbitrariness, resolution I. ÚS 71/06.

1. INTRODUCTION: THE OBLIGATION TO MAKE A PRELIMINARY REFERENCE IN THE CASE LAW OF THE COURT OF JUSTICE

The Court of Justice has jurisdiction to give preliminary ruling concerning the interpretation of the Treaty of Rome (hereinafter “the Treaty”), the validity and interpretation of acts of the institutions of the Community and of the European Central Bank and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where any such question is raised in a case pending before a court or tribunal of a Member State

against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.[1]

In case of questions concerning validity of community law the court has no discretion whether or not to refer the matter to the Court of Justice; this is possible only in case of questions concerning the interpretation.[2]

Regarding the interpretation, the Court of Justice is not so strict. There are certain conditions exempting the court against whose decisions there is no judicial remedy under national law of the obligation to make a preliminary reference on the interpretation of community law. The case-law of the Court of Justice specifies three situations.

Firstly, the national court is deprived of the obligation to refer a question if that question is not relevant, that is to say, if the answer to that question can in no way affect the outcome of the case.[3] Thus the national court is vested discretion in decision whether or not to make a preliminary reference. This exception protects the Court of Justice from the overwhelming by a flood of unnecessary cases and inhibits unreasonable lengthening of the proceeding before the national court - the parties may intentionally use a preliminary ruling as an instrument how to defer the final decision of the national court.

The second exception is represented by a doctrine known in the francophone legal world as acte eclairé - that is "explained". It means that the question raised is materially identical with a question which has already been subject of a preliminary ruling in a similar case. This condition is also applicable to a decision rendered in other proceedings where the Court of Justice has dealt with the point of law in question, even though the question at issue is not strictly identical.[4]

The third exception beloved by the national courts is called acte clair, i. e. "clear" and is applicable if the correct application of the community law is so obvious as to leave no scope for any reasonable doubt.[5] However, a subjective conviction of a national court is not sufficient, a national court must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice. Interpreting community law, a national court must take into consideration the specific characteristics of the community law. It means to compare different language versions, be aware of possible divergences in the meaning of the legal concepts in community law and in the law of the various member states. Finally every provision of the community law must be placed in its context and interpreted in the light of community law as whole.

It is apparent that the conditions for application of acte clair rule are unrealizable for a national judge because the Court of Justice forces a national court to use the same methodology. On one hand, it is comprehensible since the standard of the community law interpretation must be uniform. On the other hand, a national judge usually does not speak fluently several official languages so as to be able to compare several language versions and

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[1] See article 234 of the Treaty.

[2] See Bobek, M. a kol. Předběžná otázka v komunitárním právu. Linde, Praha 2005, p. 206.

[3] See judgment of the Court of Justice of 6 October 1982, case 283/81 *Cilfit*.

[4] See par. 13 and 14 of the judgement *Cilfit*.

[5] See par. 16 of the judgement *Cilfit*.

he equally does not dispose of vast administrative and translation body ready to prepare an analysis of the relevant case-law which is the case of the Court of Justice. The duty to find information about the case-law of other member states is illusory. The way how a national court should proceed is so burdensome that making a preliminary reference can often seem to be an easier way to proceed than trying to resolve a question of interpretation community law independently.

2. THE RELEVANCE OF THE VIOLATION OF THE OBLIGATION TO MAKE A PRELIMINARY REFERENCE IN THE CASE-LAW OF CONSTITUTIONAL COURTS

It is well-known that the preliminary ruling is a way of cooperation between national and community courts.[6] Article 234 of the Treaty does not constitute a means of redress available to the parties of a case pending before a national court. The mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the national court is compelled to consider that a question has been raised within the meaning of this article. On the other hand, a national court may refer a matter to the Court of Justice of it own motion.

Aware of this fact, how a preliminary ruling is capable of being subjected to constitutional review? There is a possibility upon the fulfilment of the condition that the individuals are capable of initiating of proceedings through a constitutional complaint. The Constitutional courts limit their review to the area of human rights. Therefore, their contemplations can be directed only to the question whether the fact that the national court did not refer the matter in the situation when he was obliged to do so constitutes a violation of a human right protected by the Constitution. There are several possibilities.

2.1 THE RIGHT TO LAWFUL JUDGE

The most elaborate case-law related to this matter has been created by the German Constitutional Court which decides on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights has been violated by public authority.[7] Solving this issue, Constitutional Court applied the right to lawful judge enshrined in the article 101 of the Basic Law.[8]

This concept was used in the Solange II. judgement [9] for the first time. According to the decision, the Court of Justice is a sovereign judicial body that renders final judgements independently. Since the Court of Justice enjoys a judicial monopoly in the decision-making regarding the interpretation and the validity of community law in the preliminary ruling, it represents a lawful judge in this sphere. The reasoning is following: If there is an obligation of the Court of Justice to participate in certain proceedings and the national court concerned omits this obligation by failure to bring the case before the Court of Justice, a violation of the

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[6] See Bobek, M. a kol. Předběžná otázka v komunitárním právu. Linde, Praha 2005, p. 232.

[7] See article 93 par. 1 lit. 4a) of the Basic Law.

[8] The article 101 of the Basic Law reads as follows: „Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge."

[9] See judgement 22. 10. 1986 , case 2 BvR 197/83 *Wünsche Handelsgesellschaft,* an abbreviated version available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572.

right to lawful judge is present.[10] However, a mere procedural defect is not sufficient, the violation of the obligation must be qualified, i. e. arbitrary and non justifiable.

The Kloppenburg judgement.[11] provides an explanation of the notion "arbitrary and non justifiable". The circumstances of the case are following: The Bundesfinanzhof did not respect a judgement of the Court of Justice given in the preliminary ruling initiated by a court of lower instance whose decision was being reviewed by the Bundesfinanzhof. According to the Constitutional Court, if the Bundesfinanzhof did not intend to comply with the opinion expressed by the Court of Justice, it was compelled to refer the matter again to the Court of Justice and set forth new argumentation aiming to impugning its legal opinion. To sum up, the disrespect towards a binding opinion of the Court of Justice is deemed as arbitrary.[12]

The most recent illustration of the above mentioned violation to lawful judge is the Rinke judgement[13] where Bundesverwaltungshof examined a collision of the community directives exclusively on the basis of the national collision rules and did not take into account the rules arising from the relevant luxembourgish case-law. The national court thus did not respect the rules contained in community (case) law and made an incorrect conclusion regarding the necessity to refer the matter to the Court of Justice.

It is worth mentioning that the German Constitutional Court did not use the criteria given in the Cilfit judgement but created its own standards which are come closer to reality and practice of the national courts.[14] It is equally notable that the criteria set by the Court of Justice are substantive whereas the German ones tend to be procedural emphasising the foreseeability of the procedure with regard to the stable practice in a situation at question. Nevertheless, the difference in the nature of the criteria is not surprising given that the German Constitutional Court applies the right to lawful judge which is a right of a typical procedural character.

The Austrian Constitutional Court follows the determined path by qualifying the failure to make a preliminary reference as a violation of the right to lawful judge.[15] In contrast to its German counterpart, the Austrian Constitutional Court has elaborated no rules specifying the arbitrariness in the failure to refer the matter to Luxembourg but applies the Cilfit criteria in a rather modified way – the application of the community law must not be in the apparent conflict with the stable interpretation provided by the Court of Justice.[16]

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[10] See Arnold, R. Evropský soudní dvůr a soudy členských států: vztah spolupráce chráněný zárukou národního ústavního práva týkající se zákonného soudce. Právní rozhledy 7/2001, příloha Evropské právo, p. 3.

[11] See judgement of 8. 4. 1987, case 2 BvR 687/85.

[12] A disrespect towards a decision of court of higher instance, especially the Supreme Court by a court of a lower instance is also deemed as unconstitutional by the Czech Constitutional Court. Nevertheless, this situation is qualified as a violation of a right to fair proceedings as a "*lex generalis*" in relation to the right to lawful judge.

[13] See judgement of 9. 1. 2001, case 1 BvR 1036/99.

[14] See Bobek, M. Porušení povinnosti zahájit řízení o předběžné otázce podle článku 234 (3) SES. C.H. Beck, Praha 2004, p. 49.

[15] See answers at the 18. colloquium, available at http://193.191.217.21/colloquia/2002/austria.pdf.

[16] See Bobek, M. Porušení povinnosti zahájit řízení o předběžné otázce podle článku 234 (3) SES. C.H. Beck, Praha 2004, p. 53.

The Spanish Constitutional Court had been refusing to interpret a failure to make a preliminary reference as a violation of the right to lawful judge for the long time.[17] Recently, its position has changed radically by accepting such constitutional complaints[18] nevertheless all the constitutional complaints have been rejected so far.[19]

2.2 THE RIGHT OF ACCESS TO THE COURT

In Ireland, the most natural way to ponder over the failure to bring the case before the Court of Justice is connected with the right of access to the court as an element of the right to fair trial. Nonetheless the Irish Supreme Court[20] has already refused to make a preliminary reference and no discussion has been held regarding a possible violation of the right of access to the court or any other constitutionally guaranteed human right.

2.3 THE RIGHT TO JUDICIAL PROTECTION

The violation of the obligation to make a preliminary reference can equally be construed more generally as a disrespect towards the right to judicial protection whose one of the components is the right to lawful judge. This approach is based on an idea that the right to judicial protection contains i. a. a guarantee that a national court shall make use of the interpretation provided by the competent judicial body (the Court of Justice). The failure to engage the Court of Justice does not represent a correctly provided judicial protection; the question of the lawful judge is secondary.[21]

2.4 THE APPROACH OF THE CZECH CONSTITUTIONAL COURT

The first decision dealing with the matter in question is the resolution IV. ÚS 154/08.[22] In the system of administrative judiciary, the claimant was seeking a review of a ministerial opinion on the environmental effects of a planned highway. The administrative courts held that a separate review is not possible and its place is not until the stage of building licence authorisation proceedings. The claimant based his legal opinion on the article 10a of directive 85/337/EEC and criticised the Supreme Administrative Court for a failure to make a preliminary reference in a situation where the interpretation of community law was not evident, i. e. the acte clair doctrine was not applicable.

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[17] See judgement of 13. 12. 1993, case 372/1993 where the Constitutional Court explained that such an objection cannot be subject to the constitutional review since a constitutional complaint claim the violation of human rights and not the community law.

[18] See judgement 19. 4. 2004, case 58/2004 (blíže Burgorgue-Larsen, L. La déclaration du 13 décembre 2004 (DTC n° 1/2004): Un Solange II à l'espagnole. Les cahiers du Conseil constitutionnel, 2005, č. 18, p. 132).

[19] See answers at the 18. colloquium, accessible at http://193.191.217.21/colloquia/2002/spain.pdf.

[20] The Irish Supreme Court plays a role of the Constitutional Court.

[21] See Mazák, J. Príspevok Ústavného súdu Slovenskej republiky pri uplatňovaní práv a plnení povinností na komunitárnej úrovni. Jurisprudence 6/2005, s. 14. It is worth mentioning that the Slovak Constitutional Court has already dealt with such a constitutional complaint. Referring to the judgement of the Court of Justice C-302/04 the Slovak Constitutional Court rejected the constitutional complaint as manifestly unfounded since the Court of Justice does not have jurisdiction to give judgement in a matter preceding the Slovak accession to the European Union (see resolution III. ÚS 151/07-14, available at http://www.concourt.sk/rozhod.do?urlpage= dokument &id_spisu =93475).

[22] See resolution of 30. 6. 2008, accessible at http://nalus.usoud.cz.

The Czech Constitutional Court admitted that failure to refer the matter to the Court of Justice can cause a violation of the right to fair trial and the right to lawful judge in certain cases. Concerning the relevant human right identification, Constitutional Court found its inspiration partly in the German model and partly in the Slovak one.

According to the cited resolution, the criteria for the constitutional review shall be searched in the Constitutional order of the Czech Republic. It is necessary to remind in this connection that the Constitutional Court has created its own rules to safeguard the right to lawful judge[23] which not suitable in the matter in question. Therefore, the Constitutional Court was forced to create specific criteria suitable for this matter. The decisive point for the formulation of that specific rule is the fact that there is a court which was not permitted to resolve a certain question. Insisting upon the rules created for the national sphere would cause problems.[24] It is possible to conclude that the Constitutional Court has elaborated its own sub-group of the specific criteria within the right to lawful judge which is applicable uniquely to the question at issue. These types of defective proceedings are recognised also in relation to national courts´ procedure but they are constantly assessed as a violation of the right to fair trial.

What are the "specific criteria"? They are represented by "certain circumstances which are able to cause a violation of the constitutionally guaranteed rights". The inspiration by the German and Austrian counterparts is apparent – according to the Czech Constitutional Court, not every failure to fulfil the obligation but only a fundamental and qualified failure can be regarded as a violation of a human right in question. That is for instance arbitrary or prima facie incorrect failure to refer the matter or the existence of a court´s doubt concerning the correct interpretation.

The above mentioned legal opinion leads to a possible conclusion that not only criteria created by the Constitutional Court itself but also the criteria expressed by the Court of Justice are applicable at the same time. When assessing whether the right to lawful judge was violated, the Cilfit criteria can serve as the first filter and only the cases which pass through are subjected to the criteria elaborated by the Constitutional Court.[25]

3. THE PRELIMINARY REFERENCE MADE BY THE CONSTITUTIONAL COURT

The second important question emerging when meditating on the relationship between the national Constitutional Courts and the Court of Justice in the matter of preliminary reference is the question whether the Constitutional Courts are obliged to bring the matter before the Court of Justice. First of all, it is necessary to resolve whether a Constitutional Court is the court in terms of article 234 of Treaty. The community definition of a court says that it must be established by law, have a permanent existence, be independent, exercise binding jurisdiction, be bound by rules of adversary procedure and apply the rule of law.[26] Concerning

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[23] For example pursuant to the decision III. ÚS 29/01 (available at http://nalus.usoud.cz), the right to lawful judge is fulfilled upon the condition of a limitation of the judicial competence prescribed by the law, by a consistent distribution of cases and a rigid composition of a bench.

[24] The consistent distribution of cases requirement would not be met since there exist no relevant rules and therefore the president of the Court of Justice has a full discretion in such a distribution.

[25] This conclusion can be based on the decision of 8. 3. 2006, case Pl. ÚS 50/04 *Cukerné kvóty* where the Constitutional Court referred to the *acte eclairé* doctrine and resolved the question of community law interpretation autonomously.

[26] See Bobek, M. a kol. Předběžná otázka v komunitárním právu. Linde, Praha 2005, p. 26.

the Czech Constitutional Court, these conditions are met as well as the criteria pursuant to article 234 par. 3 of Treaty because there is no judicial remedy against its decisions under national law. Therefore the Czech Constitutional Court is obliged to refer the matter to the Court of Justice if there is a doubt regarding the interpretation or validity of the community law.

Afterwards, it is essential to ask whether there could really exist a situation when the Constitutional Court should make a preliminary reference if it is known that its jurisdiction is limited to the questions of constitutionality. The answer is positive although a preliminary reference made by the Constitutional Court shall be rare since this task shall usually be fulfilled by the general courts of lower instances. On the other hand, the possibility that the Constitutional Court in contrast to a general court would not asses the matter as acte clair cannot be foreclosed.[27]

Though the answer to the aforementioned questions seems to be clear but the approach of the Constitutional Courts of the Member States is not uniform and that is why it is suitable to analyse their reasoning before making a final conclusion regarding the position of the Czech Constitutional Court.

3.1 THE POSITIVE APPROACH

The first group consists of the Constitutional Courts that have already made a preliminary reference or declare their readiness to do so.

The first preliminary reference ever made by a Constitutional Court is one made by the Belgian Cour d´arbitrage[28] whose preliminary references have become quite frequent.[29] The same attitude is adopted by the Austrian Constitutional Court which has already initiated a preliminary ruling for several times and by the Portuguese Constitutional Court declaring its readiness to do so. Making a preliminary reference is deemed as a natural element of own decision-making by the Irish High Court.[30] Regarding Constitutional Courts of the new Member States, the Lithuanian one has already referred the matter to Luxembourg.[31]

3.2 THE NEGATIVE APPROACH

The second group is represented by the Constitutional Courts which chose to approach the community law generally in a very self-confident manner. These courts seat in Germany, Italy and Spain.

The Spanish Constitutional Court asserts that its task is to watch over the respect towards the constitutionally guaranteed human rights and not to investigate a possible violation of

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[27] See Kühn, Z. Rozšíření Evropské unie a vztahy šestadvaceti ústavních systémů. Právník 8/2004, p. 748.

[28] The Belgian Cour d´arbitrage plays a role of a Constitutional Court.

[29] See judgement of 13. 7. 2005, case 124/2005 *Advocaten Voor de Wereld* available at http:// www.arbitrage.be/fr/common/home.html, see the analysis - Pomahač, R. Evropský soudní dvůr: Evropský zatýkací rozkaz a požadavek oboustranné trestnosti. Trestněprávní revue 6/2007, p. 173 – 175.

[30] The High Court together with the Supreme Court can be deemed as Constitutional Courts since they have jurisdiction to decide on constitutional matters. See recent decision 2007/1324, 622, 106, 1620 *Metock and Others*.

[31] See decision of 8. 5. 2007, case 47/04 available at http://www.lrkt.lt/dokumentai/2007/d070508.htm.

community law. The task to safeguard the respect towards the community law belongs to the general courts in cooperation with the Court of Justice. That is why the objection alleging the failure to make a preliminary reference can be used only when community law is applied which is not the case in the proceedings before the Constitutional Court.[32] It is clear that the Constitutional Court did not gain insight to the fact that all the national bodies bear the obligation to enforce the respect towards community law. The fact that the frequency and the available instruments of enforcement are different is not decisive and cannot lead to a conclusion that the Constitutional Court is deprived of this duty.

The Italian Constitutional Court had been trying to find its proper way how to tackle the problem. Initially, it felt to be competent to refer to the Court of Justice (despite the fact that it did not make use of this possibility and interpreted the community law autonomously).[33] Four years later, the Constitutional Court denied its declaration and commanded a general court to make a preliminary reference since the Constitutional Court did not regard itself as a court in sense of article 234 par. 3 of the Treaty.[34]

The attitude of the German Constitutional Courts seems rather obscure. The Solange I.[35] decision leads to a belief that the Court accounts itself to be a court according to the article 234 par. 3 of the Treaty but afterwards the case law in question has become rather unclear; what is important is the fact that the German Constitutional Court has not made a preliminary reference so far.[36]

3.3 THE UNCLEAR APPROACH

The Constitutional Courts belonging to this group have not yet expressly profess their opinion but it is possible to estimate that they would not resist the obligation to make a preliminary reference if needed.

The Polish Constitutional Tribunal approaches the possibility to refer the matter in a rather hypothetical manner arguing that the application of the article 234 of the Treaty neither jeopardize its competence nor narrows its jurisdiction. If the Constitutional Tribunal decided to initiate a preliminary ruling, it would do so only in cases where the application of community law is necessary.[37] The above mentioned declaration has to be construed in the specific context as a defence against objections alleging that the preliminary ruling impugns

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[32] See decision of 13. 12. 1993, case 372/1993. It is supposed that the community law does equalize to the constitutional law, its position is in the sphere of infraconstitutional law and therefore it cannot be used as a criterion of the constitutionality in the proceedings before the Constitutional Court. Consequently, all the objections regarding the violation of community law are ignored or minimized by the Constitutional Court (see Burgorgue-Larsen, L. L´application du droit communautaire en Espagne. Europäisierung durch Recht, 2005, p. 128).

[33] See decision of 18. 4. 1991, case *Giampaoli.*

[34] See decision of 15. 12. 1995, case *Messaggero Servizi Sr.* (See Cartabia, M. The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union, p. 141. In: Slaughter A. – M., Sweet, A. S., Weiler J. H. H. The European Courts and National Courts. Hart Publishing, Oxford 1998, 400 p.)

[35] See judgement of 29. 5. 1974, case 2 BvL 52/71 ze dne 29. 5. 1974, abbreviated version available at http:// www. utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588 [12. 6. 2008].

[36] See Kühn, Z. Rozšíření Evropské unie a vztahy šestadvaceti ústavních systémů. Právník 8/2004, p. 750 – 751.

[37] See judgement of 11. 5. 2005, case K 18/04, par. 18 available at http://www.trybunal.gov.pl/eng/summaries/ documents/K_18_04_GB.pdf.

supremacy of the Constitution and degrades the position of the Constitutional Tribunal.[38] To sum up, the Constitutional Tribunal did not expressly declare its legal opinion nonetheless it is possible to assume its readiness to refer the matter or at least to conclude that the Constitution does not block to do so.

The Slovak Constitutional Court denied a motion aiming at making a preliminary reference on the interpretation of the national non-discriminatory law implementing a community directive.[39] According to the reasoning of the Constitutional Court, the interpretation of a national law cannot be subject to the preliminary ruling regardless of the fact that the law in question was enacted in order to implement a community directive. The aforementioned circumstances allow to make a conclusion that the Slovak Constitutional Court feels to be the court in sense of article 234 of the Treaty, otherwise the explanation why the preliminary ruling was not initiated would be superfluous and the Constitutional Court would directly deny its competence to make a preliminary reference.

3.4 THE APPROACH OF THE CZECH CONSTITUTIONAL COURT

Where to place the Czech Constitutional Court? The scholars treat the Constitutional Court as the court in sense of article 234 of the Treaty and admonish to the referring a matter if necessary.[40]

On the contrary, the Constitutional Court´s opinion is not unambiguous that much. The Constitutional Court reserved the right to answer the question in the future and separately in each type of the constitutional review proceedings. Whereas the answer in the abstract review of norms proceedings has been still awaited, the features of a new doctrine are traceable in the constitutional complaint proceedings. The claimant[41] challenged a decision of a general court not excluding a judge for prejudice. He requested a preliminary reference on the question whether the article 6 of the European Convention on Human Rights authorises a general court of a Member State to transfer its competence to the courts of another Member State if the former ones lose ability to decide impartially and independently.

The Constitutional Court did not refer the matter since the Court of Justice has no jurisdiction in such a matter and therefore there is no point in making a preliminary reference. The Constitutional Court added that regarding these circumstances, there was no possibility to refer the matter. This declaration can lead to a conclusion that the Constitutional Court feels to be the a court in sense of article 234 of Treaty. If its opinion were different, the Constitutional Court would not waste time explaining the reasons for the failure to make a preliminary reference and it would promptly reject the request insisting its incompetence to initiate a preliminary ruling.

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[38] See Banaszkiewicz, B. Ústavní judikatura nového členského státu EU vůči vyzváním evropské integrace: zkušenosti Ústavního tribunálu Polské republiky. Jurisprudence 7/2005, p. 11.

[39] See resolution PL. ÚS 8/04-196.

[40] See Kühn, Z. Rozšíření Evropské unie a vztahy šestadvaceti ústavních systémů. Právník 8/2004, p. 751. Maršálková, Z. Jak daleko sahá omezení pravomocí orgánů ČR po vstupu do EU ve světle nálezu Ústavního soudu ve věci cukerných kvót? Právní rozhledy 15/2006, p. 560. Bobek, M. a kol. Předběžná otázka v komunitárním právu. Linde, Praha 2005, p. 221.

[41] See resolution II. ÚS 71/06 available at http://nalus.usoud.cz.

A similar reasoning is contained in resolutions I. ÚS 544/04 a II. ÚS 347/07[42]. It is possible to conclude that the claimants are not familiar with the conditions for making a preliminary reference; if they made a qualified motion, the Constitutional Court would not reject their request.

4. CONCLUSION

The Czech Constitutional has not yet pronounced its opinion in a binding judgement. Regarding a violation of the obligation to make a preliminary reference, there is solely a resolution which has no binding character. The same level of uncertainty exists in the matter of the obligation of the Constitutional Court itself to refer the case since there is no relevant judgement except of the Cukerné kvóty judgement where the Constitutional Court reserved the right to express its point of view for a later stage in the future.

Nevertheless, the relevant resolutions which have no binding character indicate a probable direction of the deliberations of the Constitutional Court in the future judgements. Although the Constitutional Court has been hesitating a little with the final statement, all the signs lead to a conclusion its approach will be pro European, i. e. the Constitutional Court will be willing to initiate a preliminary ruling as well as sanction the failure to do so.

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