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Translation Issues in Preliminary References: Cases of Czech Supreme Court[28]

Abstract. *The paper address preliminary references that the Czech Supreme Court, as the Apex Court, submitted to the CJEU when was unsure of the correct interpretation. In total, the Supreme Court filed 4 such preliminary references (out of 18) in the past 20 years since Czechia acceded to the European Union.The analysis shows that the ambiguity was most often caused by an inadequate translation. At the same time, it turned out that the Supreme Court used a total of six other different language versions – English, French, Polish, Slovak, German and Croatian – for comparison across four preliminary references. It follows that for comparison in preliminary references, at least two, but overall, maximally six other language versions were used.*

Keywords*: preliminary references, law, CJEU, translation, Czech Supreme Court*

1. Introduction

Although all laws should be written in ways their terms are unambiguous, constant, and intelligible, we know from legal practiceit is not always successful to produce such a legal text. The situation is even harder for the European Union (hereinafter referred to as "*EU*"), which, due to its multilingual nature, tries to capture the law in all official languages, whereas, from the point of view of preserving cultural and linguistic diversity and equality, translations are rather understood as language versions. The reason is the effort to maintain equal linguistic status with the motto equally authentic [1, p. 76]. This is certainly not an easy task, and it can therefore happen that some unclear (for the purpose of this paper, let's call it) translations can be made.

If there is a situation where it is not clear how to correctly interpret EU law, even because of an unclear translation, to adequately resolve the case, national courts can turn to the Court of Justice of the European Union (hereinafter referred to as "*CJEU*") with preliminary references. This institute is included in the primary law, mainly in Article 19 (3) b) of the Treaty on European Union (hereinafter referred to as "*TEU*") and in Article 267 of the Treaty on the Functioning of the European Union (hereinafter referred to as "*TFEU*"). This gives states the option, and in the case of the Apex Courts, an obligation to refer to the CJEU if such a question arises during the proceedings, unless the same case has already been dealt with by the CJEU, and unless the interpretation is clear.

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In my paper I deal with the preliminary references referred by Czech Supreme Court – Apex Court, which related to unclear translation of the language versions. The paper consists of 5 parts. After the introduction, the institution of the preliminary reference and its connection to translation is briefly introduced. This is followed by a methodological part, which explains the basis for the selection of the given preliminary references and a roadmap for subsequent work with the selected references. In the fourth part, each of the selected preliminary references is presented, setting out the unclear translation that the court has addressed in the context of what the given poor translation or translation inconsistencies have caused. In addition, there is also an analysis (with commentary) of which language versions the Supreme Court used for comparisons. This is then followed by a conclusion.

The main question of this paper is whether the Supreme Court of the Czech Republic dealt with any problematic translations in its preliminary references, and if so, in which preliminary references, where exactly was the ambiguity, and what other language versions did the court work with? The aim is to find out whether the Czech Supreme Court has had to deal with unclear translations in some of its cases that have resulted in a preliminary reference and what language versions of EU legal acts works with when there is an interpretive ambiguity caused by translation.

2. What is *Preliminary Reference*

Once a country joins the EU, became also, as U. Bernitz stated: "[…] *national arm of the European Union (EU) legal order* […]" [2, p. 17]. National courts are thus responsible for applying EU law in their country, and for ensuring uniform application of EU law. However, there may be situations where there is a doubt about the interpretation or validity of certain EU provisions.

When this situation arises and national courts are unsure about the interpretation or validity of EU legal acts, they can (or must) use the institution of preliminary reference. The preliminary reference could be understood as an act of national court asking the CJEU for help with interpretation during proceeding before a certain court. [3, p. 170]. The CJEU ruling does not decide the national court's case but binds the national court and all the national courts with jurisdiction to further decide on this case, for example in the case of legal remedies [4, p. 825].

As was stated in the introduction, some courts have the obligation to refer preliminary reference. These are the Apex Courts, i.e. courts of last instance that decide precisely on those judicial remedies. Therefore, if no remedy is possible against their decision and a question arises during the proceedings regarding the interpretation of EU law, these Apex Courts must, according to the Article 267(3) TFEU, turn to the CJEU with preliminary reference.

In addition to verification of interpretation or validity of EU law, it is also possible to verify the compatibility of national law with EU law [5, p. 447]. Through preliminary reference, individuals thus also open and additional channel to challenge both EU law and national acts [6, p. 353].

The importance of preliminary references for the area of translation relates to the already mentioned unified interpretation of the norms of EU law. It is not desirable that the rules, which are intended to unify EU law, develop differently in each Member State. This means that terms in EU law must be consistent across languages and one language version cannot be the priority or the sole basis for interpretation. In case of differences between language versions, the overall context and objectives of the legislation should be considered. On the other hand, that does not mean that it will be possible to bridge all issues in translation that can arise not only from different legal traditions of the Member States, but also precisely because of language differences [6, p. 353], even they should be, as already stated, equally authentic. This is exactly the reason there may be differences between the language versions due to translation that could be resolved by a preliminary reference.

3. Methodology

3.1 Filtering the Preliminary References

In my article I work with Czech Supreme Court, which is one of the Apex Courts in preliminary reference procedure. Therefore, I focused on the preliminary references issued by the Czech Supreme Court.

This left a total of 18 references, from which I looked only for those that:

1. dealt with the topic of poor or inconsistent translation,
2. the poor or inconsistent translation stem just from comparison of Czech version to other languages,
3. state exactly where poor or inconsistent translation is,
4. indicate which other language versions the Supreme court worked with.

After reading all preliminary references and checking whether they meet the criteria above, I have a total of 4 references left. All preliminary references that remained after filtering relate to the appeal process. One is from the area of criminal matters (abbreviation Tdo), the remaining four from the area of civil and commercial matters (abbreviation Cdo).

3.2 Roadmap for Work with Preliminary References

First, I plan to briefly introduce each of the selected 4 preliminary references in the context of the unclear translation. Then, I will define exactly what the unclear translation was. At the end, I will also focus on which language versions and their amount were used for comparison in individual preliminary references. Based on the last step, I will evaluate which language versions the Czech Supreme Court used for comparison through these 4 preliminary references and how many language versions were used in individual preliminary references.

4. Analysing Preliminary References of Czech Supreme Court

a) Case 30 Cdo 1994/2013

This case was about the interpretation of Article 12(3) Brussels II Regulation. In the Czech version, the Article is marked as "***pokračování příslušnosti***" (continuation of the jurisdiction). However, when compared with other language versions, as English, the same was marked as "***prorogation of jurisdiction"*** (could be understand

as agreement about jurisdiction). Such translation partly caused the uncertainty about the possibility of choosing the court's international jurisdiction.

The Czech Supreme Court compared the Czech version to English, French, German and Slovak version. The ambiguity here is caused by inadequate translation.

b) Case 11 Tdo 212/2016

This case arose when a previously convicted man was arrested with a bag with medical products, raising uncertainty whether they were for treating an illness or for drug preparation.It was necessary to resolve whether the medical product could therefore be precursors, as was stated by lower court or just a medicinal product containing a precursor. In the Czech version is stated: „*jakákoliv látka uvedená v příloze I, která může být použita k nedovolené výrobě omamných nebo psychotropních látek, vč. směsí a přírodních produktů, které tyto látky obsahují, avšak s výjimkou směsí a přírodních produktů, ve kterých jsou uvedené látky obsaženy tak, že tyto uvedené látky nelze snadno použít ani extrahovat snadno dostupnými nebo hospodárnými prostředky,* ***léčivé přípravky*** *ve smyslu* […]“. The Czech version shows that medicinal products (the sentence starting with **bold words**) follows the yellow highlighted sentence, implying that medicinal products are a precursor.

Yet, the Czech Supreme Court compared the Czech version to Slovak, Polish, English, and German version and find out, that the conclusion that the medical product is precursor has no support in these versions. In the English version: “*scheduled substance” means any substance listed in Annex I that can be used for the illicit manufacture of narcotic drugs or psychotropic substances, including mixtures and natural products containing such substances but excluding mixtures and natural products which contain scheduled substances and which are compounded in such a way that the scheduled substances cannot be easily used or extracted by readily applicable or economically viable means,* ***medicinal products*** *as defined* […].” It is not clear, if the sentence starting with the **medical products** follows the yellow highlighted sentence or whether it is part of an enumeration beginning with a sentence highlighted in green and then exclude them form precuros. The doubts rise from the syntactic ambiguities.

c) Case 23 Cdo 2765/2012

In this case the Court need help with interpretation of the Article 8 (1) of Directive 2004/48/ES. In the Czech version of the Directive: “***v souvislosti*** *s řízením o porušení práva duševního vlastnictví*” and even after transposition to Czech law, the meaning of the **bold words** it is not clear if the right to information is limited by the fact that information can only be requested during the ongoing proceedings or it can also be requested in a separate proceeding after the conclusion of proceedings (it is also in the English version, where it is used “***in the context of***”). In contrast, the French version uses words “***dans le cadre de”***, which could be translated as “***within***” which creates a closer relationship between the proceedings and the demand for information.

The Czech Supreme Court thus compared the Czech version to English and French.The ambiguity here is due to an inadequate translation.

d) Case 23 Cdo 511/2022

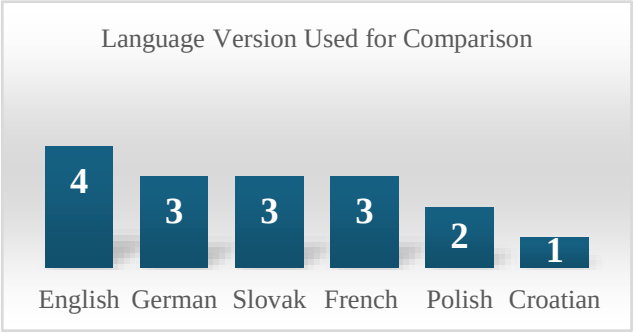
In this case, the language troubles in preliminary references stem from the Czech version of Article 8 (2) Brussels I Regulation. It was not clear whether a defendant can have a position as a third party: "*Osoba, která má bydliště v některém členském státě, může být též žalována, jedná-li se o žalobu o záruku nebo o* ***intervenční žalobu****, u soudu, u něhož byla podána původní žaloba, ledaže by toto řízení bylo zahájeno pouze proto, aby tato osoba byla odňata soudu, který je pro ni příslušný.*" In the Czech version (also in German and French versions) there was no reference to the defendant's position as a third party.

On the other hand, in the English (as well as in Polish, Slovak, and Croatian) version a different term was used: *"A person domiciled in a Member State may also* ***be sued as a third party*** *in an action on a warranty or guarantee or in any other* ***third-party proceedings****, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."* Thus, the English version, together with the Polish, Slovak and Croatian versions, emphasizes the position of the defendant as a third party and also refers to third-party proceedings.

The Czech Supreme Court compared the Czech version to English, German, French, Polish, Slovak and Croatian and the ambiguity stemmed from inadequate translation.

4.1 Language Version Used for Comparison

It follows from the above text that the range of language versions for comparison is not so diverse. A total of **six** languages were used in the four preliminary references: English, French, German, Slovak, Polish a Croatian. It also follows that English was used the most, because was used in all preliminary references. Croatian was used the least, which occurred only once during the comparison. The second most used languages for comparison were German, Slovak, and French, which all appear in three preliminary references. The Polish version was used in two preliminary references. For easier and clearer interpretation, the results are also captured in graph.

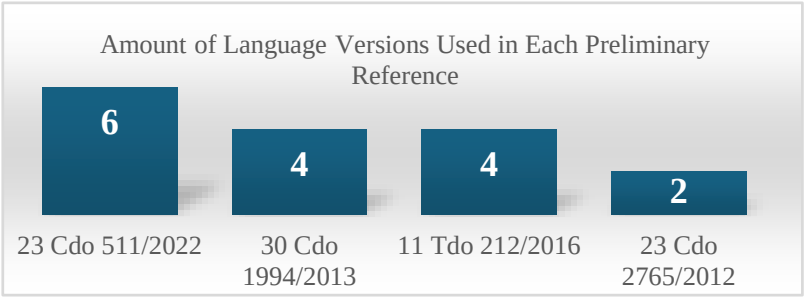


(Source: author)

It is possible to determinethree aspects from which these language versions were chosen. First aspect assumes that for comparing language versions we will look at the languages of the countries that are geographically closest to us, i.e. neighbouring countries. This would explain why the court used Polish, German, and Slovak. Based on the second aspect, we can justify the choice based on linguistic proximity. The Czech language, like Polish, Croatian and Slovak, belongs to Slavic languages (two of them are also West Slavic languages) and are quite understandable. In the last aspect, English, German and French are also languages that are relatively dominant in the EU, due to their strengthened position among working languages [7, p. 50]. At the same time, these three languages are among the most taught languages in the EU [8] and they are also languages that can be encountered during law studies in the Czech Republic.

4.2. Amount of Language Versions Used in Each Preliminary Reference

From the above, it is also possible to determine how many language versions were used in each individual preliminary reference. The most language versions, in total six, for comparison were used in preliminary reference 23 Cdo 511/2022. The fewest language versions for comparison were used in preliminary reference 23 Cdo 2765/2012, two in total. In the other preliminary references, four other versions were used for comparison. Again, for easier and clearer interpretation, the results are captured in a graph.



(Source: author)

It appears that the Czech Supreme Court used as many language versions for comparison as deemed necessary for each specific case. However, when dealing with unclear translations, it's advisable to compare with at least two additional language versions to address potential discrepancies. Determining the maximum number of language versions for comparison depends on the case's complexity, yet comparing with all versions is impractical due to limitations in language proficiency among Court staff. Although the CJEU presumes that for a court to say that a matter is clear, it must compare with all versions of the language. This is very difficult to achieve in practice, which is why there was also an attempt to reverse the criteria [9]. Generally, a range of 2-6 language versions, as observed in the Czech Supreme Court's practice, seems ideal for thorough comparison and interpretation.

5. Conclusion

In my paper I dealt with preliminary references of the Czech Supreme Court and the examination of their submission to the CJEU based on ambiguities caused by translation. Inspiration for this paper raised from the article by N. Dřínovská and Z. Vikarská dealing with preliminary questions of all Czech Supreme Courts [10].

Firstly, I introduced preliminary references and their role in ensuring consistent interpretation and application of EU law norms. I then analysed four filtered references, identifying ambiguities in translations and their origins, along with the number and languages involved. Three references exhibited inadequate translation, while one faced syntactic ambiguity. Six different languages were utilized across the references: English, German, French, Polish, Slovak, and Croatian, with English being the most frequently used for comparison. In each case, the court used at least two language versions and one case utilized all six.

In conclusion, I would like to express my hope that this article will become one of the reasons for a deeper exploration of translation ambiguities in preliminary references and will at least partially contribute to the fields of law and language research.

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