The ECJ's Precedents as Means of EU Integration: National Courts' Treatment of European Case-Law under Scrutiny

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ABSTRACT

This thesis investigates how national judges treat the case-law of the European Court of Justice in their run-of-the-mill adjudication outside preliminary reference mechanism. It shows that the ECJ formally instructs all national judges to follow its previous rulings and as a result, the Luxembourg's jurisprudence theoretically enjoys precedential force in the wider sense. Nevertheless, it is argued that in reality, there is a great variety of patterns in how national judges apply and engage with the Court's previous case-law. In order to examine those patterns, the study surpasses traditional indicators of compliance and instead embraces a broader concept of judicial treatment of previous case-law. Consequently, a three-level methodological framework for empirical analysis of the domestic referring practices consisting of a mix of quantitative and qualitative approaches is introduced. It is argued that combining automated text analysis with more traditional legal research methods offers a rather holistic approach which could contribute to the reconstruction of a more realistic and systematic picture of EU judicial choice-making. That framework is then applied to the pilot study of the Czech Supreme Administrative Court.

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TABLE OF CONTENTS

Abstract **2**

Table of Contents **3**

Table of Abbreviations **5**

Table of Cases, Statutes and Treaties **6**

Table of Figures and Tables **13**

1 Introduction **14**

1.1 What national judges *ought* to do? **17**

1.2 What do national judges *actually* do? **20**

1.3 Frontiers of the Scholarship on the Domestic Courts' EU Mandate .. **23**

1.4 Research Design and the Scope of the Study **29**

2 Theoretical Framework: Domestic Courts and the ECJ's Precedents **33**

2.1 The Formal Precedential Value of Previous ECJ's Rulings **34**

2.2 The Concept of Treatment of ECJ's Precedents **41**

3 Methodological Framework for the Study of the Treatment Patterns **51**

4 Case Study of Czech Supreme Administrative Court **57**

4.1 Macro-level Analysis: Mapping the Terrain **59**

4.1.1 Obtaining Data 59

4.1.2 Converting Text into Quantitative Data 61

4.1.3 Analysis of the Structured Data 62

4.1.4 Results 67

4.1.5 Macro-level Conclusions 76

4.2 Meso-level Analysis: Zooming In **77**

4.2.1 Selecting Cases 77

4.2.2 Defining the Treatment Patterns 79
4.2.2.1 Applicability 81
4.2.2.2 Engagement 84
4.2.2.3 Technique of Application 87
4.2.2.4 Cited Part 92
4.2.2.5 Other Categories 92
4.2.3 Coding Process and Reliability Concerns 94
4.2.4 Results 95
4.2.4.1 Applicability 97
4.2.4.2 Engagement 99
4.2.4.3 Technique of Application 101
4.2.4.4 Cited Part 104
4.2.4.5 Meso-Level Conclusions 105
4.3 Micro-level Analysis: Cherry-Picking the Interesting Cases 107
4.3.1 Limits of the Principle of Consistent Interpretation 107
4.3.2 The Principle of Consistent Interpretation as Means of Enforcement of the Settled Case-Law 110
4.3.3 The Principle of Consistent Interpretation as Means of Hierarchical Judicial Conflicts 112
4.3.4 Micro-Level Conclusions 115
5 Conclusion 116
Bibliography 120

TABLE OF ABBREVIATIONS

Abbreviation(s)	Full Name
ATA	automatic text analysis
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
EU; Union	European Union
European Court of Justice; ECJ; Court; Luxembourg Court	Court of Justice
Member States	Member States of the European Union
Rules of Procedure	Rules of Procedure of the Court of Justice
SAC	Czech Supreme Administrative Court
SCA	systematic content analysis
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaties	TEU, TFEU and EU Charter (if applicable)

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Decision of the Supreme Administrative Court No. 2 Azs 134/2020- 29 of 20.11.2020
Decision of the Supreme Administrative Court No. 2 Azs 144/2020- 33 of 23.07.2020
Decision of the Supreme Administrative Court No. 2 Azs 151/2019- 30 of 20.08.2020
Decision of the Supreme Administrative Court No. 2 Azs 165/2019- 57 of 30.09.2020
Decision of the Supreme Administrative Court No. 2 Azs 168/2020- 34 of 25.08.2020
Decision of the Supreme Administrative Court No. 2 Azs 172/2020- 45 of 21.10.2020
Decision of the Supreme Administrative Court No. 2 Azs 174/2020- 33 of 22.09.2020
Decision of the Supreme Administrative Court No. 2 Azs 241/2020- 29 of 19.08.2020
Decision of the Supreme Administrative Court No. 2 Azs 244/2019- 27 of 22.09.2020
Decision of the Supreme Administrative Court No. 2 Azs 254/2019- 26 of 30.01.2020
Decision of the Supreme Administrative Court No. 2 Azs 259/2019- 28 of 12.03.2020
Decision of the Supreme Administrative Court No. 2 Azs 278/2019- 30 of 19.02.2020
Decision of the Supreme Administrative Court No. 2 Azs 29/2019- 33 of 29.05.2020
Decision of the Supreme Administrative Court No. 2 Azs 293/2019- 41 of 19.02.2020
Decision of the Supreme Administrative Court No. 2 Azs 302/2019- 57 of 30.01.2020
Decision of the Supreme Administrative Court No. 2 Azs 305/2019- 43 of 16.04.2020

Decision of the Supreme Administrative Court No. 2 Azs 322/2020- 31 of 19.11.2020
Decision of the Supreme Administrative Court No. 2 Azs 328/2020- 37 of 16.12.2020
Decision of the Supreme Administrative Court No. 2 Azs 346/2019- 31 of 19.02.2020
Decision of the Supreme Administrative Court No. 2 Azs 349/2019- 29 of 27.02.2020
Decision of the Supreme Administrative Court No. 2 Azs 356/2019- 43 of 30.06.2020
Decision of the Supreme Administrative Court No. 2 Azs 356/2019- 43 of 30.06.2020
Decision of the Supreme Administrative Court No. 2 Azs 71/2020- 31 of 25.06.2020
Decision of the Supreme Administrative Court No. 2 Azs 90/2020- 14 of 15.10.2020
Decision of the Supreme Administrative Court No. 3 Afs 110/2018- 38 of 15.05.2020
Decision of the Supreme Administrative Court No. 3 Afs 163/2018- 29 of 26.08.2020
Decision of the Supreme Administrative Court No. 3 Afs 23/2018- 39 of 04.06.2020
Decision of the Supreme Administrative Court No. 3 As 243/2019- 55 of 11.12.2020
Decision of the Supreme Administrative Court No. 3 As 59/2019- 23 of 30.03.2020
Decision of the Supreme Administrative Court No. 3 As 90/2019- 37 of 30.10.2020
Decision of the Supreme Administrative Court No. 3 Azs 15/2020- 84 of 15.10.2020
Decision of the Supreme Administrative Court No. 3 Azs 275/2019- 33 of 14.05.2020
Decision of the Supreme Administrative Court No. 3 Azs 295/2019- 32 of 17.07.2020
Decision of the Supreme Administrative Court No. 3 Azs 426/2019- 34 of 26.08.2020
Decision of the Supreme Administrative Court No. 4 Afs 10/2020- 58 of 26.08.2020
Decision of the Supreme Administrative Court No. 4 Afs 183/2018- 41 of 29.10.2020
Decision of the Supreme Administrative Court No. 4 As 150/2019- 54 of 23.11.2020
Decision of the Supreme Administrative Court No. 4 As 167/2020- 44 of 13.11.2020
Decision of the Supreme Administrative Court No. 4 As 301/2019- 52 of 21.09.2020
Decision of the Supreme Administrative Court No. 4 As 376/2019- 31 of 11.02.2020
Decision of the Supreme Administrative Court No. 4 As 8/2018- 40 of 10.09.2020
Decision of the Supreme Administrative Court No. 4 As 85/2020- 38 of 16.09.2020
Decision of the Supreme Administrative Court No. 4 Azs 135/2020- 32 of 20.08.2020
Decision of the Supreme Administrative Court No. 4 Azs 15/2020- 71 of 26.11.2020
Decision of the Supreme Administrative Court No. 4 Azs 157/2019- 21 of 20.08.2020
Decision of the Supreme Administrative Court No. 4 Azs 170/2020- 40 of 23.10.2020
Decision of the Supreme Administrative Court No. 4 Azs 189/2018- 31 of 21.10.2020
Decision of the Supreme Administrative Court No. 4 Azs 231/2020- 33 of 19.11.2020
Decision of the Supreme Administrative Court No. 4 Azs 248/2019- 65 of 22.04.2020
Decision of the Supreme Administrative Court No. 4 Azs 339/2019- 27 of 30.01.2020
Decision of the Supreme Administrative Court No. 4 Azs 347/2019- 56 of 26.02.2020
Decision of the Supreme Administrative Court No. 4 Azs 35/2020- 20 of 14.05.2020
Decision of the Supreme Administrative Court No. 4 Azs 442/2019- 34 of 14.04.2020
Decision of the Supreme Administrative Court No. 4 Azs 461/2019- 49 of 27.08.2020
Decision of the Supreme Administrative Court No. 4 Azs 74/2020- 37 of 19.06.2020
Decision of the Supreme Administrative Court No. 4 Azs 98/2020- 23 of 04.06.2020
Decision of the Supreme Administrative Court No. 5 Afs 138/2017- 79 of 13.03.2020
Decision of the Supreme Administrative Court No. 5 Afs 344/2019- 30 of 06.02.2020
Decision of the Supreme Administrative Court No. 5 Afs 408/2019- 32 of 20.11.2020
Decision of the Supreme Administrative Court No. 5 Afs 83/2018- 45 of 09.07.2020
Decision of the Supreme Administrative Court No. 5 As 162/2018- 51 of 30.10.2020
Decision of the Supreme Administrative Court No. 5 As 219/2019- 49 of 12.06.2020
Decision of the Supreme Administrative Court No. 5 As 299/2018- 24 of 16.10.2020
Decision of the Supreme Administrative Court No. 5 As 300/2018- 23 of 09.07.2020

Decision of the Supreme Administrative Court No. 5 Azs 102/2020- 15 of 20.11.2020
Decision of the Supreme Administrative Court No. 5 Azs 105/2018- 46 of 31.01.2020
Decision of the Supreme Administrative Court No. 5 Azs 105/2020- 41 of 31.07.2020
Decision of the Supreme Administrative Court No. 5 Azs 12/2020- 30 of 08.04.2020
Decision of the Supreme Administrative Court No. 5 Azs 123/2020- 41 of 23.10.2020
Decision of the Supreme Administrative Court No. 5 Azs 129/2020- 16 of 20.11.2020
Decision of the Supreme Administrative Court No. 5 Azs 165/2019- 20 of 06.02.2020
Decision of the Supreme Administrative Court No. 5 Azs 203/2019- 20 of 06.02.2020
Decision of the Supreme Administrative Court No. 5 Azs 276/2019- 30 of 06.02.2020
Decision of the Supreme Administrative Court No. 5 Azs 28/2020- 38 of 18.05.2020
Decision of the Supreme Administrative Court No. 5 Azs 299/2020- 38 of 12.11.2020
Decision of the Supreme Administrative Court No. 5 Azs 312/2020- 15 of 11.12.2020
Decision of the Supreme Administrative Court No. 5 Azs 325/2019- 16 of 27.03.2020
Decision of the Supreme Administrative Court No. 5 Azs 329/2019- 20 of 20.02.2020
Decision of the Supreme Administrative Court No. 5 Azs 347/2019- 33 of 27.03.2020
Decision of the Supreme Administrative Court No. 5 Azs 404/2019- 28 of 16.03.2020
Decision of the Supreme Administrative Court No. 5 Azs 456/2019- 33 of 12.05.2020
Decision of the Supreme Administrative Court No. 5 Azs 466/2019- 41 of 04.12.2020
Decision of the Supreme Administrative Court No. 5 Azs 62/2019- 22 of 20.02.2020
Decision of the Supreme Administrative Court No. 5 Azs 64/2019- 35 of 23.01.2020
Decision of the Supreme Administrative Court No. 5 Azs 65/2020- 31 of 09.11.2020
Decision of the Supreme Administrative Court No. 5 Azs 72/2019- 42 of 22.10.2020
Decision of the Supreme Administrative Court No. 5 Azs 87/2020- 18 of 23.10.2020
Decision of the Supreme Administrative Court No. 6 Afs 194/2020- 51 of 10.12.2020
Decision of the Supreme Administrative Court No. 6 Afs 205/2019- 39 of 20.02.2020
Decision of the Supreme Administrative Court No. 6 Afs 207/2020- 37 of 09.09.2020
Decision of the Supreme Administrative Court No. 6 Afs 264/2016- 44 of 11.05.2017
Decision of the Supreme Administrative Court No. 6 Azs 109/2019- 74 of 22.01.2020
Decision of the Supreme Administrative Court No. 6 Azs 145/2020- 31 of 05.11.2020
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Decision of the Supreme Administrative Court No. 6 Azs 214/2019- 41 of 29.01.2020
Decision of the Supreme Administrative Court No. 6 Azs 22/2020- 19 of 26.03.2020
Decision of the Supreme Administrative Court No. 6 Azs 239/2019- 33 of 26.02.2020
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Decision of the Supreme Administrative Court No. 7 Azs 426/2019- 38 of 12.03.2020
Decision of the Supreme Administrative Court No. 7 Azs 7/2020- 22 of 05.03.2020
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Decision of the Supreme Administrative Court No. 8 Afs 303/2018- 52 of 10.09.2020
Decision of the Supreme Administrative Court No. 8 Afs 49/2019- 33 of 27.10.2020
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TABLE OF FIGURES AND TABLES

Figure/Table	Name	Page Number
Table 1	Three-level Framework	56
Table 2	Overview of the Datasets	61
Table 3	Overview of the Rules	66
Table 4	Coded Cases	79
Table 5	Treatment of the ECJ Precedents	93
Figure 1	Citations over Time	68
Figure 2	Annual Proportion of Referring Cases in the SAC's Case-Law	69
Figure 3	Most Cited ECJ Cases	71
Figure 4	Type of Procedure	73
Figure 5	Most Cited Judges	75
Figure 6	Areas of Law	96
Figure 7	Applicability of the ECJ's Precedents	98
Figure 8	Engagement with the ECJ's Precedents	99
Figure 9	Technique of Application of the ECJ's Precedents	102

1 INTRODUCTION

While having to deal with numerous crises over the past years – those of climate, pandemic, late capitalism, and many others – the European Union's project of integration through law has been moving forward.[1] As the number of EU regulatory instruments steadily increases, the process of *Europeanization* of Member States' legal orders cannot be perceived otherwise than as an empirical fact.[2] This expanded reach of EU law dynamically affects the position of national institutions, and judiciaries are no exception in that regard.

Member States' domestic courts now act as 'decentralised European Union courts'.[3] The European Court of Justice itself reasons that Article 19 TEU gives concrete expression to the value of the rule of law and assigns the responsibility for ensuring the full application of EU law and judicial protection of the individuals' rights under that law precisely to national courts and tribunals.[4] Indeed, according to the ECJ, Member States should establish a system

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1 On the notion of the 'integration through law', see Mauro Cappelletti, Monica Seccombe and Joseph Weiler, 'Integration Through Law: Europe and the American Federal Experience: A General Introduction' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law: Book 1: A Political, Legal and Economic Overview* (De Gruyter 1986) 4. A growing critique of that conception claims that the model of integration though law has been a failure in a qualitative sense [see Editorial Comments, 'The Critical Turn in EU Legal Studies' (2015) 52 CMLR 881].

2 One older study indicates that in the period from 2002 to 2005, already almost 40 per cent of German federal legislation was Europeanized. In: Annette Töller, 'Measuring and Comparing the Europeanization of National Legislation: A Research Note' (2010) 48 Journal of Common Market Studies 417.

3 Imelda Maher, 'National Courts as European Community Courts' (1994) 14 Legal Studies 22; Claes wrote about national courts operating under a 'Community mandate' in Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006); Jaremba explains how national judges are expected to function as 'decentralised EU law judges' in Urszula Jaremba, *National Judges As EU Law Judges: the Polish Civil Law System: The Polish Civil Law System* (Brill 2013) 47-112.

4 Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531, para 47; see also Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] EU:C:2018:586, para 50.

of legal remedies and procedures ensuring *effective judicial review* in the fields covered by EU law.[5] Such effective judicial protection is said to be a general principle of EU law enshrined in Articles 6 and 13 ECHR, and Article 47 EU Charter.[6] Consequently, it is only fair to claim that to the ECJ, national courts are essential interlocutors who play a crucial role in the enforcement of EU law.

In this study, I follow this conception and explore how national courts fulfil their European Union mandate. In particular, I investigate how they treat ECJ's case-law in their domestic adjudication. I argue that from the perspective of domestic courts, the rulings of the ECJ formally enjoy broader precedential value. There is, however, a great variety of patterns in *how* national judges reason with the Court's previous judgements.

National judges do not only face the dilemma of following or rejecting the ECJ's case-law in purely binary terms. Every time they reference a previous judgement, they engage with that ruling more or less creatively, use it in a substantive or rather symbolic manner, and make a choice about which part of that ruling they ultimately cite. The broader concept of 'treatment of precedents' which encompasses those diverse patterns moves the discussion beyond the traditional compliance understanding and allows us to examine more deeply the degree to which ECJ's jurisprudence if fact influences domestic adjudication.

This study presents a three-level analysis framework consisting of a mix of empirical quantitative and qualitative methods. I argue that the combining automated text analysis with more traditional legal research methods offers a holistic approach to the study of domestic

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5 Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, para 34

6 Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor din România"* [2021] EU:C:2021:393, para 190.

judges' day-to-day behaviour. That framework is then applied to the pilot study of the decision-making of the Czech Supreme Administrative Court.

The general goals of the project are twofold. First, the study aims to contribute to a more nuanced understanding of the authority of both the ECJ and the domestic judiciary within the EU judicial system. Studying how national judges interact with ECJ's jurisprudence broadens the idea of judicial dialogue,[7] and sheds light on some of the actual effects of the ECJ's authority within the national context. Similarly, by revisiting the image of how domestic judges in turn influence the content of the EU law, the project emphasises the significance of national judges for the development of EU legal doctrine.

Secondly, this project proposes a methodological research path which could be replicated and used to study other Member States' courts. In that way, the project aims to contribute to the reconstruction of a more realistic and systematic picture of EU judicial choice-making.[8]

In what follows, I will firstly posit this project in the existing doctrine and literature concerning the role of the national judges within the EU judicial system. As it will be shown, the formal demands of EU law placed on the national courts have grossly accumulated over the years (**1.1**). This in turn resulted in strands of critical views questioning the ways in which national judges fulfil these demands in their everyday conduct (**1.2**). Next, I will identify some of the substantive and methodological gaps in the EU scholarship (**1.3**) which are later used

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7 See Rob van Gestel and Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (CUP 2019).

8 See Nicolas Lampach and Arthur Dyevre, 'Choosing for Europe: Judicial Incentives and Legal Integration in the European Union' (2020) 50 European Journal of Law and Economics 65, 70.

to show why it is important to explore domestic courts' treatment of the Court's precedents. Consequently, the research design and the scope of the study will be described in detail (**1.4**).

1.1 What national judges *ought* to do?

To put it plainly, EU law (predominantly made by the ECJ) demands national courts to do *a lot*. On a daily basis, national judges ought to directly apply regulations, decisions, and national provisions implementing EU law legislation in both vertical and horizontal relations.[9] When individuals try to rely directly on the provisions of various EU law sources, national courts are expected to conduct some sort of a test ('Is the provision sufficiently clear, precise, unconditional, etc.?') to examine whether the legislative provision in question has a *direct effect*. The precise conditions for that direct effect to occur then depend on the type of legal source[10], type of legal relationships[11], temporal aspects[12], and they are especially messy when it comes to directives.[13]

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9 See Article 288 TFEU. With regards to regulations, note that to be directly applicable, their provisions also need to be 'clear and precise', and 'not leave any margin of discretion to the authorities' (Case C-9/73 *Schlüter v. Hauptzollamt Lörrach* [1973] ECR 1135, para 32).

10 The ECJ has in the past acknowledged that the direct effect can be granted to general principles of EU law (Case C-555/07 *Kücükdeveci* [2010] ECR I-365), Treaties (Case 26/62 *Van Gend en Loos* [1963] ECR 3), EU Charter (Case C-176/12 *Association de médiation sociale* [2014] EU:C:2014:2), international agreements (Case C-12/86 *Demirel* [1987] ECR 3719), and directives (Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337).

11 In *Marshall*, the Court formally limited the direct effect of directives to *vertical* relations when it stated that 'directive may not of itself impose obligations on an individual' (Case 152/84 M. H. *Marshall* [1986] ECR 723, para 48). On the contrary, the *horizontal* direct effect of Treaties' provisions was recognised in Case 43/75 *Defrenne* [1976] ECR 455.

12 In *Ratti*, the ECJ stated with respect to the directives that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its national law which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of that directive (Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629).

13 For an overview, see Dorota Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015), where she rightly questions the plausibility of the ECJ's doctrine.

The fuzzy concept of direct effect has been further complemented by another doctrine – that of consistent interpretation – under which national courts are obliged to interpret domestic law 'as far as possible, in the light of the wording and the purpose' of relevant EU provisions to achieve the result pursued by the EU law (as interpreted by the ECJ).[14] Consequently, on the one hand, national judges are required to do 'whatever lies within their jurisdiction', take 'the whole body of domestic law into consideration' and apply their national interpretative methods to give full effect to EU law, while they simultaneously must ensure that their national law is not interpreted *contra legem* (the meaning of which is – of course – up to them to determine).[15]

The list of the day-to-day tasks goes on. The ECJ further requires national judges to apply national procedural rules, without distinction, to actions based on infringement of EU law as they do to those based on infringement of national law 'having a similar purpose' (principle of equivalence).[16] Additionally, this time in line with the principle of effectiveness, domestic courts are prohibited from applying rules which render 'practically impossible' or 'excessively difficult' to exercise rights conferred by EU law.[17]

Not only should the judges consider all these doctrines when applying the EU law on a daily basis, but they are also under certain conditions expected to apply the EU law itself

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14 Joined Cases C-270/97 and C-271/97 *Sievers* [2000] ECR I-929, para 64; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Case 14/83 *Sabine von Colson* [1984] ECR 1891; Case C-306/12 *Spedition Welter* [2013] EU:C:2013:650, para 32.

15 Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, para 114; Case C-268/06 *Impact* [2008] ECR I-2483, para 100; Case C-282/10 *Dominguez* [2012] EU:C:2012:33, paras 24-27. For a good analysis of the principle, see Martin Brenncke, 'Hybrid Methodology for the EU Principle of Consistent Interpretation' (2018) 39 Statute Law Review 134.

16 Case C-591/10 *Littlewoods Retail and Others* [2012] EU:C:2012:478, para 31.

17 Case C-63/08 *Pontin* [2009] ECR I-10467, para 43.

ex officio even if the national rules preclude them from doing so.[18] Finally, the fact that national courts should, according to the ECJ, perform the comparison of 23 language versions when they interpret EU law does not make their daily business any less onerous.[19]

Hitherto, I have only sketched the run-of-the-mill demands placed on national judges. The ECJ, however, also asks the domestic judiciary to play a substantial role in cases that may be less frequent but are generally more politically and legally salient. First, based on the principle of primacy, all ordinary courts are obliged to refuse the application of domestic legal measures which incompatible with EU law.[20] This means that, in areas of EU law, ordinary national courts ought to review the legal outputs of national legislators even though such competence was typically reserved for centralised constitutional courts.[21] In other words, the ECJ requires all domestic judges to perform a *diffuse judicial review* of national legislation while such a task is mostly not conferred on them by domestic constitutions.

Secondly, national judiciary is expected to play a key part in the preliminary reference mechanism stipulated in Article 267 TFEU which enables (and under certain circumstances requires) domestic courts to ask the ECJ questions regarding the interpretation or validity of the relevant EU norms. Indeed, courts of the last instance are still formally obliged to consider the *CILFIT* criteria, i.e., to examine 1) whether a question concerning the interpretation of EU law that has been raised before them is relevant to the outcome

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18 Case C-312/93 *Peterbroeck* [1995] ECR I- 4599.

19 Case C-296/95 *The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* [1998] ECR I-1605, para 36. See also Tamara Capeta, 'Multilingual Law and Judicial Interpretation in the EU' (2009) 5 Croatian Yearbook of European Law and Policy 1.

20 Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 1141; Case 106/77 *Simmenthal* [1978] ECR 629.

21 Joseph Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2426; Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 *EuConst* 175, 176.

of the case; 2) whether previous ECJ's decisions have already dealt with the point of EU law ('acte éclairé'); and 3) whether 'the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt' ('acte clairé').[22] Consequently, the third 'reasonable doubt' test is especially demanding with regards to the comparative skills of the national judges as it requires them (among other things) to consider whether the matter in question is 'equally obvious' to the courts of the other Member States and to the ECJ itself.[23]

As the concepts described above show, the expectations placed on national judges are far-reaching both in the day-to-day business as well as in 'hard EU law cases'. It is obviously impossible to summarise decades of complex legal development in several paragraphs. Most of the doctrines mentioned here are grossly simplified, and surely, there is a number of other demands that have not been mentioned at all.[24] But that is not the point. The purpose of this section was to illustrate that the process of *Europeanisation* of national judiciary has radically progressed, and that EU law formally requires national judges to perform plentiful and often not clearly defined tasks. In the following section, we will see that incidental pieces of evidence of how domestic courts in fact fulfil their European mandate might cast some serious doubts on the feasibility of those formal demands.

1.2 What do national judges *actually* do?

Since national judges are formally entrusted with *Herculean* tasks to ensure the overall effectiveness and uniformity of EU law, it is only fair to ask (along with Bruno de Witte and others) whether they, in fact, accept their responsibility to apply and enforce EU law

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22 Case 283/81 *Cilfit and Others* [1982] ECR I-3415.

23 Case C-561/19 *Consorzio Italian Management e Catania Multiservizi* [2021] EU:C:2021:799, para 40.

24 Recalling, for instance, the obligation of national courts to hear state liability claims.

as a matter of principle, or if the imaginary of decentralised EU judicial system collapses into mere *virtual reality*.[25]

From the socio-legal perspective, we have some evidence that leans towards the latter thesis. Preliminary socio-legal research shows that rather than systematically and complexly dealing with EU law matters, national judges may, in fact, apply the EU law on a somewhat cynical and incidental basis. The fact that domestic judges may feel distant from the EU legal order and experience problems with resorting to it might be caused by various factors, including the abstractness and remoteness of the EU law, the enormous scope and fragmented nature of it, insufficient knowledge of the system, poor language abilities of the judges, style and the lengthiness of the ECJ's case-law, and the ECJ's active way of interpretation.[26] Similarly, data collected from Germany, Netherlands, Poland and Spain indicate that judges themselves are rather sceptical about their level of knowledge of EU law and about the way they approach it.[27]

Monika Glavina further argues that it is the functioning of judicial hierarchy – not the ECJ's formal demands – which largely influences how domestic judges perceive their role in the preliminary ruling procedure.[28] More generally, it has been claimed that four main modes of judicial decision-making very much determine national courts' use

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[25] Bruno de Witte and others, *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Publishing 2016) 106.

[26] See Jaremba's research concerning civil judges from Germany, Netherlands and Poland. In: Urszula Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order' [2013] Erasmus Law Review <http://www.bjutijdschriften.nl/doi/10.5553/ELR.000008> accessed 9 September 2020.

[27] Juan Mayoral, Urszula Jaremba and Tobias Nowak, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment regarding EU Law Knowledge' (2014) 21 Journal of European Public Policy 1120.

[28] Monika Glavina, 'Judicial Hierarchy in the Preliminary Ruling Procedure: Exploring the Relationship Between the First and Second Instance Courts' (2020) 5 European Papers 799.

of EU law: 1) *judicial balancing* which considers both EU law and national law, 2) *judicial nationalism* that places national rules at the canter of decision-making; 3) *Europeanism* in which European rules prevail, and 4) *judicial retreatism* that refers to a decision not to apply any legal rule system at all and to avoid taking legal decisions.[29]

However, the critical view arguing that national judges do not in fact follow the fuzzy ECJ's doctrines but instead rely on their own understanding of EU law has already found its place within EU's doctrine as well. This can be illustrated by the number of AGs' opinions openly questioning the feasibility of the *CILFIT* test of reasonable doubt. Indeed, the inherent obligation to examine a provision of EU law in every one of the official languages has in the past been said to 'place a practically intolerable burden on the national courts'[30] while AG Wahl did go as far as to claim that 'coming across a "true" *acte clair* situation would, at best, seem just as likely as encountering a unicorn'.[31] In his recent powerful opinion, AG Bobek even explicitly asked the ECJ to overrule *CILFIT* while pragmatically (or cynically) claiming that 'the entire system of preliminary rulings functions because no one in fact applies *CILFIT*'.[32]

As one can see, numerous critical voices coming from both socio-legal scholarship as well as from legal practice raise serious doubts about how national judges perceive and handle the demanding tasks which the ECJ formally places on them. So far, I hope to have shown that what national judges *ought* to do is not always reflected in what they *actually* do.

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29 Tobias Nowak amd Monika Glavina, 'National Courts as Regulatory Agencies and the Application of EU Law' (2021) 43 Journal of European Integration 739, 743-744.

30 Case C-495/03 *Intermodal Transports* [2005] ECR I- 8151, Opinion of AG Stix-Hackl, para 99.

31 Joined Cases C-72/14 and C-197/14 *X and van Dijk* [2015] EU:C:2015:319, Opinion of AG Wahl, para 62.

32 Case C-561/19 *Consorzio Italian Management e Catania Multiservizi* [2021] EU:C:2021:799, Opinion of AG Bobek, para 2.

In other words, it becomes clear that the factual role that national judges play in the enforcement of EU law may differ substantially from the rather theoretical and black-letter one.

In what comes next, I follow others in arguing that EU scholarship is yet to reveal similar discrepancies which problematise an unrealistic *status quo* picture of the EU judicial system. By means of identification of some gaps in the literature, I will contend that it is particularly crucial to study domestic courts' treatment of the previous ECJ's decisions.

1.3 Frontiers of the Scholarship on the Domestic Courts' EU Mandate

Even though many scholars have undoubtedly addressed the phenomenon of national judiciaries' Europeanization from various perspectives, existing literature remains somehow limited. The debate on the domestic courts' EU mandate has been dominated by the narratives of 'constitutional pluralism'[33], 'judicial dialogue'[34], and conflict-and-power games[35] while empirical scholarship remains restricted in both substantive and methodological aspects.

Indeed, much has been written about the preliminary reference procedure and it is understandable. As domestic courts have stocked the ECJ with high numbers of preliminary questions every year, political scientists quickly detected that in doing so, national judges act as 'the motors' of EU legal integration.[36]

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33 Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014); Jan Komárek and Matej Avbelj (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

34 Anthony Arnull, 'Judicial Dialogue in the European Union', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012), 109.

35 Arthur Dyevre, 'Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?' (2016) 35 Yearbook of European Law 106.

36 Karen Alter, 'The European Court's Political Power' (1996) 19 West European Politics 458, 467.

The literature has so far mainly examined the differences in numbers of posed references from state to state as well as the various extra-legal motives for asking the questions.[37] A prominent explanation has been offered by accounts of the 'emancipation theory' according to which both the lower courts and the ECJ cooperate together because they all want to strengthen their authority *vis-à-vis* national political actors – governments, parliaments, supreme courts and other administrative bodies.[38] However, some commentators recently suggested that such dynamics represented only a self-eroding Act I since national high courts started to cooperate with the ECJ more frequently to reclaim their position back.[39]

Notably, another strand of scholarship has focused on the later stage of the preliminary reference mechanism and highlighted that national courts use various strategies when asked to implement the ECJ's preliminary ruling in the case at hand.[40] By means of mapping the follow-up cases, such studies indicate that the way in which national courts respond to the ECJ's answers is 'far from straightforward'.[41]

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[37] See Morten Bromberg and Neils Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn, OUP 2021) or Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar Publishing, 2021); and for selected journal articles: Clifford J Carrubba and Lacey Murrah, 'Legal Integration and Use of the Preliminary Ruling Process in the European Union' (2005) 59 International Organization 399; Arthur Dyevre, Monika Glavina and Angelina Atanasova, 'Who refers most? Institutional incentives and judicial participation in the preliminary ruling system' (2020) 27 Journal of European Public Policy 912; Karin Leijon, 'National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?' (2021) 44 West European Politics 510.

[38] Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice' (1998) 52 International Organization 177, 190-196; See also Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler, *The European Court and National Courts—Doctrine and Jurisprudence* (Hart Publishing 1998), 249.

[39] Tomasso Pavone and Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) 25 European Law Journal 352.

[40] Stacy Nyikos, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment' (2003) 4 European Union Politics 397.

[41] Sanja Bogojevic, 'Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary' (2017) 29 Journal of Environmental Law

Clearly, these lines of literature are valuable as they reveal hidden extra-legal motives and implementation strategies taking place behind the scenes of politically salient preliminary reference procedures. However, preliminary cases are raised by national courts in extremely rare situations – an overwhelming majority of cases relating to EU law do not reach the ECJ. Thus, relying on the preliminary references as proxies for the assessment of the Europeanization of national judiciary might be deceptive.[42]

As Stacy Nyikos aptly puts it '[w]hat we most desperately need to know is how capable domestic courts are of shouldering the burden of resolving an increasing number of European legal issues within their own chambers'.[43] The first limit is then easy to identify: EU scholarship has not yet paid proportionate attention to EU law application outside the preliminary reference mechanism.

To say that appropriate attention has not been paid to that phenomenon obviously does not mean that no one has ever written about it. Nevertheless, the existing compliance studies have so far focused either on the implementation of seminal case-law in selective areas of EU law, or on the peak courts and instances of open backlash. This again provides us with a somewhat disbalanced image.

263; Lorenzo Squintani and Sjoerd Kalisvaart, 'Environmental Democracy and Judicial Cooperation in Environmental Matters: Mapping National Courts Behaviour in Follow-up Cases' (2020) 5 European Papers 931.

42 Denise Hübner, 'The Decentralized Enforcement of European Law: National Court Decisions on EU Directives with and without Preliminary Reference Submissions' (2018) 25 Journal of European Public Policy 1817, 1822; Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 International Journal of Law in Context 258, 265; Karen Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 Comparative Political Studies 452, 471.

43 Stacy Nyikos, 'Courts' in Paolo Graziano and Maarten Vink, *Europeanization: New Research Agendas* (Palgrave Macmillan 2008) 193.

First, there are projects tracing the domestic courts' reactions only to prominent ECJ's precedents in particular areas of law where the choice of those prominent cases as well as the areas of law remains rather arbitral or dependent on the orthodox doctrinal premises. In this manner, Stone Sweet, for instance, examined the application of the ECJ's *Dassonville* and *Cassis de Dijon* doctrine in national decisions reported by national courts.[44] Although similar insights on the national courts' use of prominent ECJ's doctrines can be valuable, the conclusions drawn from such studies cannot be easily generalised as it is not apparent how national judges work with the less visible concepts of EU law perhaps in less attractive areas of law.

Secondly, one can also notice a growing number of writings focusing on the activity of national peak courts and more importantly, on the cases in which these courts openly questioned Luxembourg's authority (open backlash).[45] In this regard, the scholarship mostly lamented about the resistance strategies which domestic courts developed over the time such as 'higher level of fundamental rights' review, *ultra vires* review of EU's competences, counter-limits doctrine and national/constitutional identity review.[46] Even though such writings undoubtedly bring important insight into the domestic courts' strategic behaviour *vis-à-vis*

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44 Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004), 140; see also Andreas J. Obermaier, 'The National Judiciary—Sword of European Court of Justice Rulings: The Example of the Kohll/Decker Jurisprudence' (2008) 14 ELJ 735 (mapping the resistance against *the Kohll/Decker* precedents).

45 To name just few most prominent examples: Decisions of BVerfG 5 May 2015, 2 BvR 859/15, *Weiss and Others*; and of 14 January 2014, 2 BvR 2728/13, *Gauweiler*; Decision of the Czech Constitutional Court 14 February 2012, Pl. US 5/12, *Slovak Pensions XVII*. For comments, see Franz Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2021) 16 European Constitutional Law Review 733; Zdenek Kühn, 'Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law', (2016) 23 Maastricht Journal of European and Comparative Law, 185.

46 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (OUP 2022); Arthur Dyevre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?' (2013) 9 *EuConst* 139, 148-151.

the ECJ, due to the reliance on the explicit disobedience of national apex courts', one needs to wonder how important such strategies are in the majority of the day-to-day adjudication.

Consequently, the second limit is also readily identified: EU scholarship does not pay proportionate attention to the run-of-the-mill cases in which ordinary national courts apply EU law. In Alec Stone Sweet's words – 'the field desperately needs more systematic data collection and empirical research on what national judges do when EU law is pleaded in cases before them.'[47]

So far, it was argued that we need more systematic data on the daily EU adjudication outside the preliminary reference mechanism. The point made here is that not only we lack systematic data on the day-to-day behaviour of domestic judges, but that there also has been no suitable complex and rigour methodological framework developed in order to gather and analyse such data.

Indeed, the already scarce attempts to study the run-of-the-mill domestic case-law suffer from a few methodological limits. The existing studies tend to rely on rather incomplete datasets and non-transparent citation analysis of national EU sources leaving us with incomplete evidence of patterns in national judges' citation practices. This can be illustrated by the following examples.

First, in her book, Lisa Conant makes a powerful and far-reaching claim that '[n]ational judges who do invoke European provisions in their decisions are likely to interpret [them] without any explicit reliance on ECJ case-law.'[48] Her dataset of French, German, and British

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[47] Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 5, 32.

[48] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002) 82.

decisions is based only on the cases collected through the (third party) case-law databases. However, with regards to the process of identifying the citations, the author merely states that '[t]he greater rate of French citation to ECJ decisions is primarily due to the need to do free-text searches on judgments in Jurifrance, which yield higher numbers than Juris and Lexis searches that isolate cases formally grounded on ECJ case law.'[49] Thus, Conant does not provide any concrete description of the process of finding the ECJ citations and she simultaneously concedes that there are significant differences in the complexity of the individual databases. This makes her powerful empirical claim quite dubious. The second example is Ramos Romeu's study of Spanish case-law where he openly acknowledges that the data is 'imperfect' and 'deficient' as it is based only on reported national decisions and not on the whole population of cases.[50]

Nevertheless, the problem runs deeper. Even though it is useful to the study of the Europeanization of the national judiciaries, quantitative citation analysis can hardly explain the real extent of that phenomenon. It is because the purely quantitative approach makes it difficult to discern cases where domestic judges formally cite the EU law source, but they do not apply it in substance, or they perhaps even criticise it.

The absence of a complex methodological framework tailored to the inquiry of the domestic courts' citation patterns in fact very well reveals the need for empirical European scholarship to move beyond the qualitative-quantitative divide. On the one hand, due to the recognised importance of the run-of-the-mill national case-law, it is no longer sufficient

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49 *Ibid* 83.

50 Francisco Ramos Romeu, 'Law and Politics in the Application of EC law: Spanish Courts and the ECJ 1986–2000' (2006) 43 CMLR 395, 396.

to draw over-reaching conclusions based on incomplete datasets or 'cherry-picked' prominent cases. Since individual European scholars are not capable of concluding in-depth analysis of the majority of all domestic EU law cases, it is crucial to think about the adoption of novel means of analysis. In particular, various forms of automated text analysis might represent a great promise in overcoming the quantitative 'dataset stigma'.[51] On the other hand, the above-described need to investigate various ways in which domestic courts treat the ECJ's case-law shows that in order to map the EU law compliance within the domestic adjudication, more nuanced and rather qualitative approaches will have to be used. [52]

1.4 Research Design and the Scope of the Study

Following the introduction of the identified gaps in the existing literature, this project aims to explore the domestic courts' run-of-the-mill EU law application outside the preliminary reference mechanism. Mirroring the above-mentioned discrepancy, the thesis explores how the formal demands that national judges *formally* ought to follow the ECJ's case-law reflect their *actual* practice.

The first part of the thesis is theoretical. There, I will first show that ECJ's case-law *formally* enjoys precedential value in the wider sense because domestic judges are expected to follow it. Consequently – relying heavily on the insights of both legal and political-institutional writings – I will argue that for us to be able to examine how the theoretical

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51 In this regard, see for instance Arthur Dyevre who argues that automated text-mining methods could help the task of tracing and monitoring jurisprudential change. In: Arthur Dyevre, 'The promise and pitfall of automated text-scaling techniques for the analysis of jurisprudential change' (2021) 29 Artificial Intelligence and Law 239.

52 Urszula Jaremba and Juan Mayoral, 'The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms' (2019) 26 Journal of European Policy 386, 390.

precedential value is reflected in the *actual* domestic practice, a broader concept of the treatment of precedents needs to be embraced.

In what follows, the thesis first introduces a three-level framework for empirical analysis which aims to surpass the qualitative-quantitative divide by combining a rather novel form of automated text analysis together with more traditional types of content analysis of the judicial decisions. The sequential approach consists of the following three steps which are then tested on the case study of the Czech Supreme Administrative Court.

First, the *macro-level* of the analysis encompasses the quantitative search for the formal ECJ rulings citations in the domestic courts' case-law. This level of analysis maps how often domestic courts refer to the ECJ's decisions and how the total number of citations changes in time. Furthermore, this level aims to identify the ECJ cases which are cited the most, but also to investigate several characteristics of those precedents such as their age, composition of the Court, and the procedure they originated from. At this first level, the automatic text analysis is employed. In the present case study, the collection of 52 660 SAC's decisions issued between the years 2003 and 2018 is analysed.

Secondly, the *meso-level* analysis consists of mapping of the individual treatment patterns. The aim of this stage is to record systematically how domestic courts engage with the cited precedents, whether they apply it and if so, how significantly the cited judgements influence the domestic court's reasoning. Moreover, it explores the parts of the precedents that national judges work with. The method applied here is called the systematic content analysis which represents a middle ground between quantitative-centric empirical approach and more traditional qualitative and doctrinal legal analysis. At the meso-level, the collection of 192 EU law cases issued by the SAC in 2020 is analysed.

Thirdly, in the last *micro-level* phase, a small number of domestic judgements will be analysed in-depth *vis-à-vis* wider, institutional, substantive and cultural contexts. The aim of this step is to hand pick several cases which could illustrate the most important aspects of the domestic courts' treatment of the previous rulings of the Court.

The concluding part of the thesis then jointly addresses the empirical findings from the individual phases and discuss the implications for our understanding of domestic judges' role in the EU.

In line with this research design, the following research questions can be identified:

Main Research Question:	
RQ: How do domestic courts treat the previous ECJ's decisions?	
Subsequent Research Questions:	
SRQ No. 1:	How frequently do domestic courts cite the ECJ's previous rulings in national ordinary adjudication, how does that frequency change in time?
SRQ No. 2:	Which precedents are cited the most and what are the characteristics of the cited cases?
SRQ No. 3:	What are the various treatment patterns used by domestic courts?
SRQ No. 4:	How do various precedent treatment patterns relate to the authority of both the ECJ and domestic courts?

Before proceeding to the theoretical part of the thesis, several caveats are in order. Firstly, by no means I attempt to claim here that the past studies have not been useful for our understanding of the role of national judiciary in the process of European integration. I certainly do not think that one method of research is superior to the other. The purpose of this project is rather to contribute to the common research endeavour by offering

an alternative methodical framework for the study of the domestic courts' treatment of the ECJ' previous decisions.

Secondly, it should be noted here that since one of the aims of this thesis is to incentivise other scholars to use this methodological framework for studies of various Member States' courts, some parts of the thesis might seem rather lengthy and descriptive. I hope that this will be outweighed by the amplified potential of replicability and usefulness of the method.

Finally, due to the limited scope of the thesis, it was only possible to conduct here the pilot study of the Czech Supreme Administrative Court. As a result, the empirical findings of that study should be perceived as confined to that specific court and context, especially until compared with other courts and Member States.

2 THEORETICAL FRAMEWORK: DOMESTIC COURTS AND THE ECJ'S PRECEDENTS

As it is the case with all court rulings, the decisions of the ECJ are not self-executing. The Court has to rely on the third parties which implement its policies into the world and try to affect wider circle of other decision makers.[53] In that regard, the domestic courts of the Member States seem to be indispensable actors for Luxembourg. Being well aware of their importance, the ECJ commonly invokes the narrative of 'judicial dialogue' between itself and national courts the purpose of which is said to be the uniformity and consistency in the interpretation of EU law.[54]

In this chapter, I will theorise about the imaginary of this 'judicial dialogue' in a wider sense, i.e., about the interactions between the ECJ and all national courts outside the preliminary reference mechanism. In particular, I will try to build up a theoretical framework regarding the institutional tool used by the ECJ to promote uniformity and consistency within the EU judicial system – the institute of reasoning with previous ECJ's cases.

In what follows, I will first argue that notwithstanding the conflicting theoretical debates about its binding force, ECJ's case-law *formally* enjoys precedential value in the wider sense because domestic judges are expected to follow it (**2.1**). Secondly, I will contend that in order to reveal to what extant is the theoretical precedential value reflected in the *actual*

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53 See Oona Hathaway and Scott Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 Yale Law Journal 252, 279.

54 Opinion 2/13 *Accession of the European Union to the ECHR* [2014] EU:C:2014:2454, para 176.

adjudication of domestic judges, a broader concept of the treatment of precedents needs to be embraced (**2.2**).

2.1 The Formal Precedential Value of Previous ECJ's Rulings

One cannot find an explicit *stare decisis*-like norm in the written EU law which would require national judges to follow the ECJ's previous decisions and which would directly instruct them to treat similar EU law cases alike.[55] Nevertheless, here I will first show that over the time, the ECJ itself developed several doctrines which might make domestic judges feel legally bound to follow its previous case-law. Subsequently, I will argue that in spite of the theoretical inconsistencies, such ECJ's demands result in the past ECJ's rulings formally enjoying precedential value in the broad sense.

First, with regards to the Court's judgements on the preliminary questions concerning the validity of EU legal acts, in *International Chemical Corporation* the ECJ clearly stated that

> [a]lthough a judgment of the Court […] declaring an act of an institution […] to be void is directly addressed only to the national court which brought the matter before the Court, it is <u>sufficient reason for any other national court</u> to regard that act as void for the purposes of a judgment which it has to give.[56]

Even though the ECJ framed the ruling in a way that it is up to a domestic court to consider challenging the validity of the same act again, in reality one can hardly imagine conditions under which a national court would do that. Taken together with *Foto-Frost*, in which the Court held that 'national courts have no jurisdiction themselves to declare that

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55 On the origins of the concept of *stare decisis* in general, see e.g., Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008).

56 Case C-66/80 *International Chemical Corporation* [1981] ECR I-1191 (emphasis added).

measures taken by Community institutions are invalid'[57], it is clear in cases in which the ECJ has already given its judgement concerning the validity of a specific EU act, domestic judges either ought to strictly follow that judgement, or raise the preliminary question of validity again, and then follow the newest judgement of the ECJ.

The issue gets a little more complex with regards to the judgements on the interpretative preliminary questions. First, it should be recalled that due to the widely accepted principle of *res iudicata*, the *inter partes* binding force of the ECJ's interpretative ruling on the domestic court that referred the question in the first place is not disputed.[58] This does not prevent the Court to assert that 'national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling'.[59] Once again, this means that the referring court in one particular preliminary reference procedure either follows the interpretation given by the ECJ, or it ought to refer again.

Nevertheless, if one reads the ECJ's case-law closely enough, they can see similar effects of the ECJ's authoritative interpretation also in later domestic cases outside a specific preliminary reference procedure as well.

In *Da Costa*, the ECJ held that the obligation of the national courts of last instance to refer may be deprived of its purpose by reason of the authority of an interpretation already

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57 Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1985] ECR I-4199.

58 As AG Reischl aptly put it: 'The court making the reference is of course bound only in the sense that it cannot when giving its decision proceed on the basis of any other interpretation of Community law than that given by the Court of Justice'. In: Case C-52/76 *Benedetti v Munari* [1977] ECR 163, Opinion of AG Reischl.

59 Case C-291/16 *Schweppes* [2017] EU:C:2017:990, para 26.

given by the Court in those cases in which the question raised is 'materially identical' with a question already answered in a similar case.[60] In other words, the national court of last instance does not have to ask the identical question if it follows the previous ECJ's case-law. Overall, a different outcome would lead to absurd conclusions: How could the Court ensure uniform interpretation of EU law if it had to repeatedly interpret each provision in every national EU law case? How large the Court would have to get in order to be able to do that?

CILFIT further pushed this line of thinking. As recalled above, according to the *acte éclairé* doctrine, domestic courts of last instance do not have to ask questions where

> the 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.[61]

In this sense, the standard shifts from 'material identity' of the questions towards the applicability of the point of law. Once again, this leads to a clear conclusion: while the Court does not explicitly say so, domestic courts of last instance are expected to either follow the interpretation already given by the Court in a similar case (importantly enough, irrespective of the nature of the proceedings), or they ought to ask the question and then follow the interpretation of the Court nevertheless.

Finally to this point, one would have to agree with Tridimas that the legally binding force of previous ECJ's rulings derives equally from the third *CILFIT* exception – *acte clairé* – as well. Indeed, when establishing whether 'the correct interpretation of EU law is so obvious

60 Case C-28/62 *Da Costa en Schaake NV and Others* [1963] ECR 61.

61 (n 22), para 14 (emphasis added).

as to leave no scope for any reasonable doubt', national courts might as well be expected to look at the existing relevant ECJ case-law.[62]

As a result, it seems that for a domestic court of last instance, the ECJ's doctrine on the exceptions from the obligation to ask preliminary reference clearly instructs her to follow previous ECJ's rulings. What is more, these rules are now also enshrined in Article 99 of the Rules of Procedure which allows the ECJ to reply by reasoned order in cases which fall under those exceptions.

The EU law (as interpreted by the ECJ), however, further commands national courts to follow previous Court's judgements by more sophisticated and also restrictive means. In *Köbler,* the Court empowered individuals to seek redress from Member States for infringements of EU law stemming from a decision of a court adjudicating at last instance.[63] Even though it is up to the national courts before which a claim for compensation has been brought to establish whether it was, indeed, the 'exceptional case' where the national court adjudicating at final instance had 'manifestly infringed' the applicable law, the Court explicitly states that 'an infringement of EU law is sufficiently serious if it was made in manifest breach of the relevant case-law of the Court'.[64] It follows from this that through a direct threat of individual liability claims, the Court openly orders national judges of the courts of last instance to follow its case-law in all cases concerning EU law.

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[62] Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business* (CUP 2014) 266.

[63] Case C-224/01 *Köbler* [2003] ECR I- 10239.

[64] Case C-168/15 *Tomášová* [2016] EU:C:2016:602; Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* [2019] EU:C:2019:630.

The enforcement of liability for not following the ECJ's interpretations is, however, not left only in the hands of individuals and national courts. Indeed, the infringement proceedings pursuant to Article 258 TFEU may also be used to redress failures of the national courts to fulfil their obligations under EU law.[65] In the recent case *Commission v France*, the Court found that France did infringe EU law because Conseil d'État failed to refer the preliminary question. Notably, the ECJ explicitly held that the failure to refer occurred, *inter alia*, because the French court had chosen to distinguish the case at hand from an earlier ECJ's judgment while it could have not been certain that its reasoning would have been equally obvious to the Court.[66] In other words, the fact that a domestic court of last instance did not strictly follow the previous ECJ's judgement while it did not ask the ECJ to provide it with proper guidance regarding that judgement constituted an infringement on side of the Member State.

It should be noted here that even though the rules covering the exceptions from the obligation to ask preliminary questions and liability procedures explicitly apply only to the courts of last instance, those legal incentives to follow ECJ's previous rulings apply to domestic lower courts as well. As lower court judges are aware of the legal obligations of the courts of last instance to follow the ECJ rulings, they feel legally bound by those rulings as well due to the threat of reversal conducted by those higher courts in the appellate procedures.

As a result, considering all above-mentioned doctrines together, it is plausible to claim that the ECJ instructs all national judges to follow its previous case-law irrespective of the type

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65 Case C-129/00 *Commission v Italy* [2003] ECR I- 14637; Case C-154/08 *Commission v Spain* [2009] ECR I- 187.

66 Case C-416/17 *Commission v France* [2018] EU:C:2018:811, para 111.

of proceedings. Especially due to the existence of two liability procedures as formed and enforced by the ECJ, it is evident that the Court's official narrative is that for domestic judges, the Court's case-law enjoys binding force, and as a result, national judges should as 'faithful agents' strictly apply the ECJ's interpretations of EU norms.[67] If national courts could freely choose to follow Court's rulings only in cases in which they would find ECJ's arguments persuasive enough, the logic 'either follow, or ask' would be lost.

Now, some commentators have tried to make sense out the ECJ's formal doctrines which oblige judges to strictly follow the Court's case-law. Even though essentially no one disputes that the Court's previous decisions play a major justificatory role in EU law adjudication in general[68], there has been a long theoretical debate concerning the binding character of the ECJ's case-law on domestic courts.[69] Views range from those which claim that despite the Luxembourg's official narrative, previous ECJ's rulings bare mere persuasive authority depending on how well-reasoned the judgements are, to those who assert that ECJ's cases represent formally binding precedents.

The reasoning of AG Toth may serve as a good example of the former view. Differentiating between the strict (*stare decisis*) binding force and the wider legal effects

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67 See Jan Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 CMLR 9, 15-17.

68 Most of the existing studies dealing with the precedential character of prior ECJ's case-law have focused on the role of that case-law in the decision-making of the ECJ itself. Apart from the studies mentioned below, see Urška Šadl and Sigrid Hink, 'Precedent in the Sui Generis Legal Order: A Mine Run Approach' (2014) 20 European Law Journal 544 (using citation networks to explore the force of precedent in ECJ's citizenship case-law); Urška Šadl and Ioannis Panagis, 'What is the Leading Case in EU Law? An Empirical Analysis' (2015) ELR 15; Mattias Derlen and Johan Lindholm, 'Is It Good Law: Network Analysis and the CJEU' Internal Market Jurisprudence' (2017) 20 Journal of International Economic Law 257; Urška Šadl, 'Old is new: The Transformative Effect of References to Settled Case Law in the Decisions of the European Court of Justice' (2021) 58 CMLR 1761.

69 For a good overview of such debate, see John Barcelo, 'Precedent in European Community Law' in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Routledge 1997) 415-417.

of the ECJ's decisions, Toth contends that the Courts' judgements do not constitute the 'source of law' because all EU rules derive their validity – directly or indirectly – from the Treaties. In line with this argument, ECJ's rulings only contain 'authoritative' statements or evidence of what the EU law is on a given point at a given time.[70]

On the other side of the barricade, commentators are not afraid to compare the character of the ECJ's past rulings to the Anglo-American system of precedent contending that all courts throughout the Union with the exception of the ECJ itself are strictly bound by the *ratio decidendi* of the Court's earlier judgments[71] and that in certain cases, the Courts' judgements 'constitute a source of law in full sense'.[72]

Here, I take issue with such an abstract debate and join others in arguing that the theoretical differences between the two camps are rather formal than practical. Indeed, it has been claimed that dwelling on the issue of strict binding force and categorisation of formal sources of EU law is not very productive, because even if prior ECJ's judgements are not formally binding in the strict sense, they still enjoy a great degree of *de facto* strong authority.[73] As opposed to the notion of precedent in the strict sense, it is therefore more productive to discuss the 'system of precedent in the broad sense'.[74] In other words,

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70 AG Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' (1984) 4 Yearbook of European Law 1, 69-70.

71 See e.g., Tim Koopmans, 'Stare Decisis in European Law' in David O'Keeffe and Henry Schermers (eds), *Essays in European law and integration* (Deventer 1982) 21-24.

72 Anthony Arnull, 'Owning up to Fallibility: Precedent and the Court of Justice' (1993) 30 CMLR 247, 265.

73 Mattias Derlen and Johan Lindholm, 'Peek-A-Boo, It's a Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' (2017) 18 German Law Journal 647, 653.

74 See Eric Tjong Tjin Tai and Karlijn Teuben, 'European Precedent Law' (2008) 5 European Review of Private Law 827, 834.

to circumvent the paralyzing discussion about the theoretical nature of precedent, we need to go beyond the scale between strictly binding and merely persuasive.[75]

Thus, it seems more reasonable to identify as a starting point the prevailing position that ECJ's rulings formally enjoy a 'wider precedential value' which, in certain cases, reaches 'a quasi-normative effect'.[76] The notion of precedent understood in that sense is not about strict authority, bindingness or dictation, but it rather revolves around legal information and normative justification within the system of law perceived as an argumentative practice.[77] Previous ECJ's decisions, in this view, offer specific range of arguments which allow other judges to engage in analogical reasoning that involves parsing the issues in similar cases and referring to precedents for guidance on acceptable alternatives.[78] This broader approach recognises that domestic judges are in any event formally expected to apply the Court's previous case-law and as a consequence, it claims a certain degree of normative force.

2.2 The Concept of Treatment of ECJ's Precedents

So far, I claimed that from the theoretical point of view, past ECJ's judgements formally enjoy precedential value in the wider sense because domestic judges are expected to follow them. Remember that the aim of this project is to inquire the discrepancy between what national judges *ought* to do and what they *actually* do. In order to be able to assess the degree to which

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75 Mattias Derlen and Johan Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16 German Law Journal 1073, 1075.

76 Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 326; see also Michal Bobek and others, *Preliminary Question in Community Law* (Linde 2005) 355 [CZ].

77 Jacob (n 62), 267.

78 Mark Richards and Herbert Kritzer, 'Jurisprudential Regimes in Supreme Court Decision Making' (2002) 96 American Political Science Review 305, 306.

the ECJ's rulings enjoy the quasi-normative effect in reality of the day-to-day domestic adjudication, we first need to ask what the concept of 'following the precedent' encompasses. Thus, here we ask what is it exactly judges are supposed to do and how can we observe whether they in fact do it?

The research that has examined how domestic apply the ECJ's judgements mostly revolved around the concept of compliance. The main question that the prevailing understanding of that concept puts forward is whether domestic judges' behaviour conforms to rules stipulated by the ECJ' precedents.[79] As mentioned in the introduction, this kind of compliance studies typically examines the practice of domestic judges in a small number of domestic cases *vis à-vis* few prominent ECJ's judgements. Even though such compliance studies are valuable in bringing information about the domestic judges' behaviour in particular instances, the choice to focus on the question of 'conformity' with the ECJ's doctrine has several far-reaching implications.

First, examining whether domestic court's decision is materially 'in line' with the ECJ's case-law presupposes that the content of EU law can be objectively defined with reference to its source (the ECJ's precedent), and in principle is not dependent on the subsequent behaviour of domestic judges who subsequently apply it.[80] In that way, the rules stipulated by the ECJ are treated as having a static meaning which represents the gold standard against which the conformity of the subsequent behaviour is checked.

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[79] See André Nollkaemper, 'The Role of National Courts in Inducing Compliance with International and European Law—A Comparison' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012) 160.

[80] See Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 Mich J Int'l L 345, 346.

Together with others, I contend here that such approach obscures the intersubjective and interpretative process of generation of meaning of legal norms.[81] It pushes aside the idea of EU legal pluralism which depictures EU law as multiplicity of diverse communicative processes.[82] Consequently, such conception of compliance necessarily and significantly limits the role of domestic judges in development of the EU law from the very beginning.

Secondly, with regards to the ECJ's precedents, focusing on the question of 'conformity' presupposes the binary understanding of domestic judges' behaviour. In that logic, domestic judges either fully comply with the ECJ's judgement, or they do not comply with it at all. What national judges do is that they either follow the ECJ's authority, or they do not. Such approach is demonstrated for instance in Lisa Contant's study on how German and French courts' decisions 'conformed' with the ECJ's narrow definition of public service to grant EU nationals access to employment in various public sector jobs.[83]

Here, I follow others and argue that such 'all-or-nothing' approach reduces the varieties of domestic judges' possibilities. There are various degrees to which national judges may 'obey' to the ECJ's pronouncements – indeed, they may follow it only partly. In short, there is a large grey area which does not fit within the clear-cut categories of following/not following. Rather than seeing the compliance as the binary concept, I submit that it should rather be treated as a continuum.[84]

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81 David Kosař and others, *Domestic Judicial Treatment of European Court of Human Rights Case Law: Beyond Compliance* (Routledge 2020) 59.

82 See Turkuler Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 Global Constitutionalism 166.

83 Conant (n 48) 173.

84 Diana Kapiszewski and Matthew Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38 Law & Social Inquiry 803, 807.

Thirdly, examining whether domestic decisions substantively conform with the ECJ's rulings does not necessarily tell us anything about the effects of those rulings on the domestic adjudication.[85] Even if domestic decisions 'conform' with the ECJ's precedent substantively, this does not mean that that conformity was *caused* by that precedent. Indeed, domestic courts might interpret decided EU law question without referring to the ECJ's authority altogether, but still may end up with the result that is substantively in line with what ECJ interprets as the right one. Furthermore, even when national judges refer to the ECJ's authority in their decision and that decision at the end materially 'conforms' to the cited precedent, the 'core' of their argument might not be based on that precedent at all, but rather derive from considerations of national law.

However, in order to be able to assess whether ECJ's case-law enjoys factual precedential value in domestic practice, one has to consider whether its rulings influence national judges' reasoning. Indeed, if we are interested in the interactions within the EU's system of precedent, we need to focus on the *causal* effects as well. Additionally, it is essential to differentiate between instances in which ECJ's precedents only formally support national court's reasoning, and instances where they have substantive impact.

Taken all together, it seems that focusing on the substantive conformity of the national decisions with the ECJ's precedents and embracing the prevailing view of the concept of compliance would not allow us to assess the degree of authority ECJ's jurisprudence actually enjoys in the domestic adjudication.

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85 Nollkaemper (n 79) 161.

Now, some studies have previously tried to operationalize and measure compliance with other indicators than the 'substantive conformity'.[86] Such studies did not focus on the material 'legality' of the domestic decisions, but they rather examined whether the national judges cited the ECJ's precedents.[87]

Even though such citation compliance studies might seem slightly more productive when it comes to examining the broader patterns in domestic adjudication, they too suffer several limits. Citation analysis in general is based on the presumption that if a court formally refers to a precedent, that precedent bears at least some impact on the case at hand. However, on its own terms, such assumption is rather too simplistic.

I contend here that it is not plausible to only focus on whether the examined opinion formally cites the precedent, or not. A purely quantitative citation compliance approach employs a similar clear-cut binary assessment as the 'conformity' approach, only this time, it is citing/not citing what matters. Nonetheless, the variety of techniques national judges can employ with regards to a precedent is much greater.

Judges can interpret a precedent *positively* by relaying on it as a guiding authority.[88] The positive interpretation involves an explicit reliance on the precedent for at least part of the opinion's justification for the outcome in the dispute which can, in turn, invigorate that

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86 For a good overview of various compliance studies, see Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (OUP 2012) 24-27.

87 Marlene Wind, 'Who Cares about International Law? A Study of How Scandinavian Judges Cite International Law and Courts' in Astrid Kjeldgaard-Pedersen (ed), *Nordic Approaches to International Law* (Brill 2017) 76-96; Conant (n 48), 82-83.

88 Michael Fix, Justin Kingsland and Matthew Montgomery, 'The Complexities of State Court Compliance with U.S. Supreme Court Precedent' (2017) 38 Justice System Journal 148, 155.

precedent's legal authority and possibly expand its scope.[89] On the other hand, when judges interpret an existing precedent *negatively*, they restrict its reach, or call into question its continuing importance.[90] Indeed, there is a noteworthy difference between the court citing the precedent in order to apply its content to the case at hand and court citing the precedent in order to *distinguish* it from the case at hand.[91] Consequently, when treating the Court's case-law negatively, domestic judges might attempt to limit the authority of the ECJ in certain areas, or question the viability of certain decisions.

Obviously, there is a fine line between positive and negative treatment. Fix and Kassow argue that in studies examining treatments of precedent, the potential choice set should not consist only of *positive* and *negative* interpretations but should also include instances where judges treat precedents *neutrally* ('mere citing'). Moreover, one should not overlook the instances where judges *ignore* the precedent altogether.[92]

In a similar vein, many studies of precedent compliance by lower courts rely on the more detailed categorisation of judicial referral practices provided by commercial online citators such as *KeyCite* (Westlaw) and *Shepard's* (LexisNexis). Even though there are differences between individual categories the reliability of which have also been criticised[93], they highlight the point I am trying to make here – there are in fact more than two ways in which judges can work with previous case-law. Thus, distinguishing between concepts such

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89 Thomas Hansford and James Spriggs, *The Politics of Precedent on the U.S. Supreme Court (PUP 2006)* 6.

90 *Ibid.*

91 See Llewellyn who described various techniques of use of the precedent in Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company 1960).

92 Michael Fix and Benjamin Kassow, *US Supreme Court Doctrine in the State High Courts* (CUP 2020) 65.

93 See Aaron Kirschenfeld, 'Yellow Flag Fever: Describing Negative Legal Precedent in Citators' (2016) 108 Law Library Journal 77.

as 'following', 'criticising', 'limiting', 'questioning' or 'overruling' is imperative when studying the authority of ECJ's precedents.[94]

Now, simple quantitative citation analysis cannot only reflect whether domestic judges in fact apply the precedent to the case at hand, it also cannot reveal how and with which parts of ECJ's rulings domestic judges *engage*.

When developing his powerful concept of reasoning with previous cases, Komárek distinguished between two modes of reasoning – case-bound and legislative.[95] The former one more or less corresponds to the conventional description of the common-law view of the lawyers' work with precedents. In that mode, when working with previous decisions, judges search for the *ratio* of a particular case, distinguished from mere *dicta*.[96] In order to understand the *ratio*, judges need to identify the facts that were material to the cited case. Thus, what matters is what the court *decided*, not what it *said*.[97]

Conversely, in the legislative mode of reasoning with previous cases, judges tend to treat the ECJ's holdings like rules, akin to legislation. In such mode, statements of a court are interpreted by other lawyers as if they were legislated rules. What is deemed relevant are varieties in the text, not in the factual circumstances of individual cases.[98] Consequently, such

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94 See Ramos Romeu (n 50) 403 (differentiating between compliance, limiting, distinguishing, and dissenting).

95 Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 The American Journal of Comparative Law 149.

96 For a classic paper on the doctrine of *stare decisis*, see Herman Oliphant, 'A Return to Stare Decisis' (1928) 14 American Bar Association Journal 71.

97 Komárek (n 95), 156-157.

98 *Ibid.*, 158.

practice results in cut-and-pasting, de-contextualization and textualization of precedents.[99] To put it simply, what matters is what the court *wrote*, not what the case was really about.

From theoretical point of view, it has been claimed that the ECJ itself reasons with its previous judgements in this textualized manner. According to such voices, ECJ's reasoning often includes verbatim reproduction of previous statements (so called LEGO technique of constructing legal propositions from preformed building blocks) and using string citations of one or more precedents without discussing the references substantively.[100] The fact that such trends have already been tested empirically[101] only supports our claim that they should also be considered with regards to the domestic courts' adjudication practice.

Indeed, unlike purely quantitative citation studies, an inquiry about the engagement of national judges with various parts of the ECJ's precedents can enhance our understanding of the Court's authority significantly as it matters a lot whether national judges in fact follow not only what the Court decides, but also what it says in the course of its reasoning.

Finally, the citation compliance approach focusing on simple numbers of citations included in the decisions of the domestic courts does not uncover anything about the characteristics of those cited precedents. Consequently, it does not help us with identifying precedents that enjoy higher degree of precedential value, nor does it allow us to explore

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99 Peter Tiersma, 'The Textualization of Precedent' (2007) 82 Notre Dame Law Review 1187; for the most insightful overview of the theory of textualization of precedent, see Niccolo Ridi, '"Mirages of an Intellectual Dreamland'? Ratio, Obiter and the Textualization of International Precedent' (2019) 10 Journal of International Dispute Settlement 361, 383-385 (applying the concept to international arbitration).

100 Jacob (n 62) 94-105; see also Arnull (n 72) 252-253.

101 Urška Šadl and Ioannis Panagis, 'The Force of EU Case Law: An Empirical Study of Precedential Constraint' (2015) 279 Frontiers in Artificial Intelligence and Applications: Legal Knowledge and Information Systems 71.

the origins of those precedents. If one aims to examine such phenomenon, a more nuanced understanding of those characteristics of the ECJ's case-law will be needed.

As it can be seen, national judges reason and work with the ECJ's precedents in numerous ways and neither material 'conformity' compliance studies, nor simple citation analysis are well-suited to observe those patterns. As result, it is argued here that in order to empirically examine the *actual* degree of wider precedential value the ECJ's case-law enjoys, it is necessary to go beyond the above-mentioned indicators of compliance and embrace a broader concept of *judicial treatment of previous case-law* instead.[102]

First and foremost, this broader concept captures not only how frequently national judges *cite* the ECJ' precedents, but it also encompasses the *characteristics* of the cited decisions. Additionally, the concept recognises that when citing the previous case-law, domestic courts may not only *apply* it, but also reject its authority. Similarly, this broader perspective recognises that national judges might in fact *engage* distinctively with *different parts* of the ECJ's judgements. Finally, it is not only interested in instances where the ECJ's precedent had a substantive *influence* on the result of the domestic case, but also in instances where the ECJ's precedent was only used in a supportive manner in the overall reasoning of the case.[103]

To conclude, in this chapter I primarily argued that the ECJ's precedents formally enjoy certain precedential value in the wider sense as national judges are expected to follow them. Subsequently, I argued that in order to be able to examine the degree of precedential force that ECJ's case-law enjoys in day-to-day domestic adjudication, we need to go beyond

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102 Here, I follow David Kosař and others (n 81) 69.

103 Drowning mostly on Jan Petrov's description of patterns in treatment of the ECtHR's judgements. In: Jan Petrov, 'Domestic Courts and Methods of Argumentation with the ECtHR's Case Law' (2019) 158 Právník 163 [CZ].

the traditional conceptions and indicators of compliance and embrace a broader concept of judicial treatment of previous case-law. In what follows, a methodological framework for empirical study of this concept will be introduced.

3 METHODOLOGICAL FRAMEWORK FOR THE STUDY OF THE TREATMENT PATTERNS

Once we know that domestic courts' treatment of previous ECJ's rulings matter in theory and is central to the EU's system of precedents, it is time to search for ways to study these patterns empirically. Drawing on the research approach developed for the study of national judiciary's treatment of the rulings of the ECtHR[104], this chapter adjusts and introduces a three-level framework for empirical analysis of domestic judges' treatment of ECJ's precedents. The aim of this section is to provide appropriate method for empirical inquiry of our main research question: 'How do domestic courts treat the ECJ's precedents?'.

The framework aims to surpass the qualitative-quantitative divide mentioned in the introduction by combining rather novel form of automated text analysis together with more traditional types of content analysis of domestic judicial decisions. The sequential approach consists of the following three steps.

First, the *macro-level* of the analysis encompasses the quantitative search for the formal ECJ rulings citations (references) in the domestic courts' case-law. On the most abstract level, national courts enjoy certain level of discretion even in choosing the ECJ's judgements they mention in their decisions in the first place. Therefore, this level of analysis maps *how often* domestic courts refer to the ECJ's case-law and how the total number of citations changes

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[104] See David Kosař and others, (n 80) 83-99. In a separate journal article, the same authors explicitly acknowledge that 'one of the main contributions of [the] three-level approach is its wide applicability, which stretches far beyond the ECtHR's and the Czech apex courts' case law.' In: Katarina Šipulová, Hubert Smekal and Jozef Janovský, 'Searching for a Reference: Using Automated Text Analysis to Study Judicial Compliance' (2018) 12 Masaryk University Journal of Law and Technology 131, 157.

in time. By comparing the total number of ECJ case-law citations with the total number of all decisions of a particular court, it is possible to find out how frequently national judiciary deals with cases where the ECJ's case-law is somewhat relevant.[105] Furthermore, this level aims to identify the ECJ cases which are cited the most. This will allow us to assess the effects of individual ECJ judgements. Finally, the *macro-level* investigates several characteristics of the cited precedents including their age, composition of the Court, and the procedure they originated from. These might bring additional 'metadata' about the influential precedents.

Even though the first step cannot provide us with any specific insights about the ways in which domestic courts work with these holdings, by means of the *macro-level* analysis it is possible to build a much more complex picture about the overall impact of the ECJ's case-law in national adjudication.

In this first level, the *automatic text analysis* ('ATA') is employed.[106] Computational tools are used to detect the citations/formal references to the ECJ's case-law. Extracting references based on the use of regular expressions[107] allows us to address three general shortcomings of qualitative analysis: First, there is simply too many domestic judgements where the past ECJ's rulings are cited which makes the in-depth reading and hand-coding unmanageable even for large teams of researchers. The use of computational tools makes the processing of super-

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105 The premise here is that if a domestic court cites the ECJ precedent at any part of the decision, the precedent somehow effects the formation of the judgement even though the court might decline to apply it.

106 For a general overview of the method, see Justin Grimmer and Brandon Stewart, 'Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts' (2013) 21 *Political Analysis* (2013) 267.

107 Regular expressions are programming language tools with slightly different dialects in different programming languages including R and Python, that are used to specify patterns in strings of text that you want to find, extract, or replace. See Mitchell Goist and Burt Monroe, 'Taking Data Seriously in the Design of Data Science Projects' in Luigi Curini and Robert Franzese (eds), *The SAGE Handbook of Research Methods in Political Science and International Relations* (SAGE Publications 2020) 92.

large number of judgements possible (‘*data amount problem*’). Secondly, the focus on the mere occurrence of the ECJ’ case-law citation in the national judgements minimises the bias selection of prominent precedents the implementation of which is examined as well as it reduces the risk of tendency to ‘read a story into our analysis’ (‘*cherry-picking problem*’). Finally, qualitative reading of the domestic case-law necessarily suffers from a decreased level of transparency in presenting the research outputs. Discovering domestic courts’ reactions to the ECJ’s precedents in detail and categorising those reactions into treatment patterns is central to the qualitative analysis. However, the ability to describe in detail all the processes by which such classifications were developed are necessarily limited. Inclusion of the automatic processes which are more technical, clear-cut, and universal, might, on the other hand, increase the overall transparency of the research (*transparency problem*’).[108]

Once the general quantitative citation analysis is conducted and the overall picture of the role which the ECJ’s former precedents play in domestic adjudication is depicted, we can turn to the second *meso-level* of our analysis. In that phase, it is possible to begin reading larger amount of the domestic judgements more closely with the aim to map specific treatment patterns of how domestic courts interact with the ECJ’s opinions. Here, the aim is to record systematically how domestic courts engage with the cited precedents, whether they apply it and if so, how significantly the cited precedents influence the domestic court’s reasoning. Moreover, it records which parts of the precedents national judges work with.

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108 Here, I draw on the insights from other fields which call for integrating computational techniques with qualitative methods. See Parijat Chakrabarti and Margaret Frye, ‘A Mixed-methods Framework for Analyzing Text Data: Integrating Computational Techniques with Qualitative Methods in Demography’ (2017) 37 Demographic Research 1351, 1353-1357.

The method applied here is called the *systematic content analysis* ('SCA') which represents a middle ground between quantitative-centric empirical approach and more traditional qualitative and doctrinal legal analysis. Using this method, a researcher collects a set of judicial opinions and systematically reads consistent features of each while drawing inferences about their use and meaning.[109] The SCA is typically comprised of three stages: 1) creating a database of courts' decisions based on robust selection criteria; 2) systematically recording (manually or in an automated manner) quantitative and/or qualitative features of the cases based on pre-defined protocol ('manual coding'); and 3) a reflection stage, in which the cases are categorised into common themes and inferences are dawned about their use and meaning.[110]

It should be emphasised here that the *meso-level* SCA tackles drawbacks of both the large-scale quantitative automatic text analysis and small-scale in-depth doctrinal reading of the cases. Since the ATA only records quantitatively how frequently domestic courts cite the ECJ rulings, it does not differentiate qualitative characteristics of individual citations. Nevertheless, it is obvious from the theoretical part that not every citation of the ECJ's ruling plays the same role in the national court's decision. On the other hand, the SCA systematically records the behaviour of national judges on a larger, statistically significant number of cases and thus, its informative value is much richer than that of an isolated doctrinal analysis of a handful of leading cases. Moreover, the SCA is (or at least ought to be) easily falsifiable but also replicable which speeds up the common search for a more robust understanding of the role of domestic courts in implementation of EU law more than the somewhat arbitral

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109 Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 64.

110 Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl, Pola Cebulak, and Jessica Lawrence (eds), *Behind the Method: The Politics of European Legal Research* (Edward Elgar Publishing 2022) 109.

analysis of prominent cases.[111] As a result, the SCA balances and bridges the two commonly used 'more extreme' techniques.

Finally, the two previous steps of analysis allow us to proceed to the last *micro-level* of our inquiry. In the last phase, a small number of domestic judgements will be analysed in depth *vis-à-vis* wider theoretical, institutional, substantive and cultural context. The aim of this step is to hand pick several cases which could illustrate the most important aspects of the domestic courts' treatment of the previous rulings of the Court. Unlike in the preceding two levels of analysis, this approach relies heavily on the intellectual and doctrinal experience of the researcher because it requires careful evaluation of the national judicial EU law practice as well as the potential consequences for both EU law and national law substantive fields. While in previous levels, all individual cases bear similar value due to the more or less scientifically 'objective' analysed categories, the choice of pivotal cases hand-picked authoritatively by a researcher is justified by the researcher's ability to draw and present noteworthy conclusions from these cases.

To put it plainly, the complementary *micro-level* of the study allows the researcher to 'cherry-pick' the prominent domestic cases, only this time the cherry-picking is based on the wider knowledge which had already been acquired during the previous stages of the inquiry. In contrast to the ATA and the SCA which trade-off usefulness and depth of the findings in favour of the replicability and breadth of the study, a more traditional interpretative legal

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[111] I do not claim in any way that the systematic content analysis is completely free of research and political biases. Nevertheless, I am persuaded that if conducted well, the study can be replicated and falsified easily. On this point, see Or Brook (n 110).

method provides us with nuanced and highly contextual insights regarding the role which the precedent play in domestic adjudication.

To summarise the framework up, the three-level approach consists of a mix of quantitative and qualitative empirical methods employing various forms of case-law analysis (for an overview, see Table 1 below). It is important to highlight that all developed stages of the analysis are complimentary as they overcome each other's shortcomings. In other words, while no method is paramount, each approach is rigorous in its own way as it also illuminates different dimension of the studied phenomena.[112] In the following chapter, this methodology framework will be applied to the case study of Czech Supreme Administrative Court.

Level	Character	Method	Tools	Scope	Output
macro-level	quantitative	Automatic Text Analysis	computational coding	large N	citation statistics
meso-level	qualitative	Systematic Content Analysis	hand coding	medium N	descriptive statistics of patterns
micro-level	qualitative	Doctrinal Analysis	in-depth reading	small N	contextual analysis

Table 1: Three-level Framework

112 Kay Levine, 'The Law Is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis' (2006) 17 University of Florida Journal of Law and Public Policy 283, 287.

4 CASE STUDY OF CZECH SUPREME ADMINISTRATIVE COURT

In the previous chapter, a three-level methodological framework for the empirical study of domestic courts' treatment of the ECJ's precedents was introduced. This general framework is designed for the study of the impact of the ECJ's precedents in domestic adjudication irrespective of a Member State in which the ECJ's rulings are implemented. Similarly, the design is not limited to a particular type of domestic courts, or proceedings (e.g., administrative, civil, criminal). As a result, under model conditions, it would be possible to conduct the study of all domestic courts' decisions and in all Member States. Obviously, such a far-reaching project cannot be conducted here due to the very limited scope of this thesis. Thus, here I will only test the developed methodological framework on a case study of Czech Supreme Administrative Court ('SAC').

The selection was primarily guided by both my expertise regarding the set jurisdiction and my language background. As it was explained above, understanding of the wider institutional and cultural context of national judiciary is an essential prerequisite for the proper completion of the *micro-level* in-depth analysis of individual cases.

Secondly, even though administrative courts' agenda is evidently limited to the field of public law, there is great variety of EU law fields with which the SAC deals on daily basis (environmental law, tax regulation, data protection etc.). Thus, even though criminal and civil EU law will not be included in the study, it will still be possible to map how the ECJ's precedents matter in different areas of EU law.

Additionally, there are some important institutional aspects supporting the choice of the SAC. In both doctrinal and empirical writings, it has been suggested that the Supreme

Administrative Court seems to be rather active and creative in treatment of foreign sources of law. Several institutional factors were put forward as reasons behind this including the young 'age' of both the SAC and its judges, higher number of well-educated law clerks, and existence of the quality analytical department.[113] Such features indicate that the SAC might employ the whole variety of the examined treatment patterns and thus, might test well our newly developed researched categories.

Finally, one should not overlook the significance of the wide systemic context when choosing the appropriate case study. Czech judiciary has not so far suffered from severe political attacks on judicial independency that can be seen in Member States like Poland or Hungary, and which might strongly influence the degree of compliance with the ECJ's rulings.[114] On the other hand, there are indicators that even in the Czech judiciary, instances of backlash against the ECJ's authority are present.[115] As a result, the SAC represents an appropriate middle ground for the case study of domestic courts' treatment of the previous ECJ's rulings. In the following subsections, the three levels of empirical analysis will be conducted in detail.

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113 See Michal Bobek, *Comparative Reasoning in European Supreme Courts* (OUP 2013) 167; Kosař and others (n 81) 161.

114 On the attacks against the Central and Eastern European judiciary in this region since 2010, see James Moliterno and Peter Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious' (2021) 22 German Law Journal 1159. Also see the chapter in which Mayoral analyses the degree to which the Polish Constitutional Court's behaviour linked to the Polish governmental attacks on judicial independence may affect Polish courts' co-operation with the CJEU. In: Juan Mayoral, 'Game of Courts: The Effects of Constitutional Judicial Conflicts on Polish Judges' Co-operation with the CJEU' in Clara Rauchegger and Anna Wallerman (eds), *The Eurosceptic Challenge National Implementation and Interpretation of EU Law* (Hart Publishing 2019) 213-226.

115 In the famous case *Slovak Pensions* in which the Czech Constitutional Court declared the ECJ's judgement to be *ultra vires*. See Judgement of the Czech Constitutional Court 14 February 2012, Case No Pl. US 5/12, *Slovak Pensions XVII*.

4.1 Macro-level Analysis: Mapping the Terrain

Drawing on the above-stipulated general framework, the main aim of the *macro-level* analysis in our case study is to map how often the SAC refers to the ECJ's case-law and how the total number of citations changes in time. Subsequently, some characteristics of the cited cases will be explored, including their age, composition of the Court, and the procedure they originated from. To meet this goal, the text of the court's decisions is automatically analysed by means of computational coding. The automatic text analysis can be typically divided into four stages: 1) obtaining data; 2) converting text to quantitative data; 3) analysing the data; 4) validating the data.[116] Here, I roughly follow this outline.

4.1.1 Obtaining Data

In order to be able to trace down the EJC's references, it was necessary to obtain two datasets – the collection of the SAC's decisions and the collection of the ECJ's rulings. As for the former one, full and electronically readable text of the judgements is necessary for the computational code to be able to identify all the references to the ECJ's case-law. As for the latter, on the other hand, the full text of the EJC's rulings is not needed as the aim is merely to identify these rulings in domestic courts' decisions. Thus, it was sufficient to obtain information about ECJ's rulings including among others the name of the case and the case number.

Fortunately, in their project 'Czech Court Decision Corpus', Novotná and Harašta created a dataset of 237 723 decisions published by the Czech apex courts (including the SAC)

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116 John Wilkerson and Andreu Casas, 'Large-Scale Computerized Text Analysis in Political Science: Opportunities and Challenges' (2017) 20 Annual Review of Political Science 529, 530.

in order to make the collection of court decisions freely available online in consistent (plain) format for future research.[117] In order to lower the cost of the obtaining and further processing of the full text of the decisions by means of web scrapping, I chose to use this already existing dataset which consists of 52 660 decisions issued by the SAC dated from 1 January 2003 until 30 September 2018.[118] Such a dataset clearly represents the best available collection of the vast majority of the SAC's published decisions on merits. Apart from the full text of the decisions in, the dataset also includes file containing the list of all SAC's decisions and their metadata (case ID and date of the decision).

In order to be able to carry out the 'other side' of the citation analysis, the relevant information regarding the ECJ's precedents needed to be obtained. I used the *eurlex* R package to retrieve the relevant data on ECJ's case-law.[119] Consequently, we obtained information regarding 20 032 decisions of the ECJ issued between 1953 and February 2022. This data set included full name of the case, case number, ECLI, full name, date, the type of procedure, composition of the Court, and judge rapporteur.

Unfortunately, the EUR-Lex database does not include the 'popular' names of the cases which can only be find in the search form on InfoCuria which is the official website of the CJEU. Since we know that many domestic judges use the InfoCuria search form primarily while regularly citing not the rather lengthy full name of the ECJ's ruling, but only

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117 Tereza Novotná and Jakub Harašta, 'The Czech Court Decisions Corpus (CzCDC): Availability as the First Step' (2019) arXiv. arXiv:1910.09513 (preprint).

118 Tereza Novotná and Jakub Harašta, 'Czech Court Decisions Corpus (CzCDC 1.0)' (LINDAT/CLARIAH-CZ digital library at the Institute of Formal and Applied Linguistics, 2019) <https://lindat.mff.cuni.cz/repository/xmlui/handle/11372/LRT-3052> accessed 4 July 2022.

119 Michal Ovádek, 'Facilitating Access to Data on European Union Laws' (2021) 3 Political Research Exchange.

the short 'popular' form of the name, we needed to obtain these names as well. Since the InfoCuria database does provide the exportation service as it is in case of EUR-lex, we had to scrap the case-law data automatically by means of Python script. As a result, we obtained popular names of 15 574 ECJ's rulings.[120] As it was my colleague who works on the project with me and who created the script, it is not described here in detail.

For an overview of the collected data, see Table 2 below.

Type of Court	Supreme Administrative Court	European Court of Justice
Number of Cases	52 660	20 032
Data Obtained	full text, case ID, date	case ID, date, full name, 'popular name', ECLI, type of procedure, composition, judge rapporteur

Table 2: Overview of the Datasets

4.1.2 Converting Text into Quantitative Data

Once we obtained the collections of data, several pre-processing operations needed to be done before the actual citation analysis could be conducted. With regards to the SAC dataset, no further steps were necessary because the text of the decisions had already been 'cleared' into the plain text (.txt format). Furthermore, apart from the full text of the decisions in the .txt format, the dataset also includes .csv file containing the list of all SAC's decisions and their metadata. This list consists of columns which match the basic case-law metadata (case docket number and date of the decision) with the corresponding file name of a decision with

120 Not all decisions included in the EUR-Lex database have the popular name in InfoCuria.

extension .txt. This will allow us to connect the full texts of the domestic decisions with the years in which they were issued easily.

As for the ECJ dataset, the 'popular names' scraped from InfoCuria needed to be matched with the data retrieved from the EUR-lex database. As it was my colleague who processed this operation, it is not described here in detail. Suffice to say that as result, the two databases were merged into one which contained the list of all ECJ's rulings all the above-mentioned metadata

As a result, the two separate databases containing the list of the SAC's decisions and the ECJ's decisions were prepared. Furthermore, the collection of the plain text SAC's decisions was ready to be scanned automatically.

4.1.3 Analysis of the Structured Data

Once all the data was structured, we needed to decide how exactly we should proceed in tracing the collected ECJ references in the collection of the SAC's decisions. In general, there are several techniques that are used in the automated text analysis ranging from simple key word searches to supervised or unsupervised machine learning.[121] For the purposes of our citation analysis, we opted in for the so called 'rule-based method' in which 'the researcher explicitly instructs the computer to look for certain words or patterns and interprets

121 For the comparison of the supervised and the unsupervised approaches, see Matthew Denny and Arthur Spirling, 'Text Preprocessing for Unsupervised Learning: Why It Matters, When It Misleads, And What to Do About It' (2018) 26 Political Analysis 168.

the resulting outcome as a measurement.'[122] To put it plainly, we developed several instructions for the computer to detect the ECJ citations in the SAC's decisions.

Now, the most difficult part of developing the rules was to overcome our professional limitations. Personally, I do not have any formal training in programming and my colleague, on the other hand, does not have any legal background. However, developing the code for the citation analysis requires both programming skills as well as the knowledge of legal context. Here, I will describe only the substantive rules of the analysis to development of which I directly contributed, and which should also provide the reader interested in the legal side of the method with necessary details. The technical 'code' itself was created by my colleague and it is not included in the thesis.

Let us start with providing an example of an ideal ECJ case-law citation which can be found in some of the SAC's decisions. In the Decision No. 1 As 387/2019, para 26, the SAC stated:

> The requirement of prioritisation of the objective approach over the subjective one follows from the wide interpretation of the definition of the notion 'personal information' (see […] and the Judgement of the Court of Justice of the European Union of 20. 12. 2017, *Peter Nowak v. Data Protection Commissioner*, No. C-434/16, para 34).

As it is apparent from the cited example, one can identify typical components of the EJC case-law citation: 1) identification of the ECJ; 2) date of the ECJ's ruling; 3) name of the case; 4) case number. Even though the citations might seem quite straightforward at the first glance, it is a well-known fact that domestic courts cite case-law in very inconsistent way

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122 Wouter van Atteveldt, Kasper Welbers and Mariken van der Velden, 'Studying Political Decision Making with Automatic Text Analysis' (*The Oxford Encyclopaedia of Political Decision Making*, 2019) <https://doi.org/10.1093/acrefore/9780190228637.013.957> accessed 5 February 2019.

without any formal instructions. Consequently, domestic courts for instance identify the ECJ not only as 'the Court of Justice of the European Union', but also as the 'CJEU', 'ECJ', 'European Court of EU', 'Community Court', 'European Court', and 'Court'. Similarly, with regards to the name of the case, domestic courts sometimes omit the name altogether, cite only the 'popular name', cite full name, cite part of the full name, cite full name with 'v', 'v.' or 'proti' (which stands for *versus* in Czech). Finally, in an ideal scenario, domestic courts would also include another component to the citation – the ECLI identifier or CELEX number which are specific citation identifiers. However, these are almost never used in the practice of Czech ordinary courts which makes the citation analysis even more challenging.

In order to detect as many citations as possible, we started with the most specific component of the ECJ case-law citation – the case number (**Rule No. 1**). Fortunately, the pre-sign "C-" is quite specific in European and Czech context which means that the ECJ's case-numbers in that format do not overlap with docket numbers of other institutions.[123] Knowing that the ECJ has never decided more than 999 cases in a year, we could search for all the sequences of signs in the format 'C-(X)XX/XX' where X stands for any number from 0-9. The regular expression had to be readjusted several times in order to also detect references in which domestic courts cited the ECJ case number imprecisely [e.g., used a dash instead of a hyphen ('C–XXX/XX'), added extra spaces ('C - XXX/XX') etc.].

The issue with the Rule No. 1 is that even if adjusted to cover various typographical errors of the national judges, it would still not cover three groups of references. First, it does not detect the references in which national courts omit to include the 'C-' (be it either

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123 For instance, the format of the Czech Constitutional Court's docket number is "sp. zn. XXX/YY"; similarly, the docket number of the ECtHR is "XXXXX/YY" (without 'C-').

intentionally or unintentionally). Secondly, until the end of 1988, the ECJ's the format of the ECJ's case-law did not include the prefix 'C-' and took the form of 'XXX/XX'. Lastly, the rule does not capture the references in which the domestic courts omit to cite the case number as such and merely cite the name of the case. Consequently, we had to develop three additional rules which would detect these instances.

The second rule needs to detect references in which the case is cited without the prefix 'C-' (**Rule No. 2**). One cannot solve the issue only by searching for the ECJ case-law number in the format '(X)XX/XX' as such format overlaps with the docket numbers of other institutions, i.e., the search would identify for instance the ECtHR's rulings instead of the ECJ ones. Thus, another specific element needed to be added. In this regard, we used occurrence of another typical citation element – the identification of the ECJ. The premise is simple – every time the domestic court refers to the ECJ's ruling, it also mentions the name of the ECJ nearby that reference.[124] Furthermore, we know that as of 1989, the prefixes 'C-' and 'T-' were included. Therefore, the second regular expression searched for the occurrence of the number in format '(X)XX/(53-88)' under the condition that a name of the ECJ was mentioned in the vicinity of 500 words surrounding that number. Here, we used the specificity of the Czech version of the ECJ's identification. In Czech, a court in general translates as 'soud' while the Court translates as 'dvůr'. Thus, the probability that the search would identify docket numbers of other courts was very low as these other courts would be identified as 'soud' and not 'dvůr'. On the other hand, due to the linguistic peculiarity of Czech

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124 Šipulová, Smekal and Janovský (n 103) 147.

declension, various forms of the world 'dvůr' needed to be included. Also, we searched for the potential abbreviations such as 'ESD' ('ECJ') and 'SDEU' ('CJEU').

The last rules aim to capture the references where domestic courts omit to cite the ECJ case number entirely and they solely refer to the name of the case or ECLI instead. Since national judges mostly do not cite the full name of the case but merely refer to the 'popular' one, we searched for appearances of those 'popular' names contained in the ECJ dataset (**Rule No. 3**). Here, however, the rule had to adjusted to search for occurrence of a 'popular' names under the condition that the year of the ECJ's decision was mentioned in the vicinity of 150 characters surrounding that number. The premise here is that domestic court cites not only the popular name, but also includes the date of the decision. Finally, we also searched for cases in which judges merely referred to ECLI (**Rule No. 4**).

Now, the substantive description of the developed rules shows that none of these rules could detect all the ECJ references in the SAC's decisions on its own terms. The four rules are complementary and are designed to cover as many varieties in citation style as possible. We believe that these instruction›ns taken together are complex enough to detect majority of the cases in which the Supreme Administrative Court referred to the ECJ's case-law. For an overview of the rules, see Table 3 below.

Rule	Searched Components	Example
Rule No. 1	full case numbers	'C-434/16'
Rule No. 2	incomplete case numbers + identification of the ECJ	'434/87'+ 'SDEU'
Rule No. 3	'popular' name + year	'*Nowak*' + '2017'
Rule No. 4	ECLI	'ECLI:EU:C: 1954:3'

Table 3: Overview of the Rules

4.1.4 Results

Finally, let us discuss the results of our *macro-level* analysis. Following the original design and research questions, we will first explore how often SAC judges refer to the ECJ's case-law. Subsequently, some features of the cited cases will be observed. In particular, we will inquire the most cited ECJ precedents as well as the type of procedure the cited precedents originate from. Next, the composition in which the Court issued the cited rulings will be analysed. Ultimately, we will briefly discuss the average age of the cited ECJ precedents and the most cited judge-rapporteurs. By examining various aspects of the cited ECJ's case-law the large scale, we can gain some valuable insights which might shed some light on the theoretical assumptions of the EU's system of precedent. Similarly, such characteristics are crucial as they inform our analysis in the next levels of empirical inquiry.

So how frequently does the SAC in fact refer to the ECJ's case-law in its domestic adjudication? To put it plainly – overall, not so much, but the numbers are slowly growing. From Figure 1, it is apparent that between the years 2003 and 2018, the SAC referred to at least one of the ECJ's precedents in 1 830 cases in total (see the blue line). As the SAC started to function in 2003 while Czechia only became a Member State in 2004, it is understandable that it took several years for the SAC to begin using the Court's case-law properly. In early years, we found only a handful of decisions in which the SAC used the precedents; nevertheless, since then the trend steadily increases and from 2013 onward, the number oscillates around 200 decisions a year.

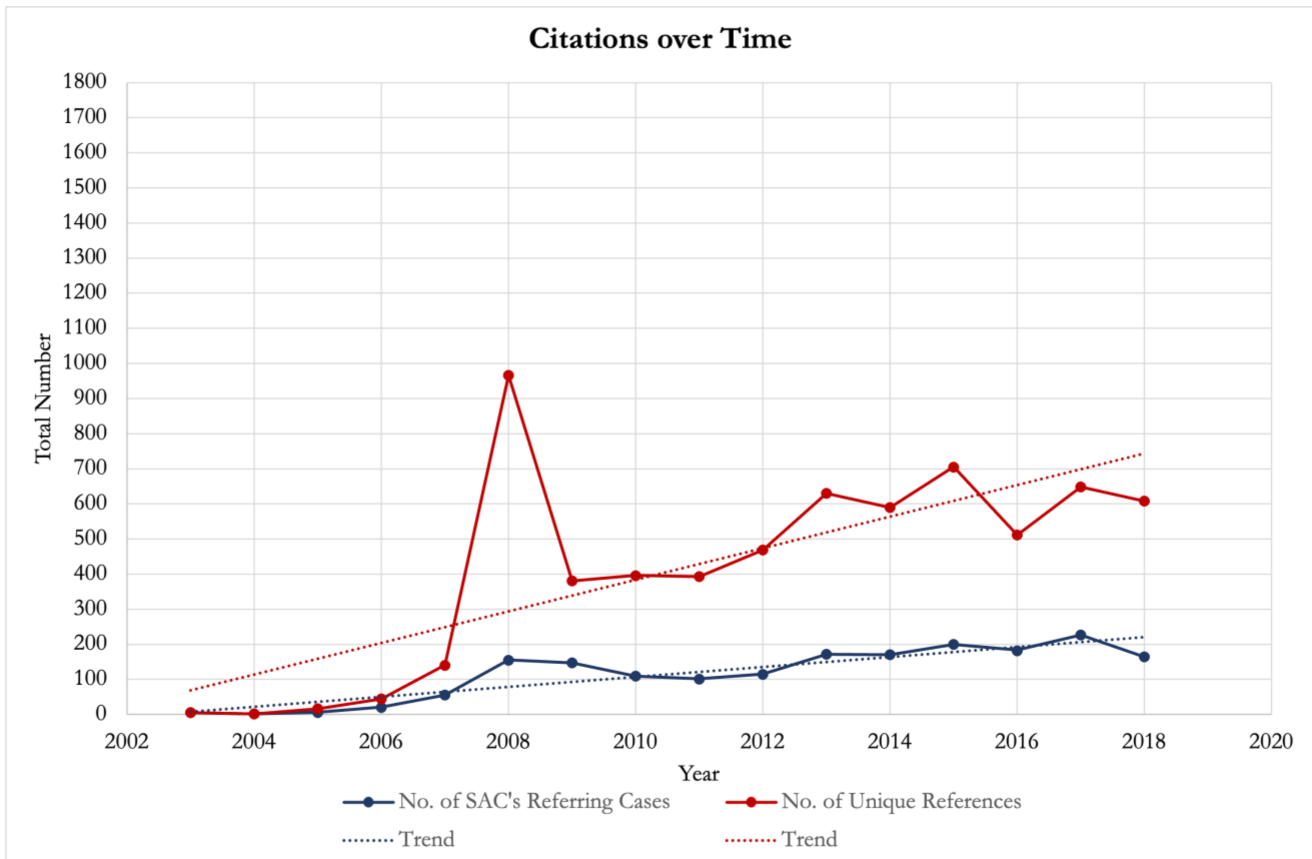

Figure 1

Now, it is interesting to compare these numbers about decisions which contain at least one reference to the ECJ precedent with another measure. Since the SAC might refer to more than one specific precedent in a single decision, it is valuable to see whether and how often that happens. The red line in Figure 1 depicts the yearly numbers by the count of such unique references. From that perspective, the SAC seems much more active as its decisions contain 6 503 unique references in total. More importantly, the measure allows us to see that in the early years, the SAC on average cited less than two ECJ's precedents per decision while as of 2013, the average density of the citations almost reaches 3,5 precedents per decision. In other words, the analysis reveals that when the SAC deals with the EU law issues and it decides to refer to the ECJ case-law, it does so more 'in detail' than it used to.

Finally, we can only speculate why there was a radical increase in unique references in 2008. Perhaps, this could be caused by the unusual line of similar decisions which contained

a lot of ECJ precedents, but this is something which could be revealed only by closer examination of those cases in other levels of the analysis. In any event, this seems to be an evident excess.

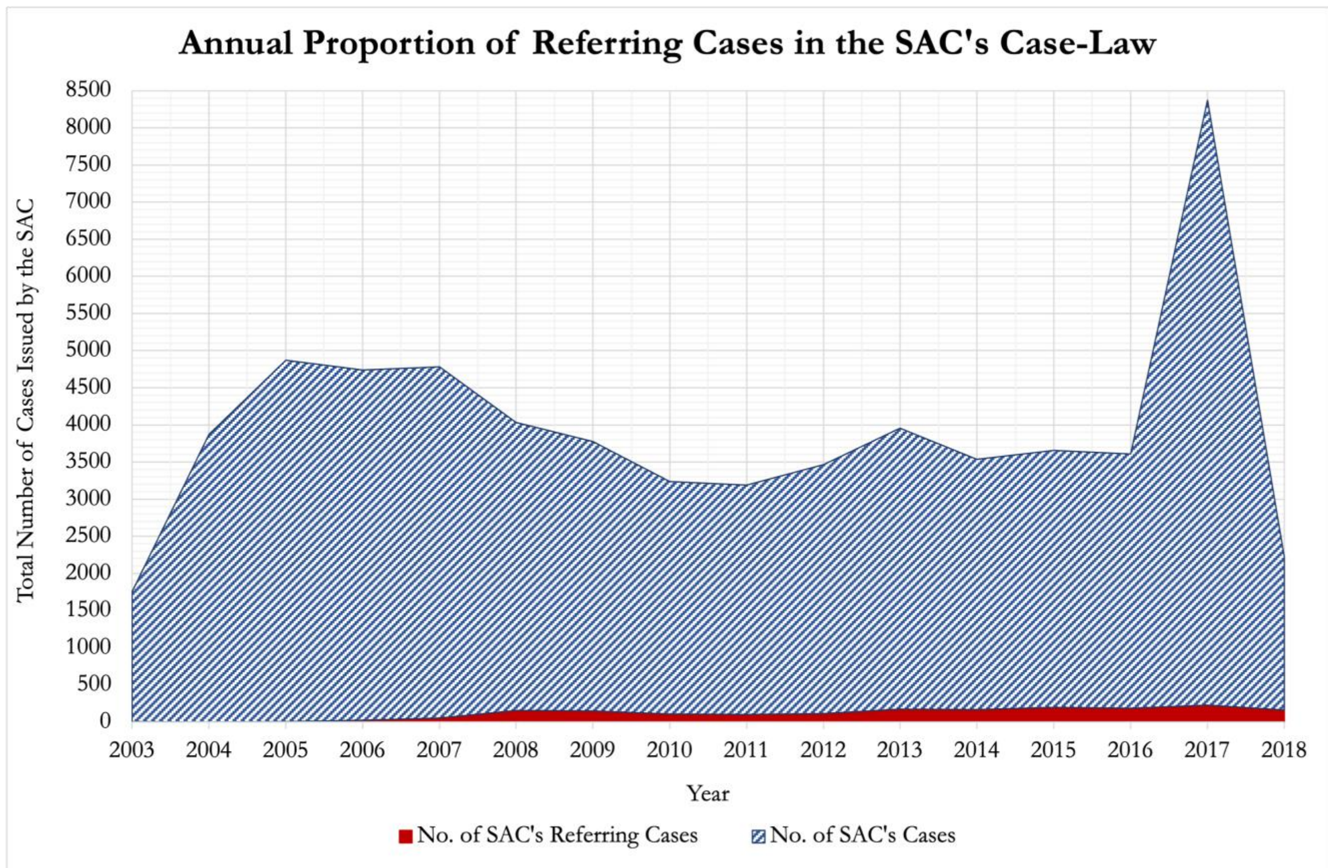

Figure 2

Although it might seem that the SAC reasons with the previous ECJ's judgements on somewhat frequent basis, such impression should not be overestimated. In fact, Figure 2 divulges that the proportion of cases in which the SAC reasons with at least one ECJ's precedent to all the decisions issued by the SAC remains very low. Specifically, the SAC argues with the Luxembourg's case-law only in about 5 % of its decisions. Such number, however, should not be bluntly accepted as evidence that the process of 'radical *Europeanisation*' is in reality not taking place. Since even some older and modest studies have already shown

that the proportion of national legal rules affected by the EU law is quite higher than 5 % [125], the low number of referring cases shows – more than anything else – that the SAC might often adjudicate EU law issues without evoking the ECJ's previous judgements at all. This would, in fact, support Lisa Conant's somewhat unsubstantiated strong claim mentioned above.[126] Consequently, the fairly low citation practise of the SAC shakes the naïve narrative of the ECJ that national judges should not interpret EU law norms on their own, because they ought to 'either ask, or follow the previous case-law'.

So far, we have assessed an overall picture of how *frequently* the SAC refers to the ECJ's precedents. Here, let us briefly discuss some of the characteristics of the cases the SAC cites.

First, we might explore what are the precedents with which the SAC's judges reason most often. Over the analysed period, the SAC referred to only 1 475 ECJ individual precedents in total. This means that at least with regards to the SAC's adjudication, more than 90 % of the ECJ's case-law have not had any apparent or direct effect. Vast majority of the precedents were cited only once or twice.

Figure 3 depicts 30 ECJ precedents that were cited the most by the SAC. It might not be surprising that *CILFIT*[127] is the leading case in that regard. Interestingly enough, the SAC referred to that precedent in 175 cases while it only asked 32 preliminary questions until the mid 2018. Considering that in a lot of cases judges do not even refer to the *CILFIT* criteria when considering their obligation to ask preliminary question, this once again shows us that

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125 Wolfgang Müller and others, 'Legal Europeanization: Comparative Perspectives' (2010) 88 Public Administration 75 claims that by mid-2003, the legal orders (the entire bodies of legislation in force) of three EU member states – Austria, Denmark, and The Netherlands – contained between 10.5 and 14.2 per cent of rules devoted to the transposition of EU directives.

126 Conant (n 48).

127 (n 22).

there might be a large grey area in the domestic adjudication which is crucial for the development of EU, but which remains out of spotlight of both the ECJ and EU scholarship. Certainly, the pure statistics might be misleading as they do not tell us whether the SAC considered the *CILFIT* criteria at all and if so, which exception it applied. Nevertheless, the number adds to our understanding of how often the SAC's judges openly consider asking preliminary questions.

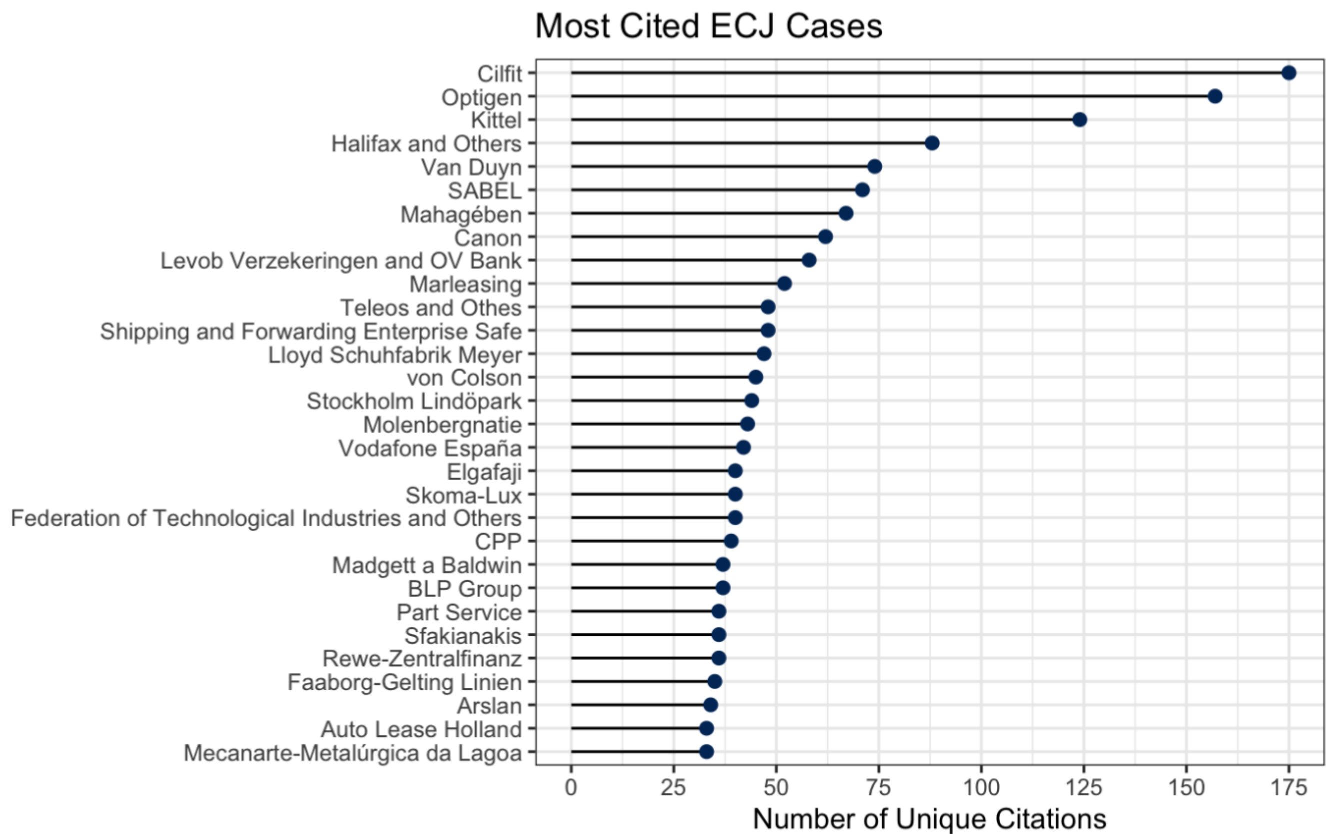

Figure 3

As far as other top cited precedents are concerned, it is clear that most of them are the leading cases within EU tax law, the VAT frauds in particular (see *Optigen*[128], *Kittle*[129],

128 Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen Ltd, Fulcrum Electronics Ltd, Bond House Systems Ltd v Commissioners of Customs & Excise* [2006] EU:C:2006:16.

129 Joined Cases C-439/04 and C-440/04 *Kittel* [2006] EU:C:2006:446.

Halifax and Others[130], and *Mahagében*[131]). This information provides us with useful data about areas of law in which the ECJ enjoys larger authority. Furthermore, the fact that the list includes *Van Duyn,*[132]*Marleasing*[133] and *Von Colson*[134] reveals that there are almost two hundred cases in which the SAC might have granted the 'direct effect' to an EU legal norm, or in which it interpreted national provisions 'in the light of the wording and the purpose' of EU regulation. Once again, these are cases with potential great effects both for national and EU law and thus might be worth exploring further.

Finally, it is also interesting to notice which cases are missing. As *Costa v E.N.E.L.* and *Simmenthal*[135] are not present in the 'top list', one may expect that the SAC does not often openly frame issues of conflict of legal orders in the terms of absolute incompatibility where it would have to adhere to the principle of primacy. Similarly, considering that until 2018, the SAC referred to *Foto-Frost* only in 26 cases, it is possible to turn down the possible narrative about the young and proactive SAC's judges having great ambitions to contribute to the development of EU legal order by challenging the validity of problematic EU legislation.

Turning our attention to Figure 4 now, it is fruitful to explore another characteristic of the cited ECJ's case-law, namely the type of procedure from which these decisions originate. We can see that the SAC reasoned with ECJ's judgements originating from preliminary

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130 Case C-255/02 *Halifax and Others* [2006] EU:C:2006:121.

131 Joined Cases C-80/11 and C-142/11 *Mahagében* [2012] EU:C:2012:373.

132 (n 10).

133 (n 14).

134 (n 14).

135 (n 20).

reference procedure in the vast majority of cases (in about 87 %). Nevertheless, the fact that the SAC also works with precedents coming from other procedures (such as Article 258 TFEU infringement procedure, or actions for annulment) mirrors the ECJ's doctrine mentioned in the theoretical part according to which domestic courts are bound by previous decisions irrespective of the nature of the proceedings.

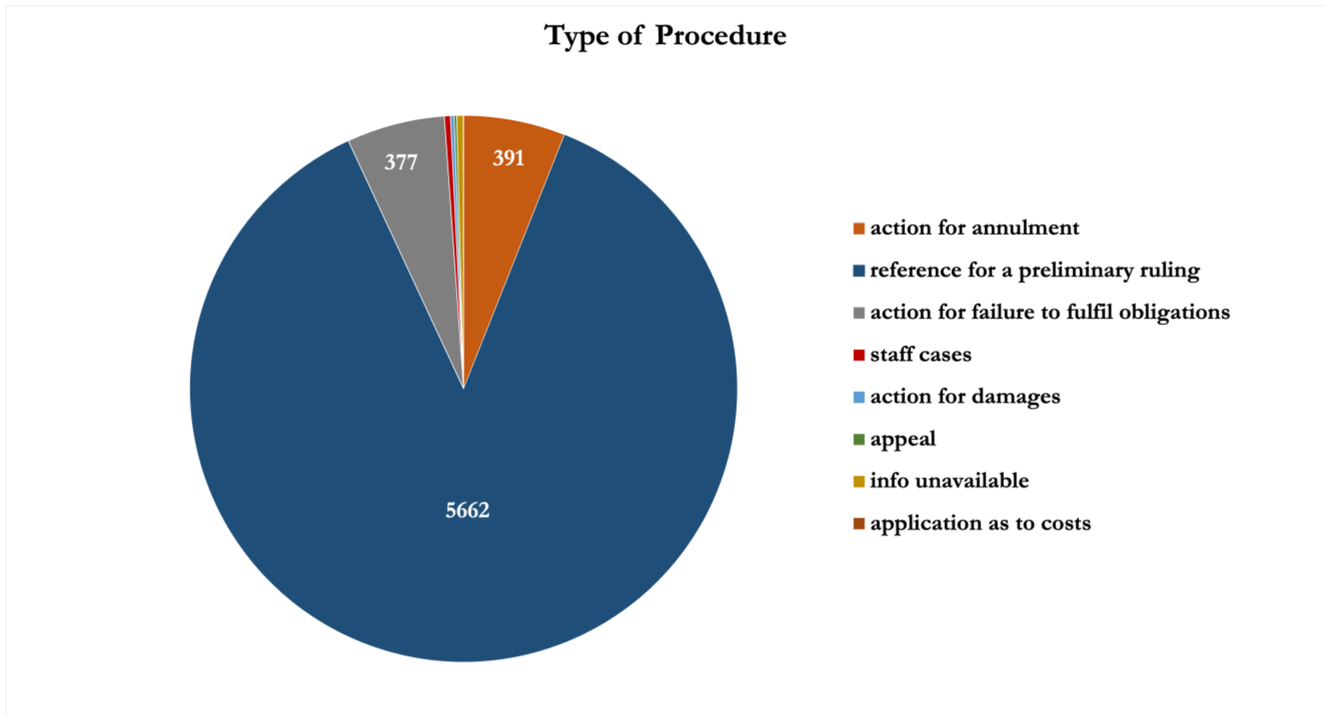

Figure 4

Next, we are able to observe the prevailing composition in which the Court decided the cited cases. Why is such characteristic relevant for our analysis of domestic judges behaviour? Since 2004, the Grand Chamber of the ECJ is expected to decide where the difficulty or importance of the cases or particular circumstances require so.[136] AG Bobek then speculates that the Grand Chamber's existence might be legitimised by the need to ensure

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136 Article 60 of the Rules of Procedure.

unity and coherence of the case-law, on the one hand, and the need to decide cases of great importance, on the other. The former function might, in turn, may be of great concern for national judges due to their need to identify clear and coherent guidance in the 'avalanches of technical cases'.[137] To put it differently, one might expect that national judges will cite decisions of Grand Chamber more often as they should represent clear and coherent signals of high legitimacy.

Considering that Grand Chamber decides around 11 % of all cases[138], the fact that the SAC cited Grand Chamber's decisions in almost 1/4 of the unique references seem to support the 'hunch' that Grand Chamber's case-law might enjoy greater legitimacy from the part of national judges. Nevertheless, the exact influence of the Court's composition on the domestic court's citation practice is to be explored more thoroughly in the future research.

Another measure we are able to trace from the collected data is the average age of the cited precedents. On the one hand, it could be argued that older ECJ's precedents might be more institutionalised and entrenched in knowledge of national judges and academic literature and thus get cited more often. On the other hand, it could be argued that national judges might prefer citing newer precedents as they reflect contemporary legislation better.[139] Be it as it may, the average age of the precedents cited by the SAC in the analysed period is around 11 years. Thus, on the first sight it seems that it might take a quite some time for the ECJ's doctrines to get entrenched properly into the national adjudication practices.

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137 Michal Bobek, 'What Are Grand Chambers for?' (2021) 23 Cambridge Yearbook of European Legal Studies 1, 18.

138 *Ibid*, 14.

139 See Hansford and Spriggs (n 89) 24.

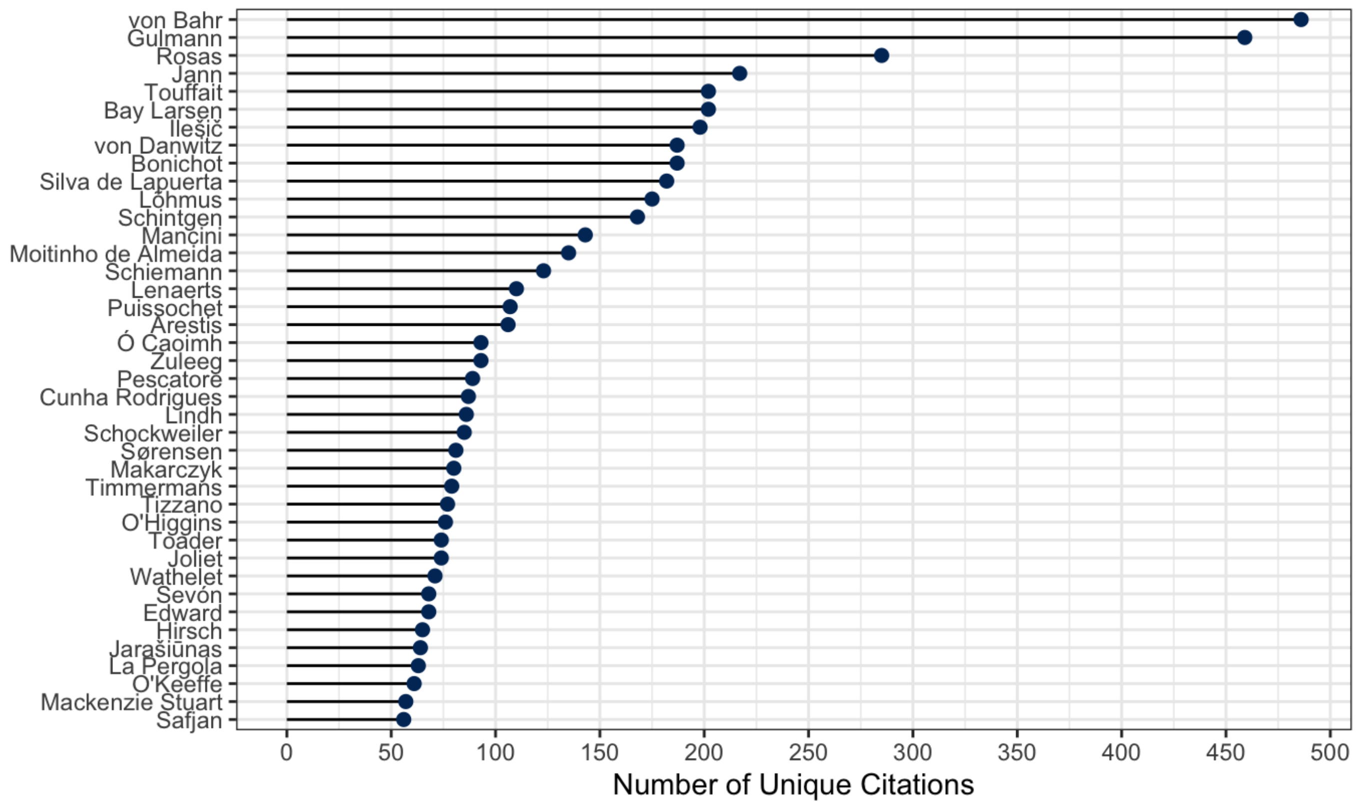

Figure 5

Last but not least, it is possible to briefly explore the individual judges-rapporteurs that are cited most often by the SAC. This might be a worthwhile exercise for several reasons. Some scholars have previously theorised about how citation frequency of judges' opinions might influence their prestige and authority in the field.[140] Furthermore, others have also explored how readability of higher courts' judicial opinions might influence their implementation by lower courts while such readability may in turn depend on the expertise and prior experience of individual authors of the opinions.[141] Even though it is not possible

140 See David Klein and Darby Morrisroe, 'The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals' (1999) 28 The Journal of Legal Studies 371.

141 See Michael Fix and Bailey Fairbanks, 'The Effect of Opinion Readability on the Impact of U.S. Supreme Court Precedents in State High Courts' (2020) 101 Social Science Quarterly 811; Michael Nelson and Rachael Hinkle, 'Crafting the Law: How Opinion Content Influences Legal Development' (2018) 39 Justice System Journal 97, 107.

to examine such effects with regards to the ECJ judges and the SAC's citation practice here, it is interesting to see that judges Von Bahr and Gulmann were cited on a considerably more frequent basis than the others (see Figure 5). On the other hand, one may notice that the Czech judge Malenovsky has not made the list and thus, the implausible logic that domestic judges might be keener to follow their 'colleague' from their Member State can be turned down ultimately.

4.1.5 Macro-level Conclusions

To conclude this whole section, the *macro-level* analysis revealed some valuable insights about the big-picture citation patterns of the SAC. Not only has the SAC frequency of reference to the ECJ's precedents increased steadily in the last years, but national judges also cite the case-law in more detail (with higher density) than they used to. Nevertheless, the overall number of cases where the SAC judges reason with Luxembourg's case-law still remains fairly low when compared with the total number of issued decisions. We also found out some additional information about the cited cases.

At the same time, however, several important questions remain answered: How do the domestic courts engage with the cited ECJ's precedent? Do the SAC's judges apply the ECJ's previous case-law and if so, how those decisions influence the reasoning of the SAC? Finally, what part of the precedent do national judges cite? These and other issues will be dealt in the following *meso-level* analysis.

4.2 Meso-level Analysis: Zooming In

Following the general framework, at the *meso-level*, we employ the systematic content analysis which allows us to process larger numbers of cases while providing for a more rigorous measure of treatment patterns in the case law the Supreme Administrative Court.[142] The content analysis allows us to read the selected cases more consistently and with greater focus on the above-mentioned questions. This approach is mostly descriptive and explanatory and thus, it aims to map the occurrence of various trends in the SAC's practice.

Following the traditional steps of the systematic content analysis, next subsections proceed as follows. First, the selection of the SAC's case-law will be described in detail. Next, the process of defining the recorded categories will be explained. Furthermore, a brief description of the recording process and the reliability of the 'coding' process will be addressed. Finally, I will comment on the findings.

4.2.1 Selecting Cases

To be able to conduct the systematic content analysis, we must first decide which cases to select and sample. Note that we are interested in the closer examination of the ECJ's precedents treatment patterns including the instances in which domestic courts do not refer to the ECJ case-law even though the dispute at hand relates to the EU law questions.[143]

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142 It should be highlighted that I am not reinventing the mythological wheel here. For a general overview of the use of content analysis method in non-legal fields see Kimberly Neuendorf, *The Content Analysis Guidebook* (2nd edn, SAGE 2017); or Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (4th edn, SAGE 2018). For a comprehensive overview of the legal scholarship see Hall and Wright (n 108) 67-76, where they trace down the use of the SAC up to late 1950s'.

143 This is in contrast to the studies examining the use of the ECtHR's case-law which only analysed decisions where domestic courts formally referred to the past ECtHR's judgements.

This makes our hypothetical universe of relevant cases (i.e., sampling frame) quite wide as all cases decided by the SAC are potentially relevant.

Auspiciously, the search form of the SAC'S database allows for the identification of cases where either EU directives of EU regulations were applied. In other words, one can detect EU law cases in which a decent possibility of existing applicable ECJ's case-law exists without necessarily relying on the formal inclusion of the citation in the domestic court's ruling. If we analysed only the cases where the SAC expressly cited at least one ECJ's precedent, we would not be able to detect the instances in which it omitted to cite the precedent altogether.

However, it needs to be noted that since there are no precise classification rules published on the SAC's website, the process of identifying cases as EU law cases is not very transparent. By looking at the numbers of cases identified as EU law cases, one can quickly conclude that there is high probability that not all EU law cases where EU secondary sources are applied are in fact classified as EU law cases in the database.[144] Still, since it is the SAC's analytical department, law clerks, or judges themselves who classify the rulings as EU law cases, we can presume that once the few cases are classified as EU law cases, the basis for such identification are quite strong. To put it plainly, if the case is identified by judicial staff as the EU law case, it can be expected that such case deals with an important or evident EU law issue where the ECJ precedents should be somewhat relevant.

Due to the scope of this project, we decided to restrict our sample by time frame – one year of the courts' decision-making. This is generally accepted selection method which

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[144] Out of 52 660 decisions issued by the SAC between 1 January 2003 until 30 September 2018, only 784 cases (1, 5 %) are formally classified as EU law cases in the database.

is easily replicable, and which is appropriate for mapping broader trends and models adjudication.[145] I chose to analyse the year of 2020 in which the SAC identified 192 rulings as EU law cases in total (see Table 4 below).

Courts	Supreme Administrative Court
No of Analysed EU Law Cases	192

Table 4: Coded Cases

4.2.2 Defining the Treatment Patterns

The main part of the content analysis itself entails that the selected sample of cases is examined in more detail and subjected to an analytical process which is referred to as manual or human coding.[146] To develop a coding scheme, it is necessary to first define a set of categories which will represent various patterns in treatment of the ECJ's precedents.

Before introducing the recorded categories, it should be noted that they are not *a priori* defined from scratch; they are rather based on both the extensive review literature as well as on the explorative reading of the domestic case-law.[147] Bearing in mind the theoretical insights according to which not all citations of the ECJ references are equal; that they differ in their significance for deciding the dispute and that what matters is how judges engage with

145 See e.g., Joanna Bell and Elizabeth Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' (2021) Public Law 505 (analysing 801 decisions handed down by the Administrative Court of England and Wales in 2017). In their study of 114 case-coding projects, 85 % used universal sampling limited only by year while most of the projects coded between 100 and 300 decisions. In: Hall and Wright (n 108).

146 Doug Bond, 'Content Analysis' in Kimberly Kempf-Leonard (ed), *Encyclopaedia of Social Measurement: A-G* (Elsevier 2005) 481.

147 Josephine Marna-Rose Hartmann, 'A blessing in disguise?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives' (PhD thesis, Leiden University 2016) 108.

the various parts of precedents, I conducted a review of precedent and judicial compliance studies mostly concerning the American context, international courts' case-law, or treatment of foreign sources of law.[148] This allowed me to come up with a tentative set of detailed judicial treatment patterns.

Similarly, the explorative reading of random 30 Czech administrative courts' rulings[149] was steered by both the tentative set of judicial treatment patterns as well as by the research questions to which the macro-level did not provide any answers.[150] Primarily, close reading of small number of cases served to familiarise oneself with the structure of domestic courts' decisions, wording and general citation practices. Nevertheless, the exploratory study proved to be particularly valuable as it shed some light on the peculiarities of the EU law fundamental doctrines (e.g., doctrine of direct effect) which were naturally not considered by previous studies of other international courts such the ECtHR. Finally, the initial treatment categories were later refined after a thorough evaluation of both literature review and exploratory study in connection with the feedback from experts in the field.[151] As a result, it was possible to draw up several coding categories (variables) which are used to identify and record various text-based information contained in the domestic rulings.

In this study, the concept of the treatment of the ECJ's precedents is captured by four main categories: *applicability* of the precedent, *engagement* with the precedent,

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148 Regarding the last category, see mainly Grainne De Burca, 'International Law before the Courts: The EU and the US Compared' (2015) 55 Virginia Journal of International Law 685; and Wayne Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 Fordham International Law Journal 595.

149 These rulings were only identified in the Czech database as EU law cases.

150 Bond notes that '[t]he questions thus anchor the investigation and serve to guide the coding of the indicators as they are found in the data.' In: Bond (n 145) 483.

151 For the provided feedback, I am grateful mostly to mu supervisor, members of JUSTIN, and members of the PGR EU Law Discussion Group.

technique of application of the precedent, and *cited part* of the precedent. Apart from identifying how actively and creatively domestic courts work with the ECJ precedents, the categories aim to reveal how significant role the ECJ's precedents play in the domestic courts' reasoning and whether they substantively affect the outcomes of the domestic cases. Last but not least, the categories also cover the 'other side of the coin' through recording whether the national judges cite the operative outcomes of the ECJ's reasoning or whether they rather refer to individual passages of the ECJ's reasoning. In what follows I will briefly describe all four categories while providing several apt examples. Finally, some additional categories that are recorded will be briefly mentioned.

4.2.2.1 Applicability

The concept of applicability captures the decision of a domestic court regarding the applicability of the ECJ's precedent in the case at hand. The aim of this category is to identify various positions which domestic courts may adapt towards a particular precedent.

The fact that a domestic court cites the precedent does not necessarily mean that the conclusions/rules contained in the precedent are in fact used to solve the legal questions of a case. This category should help us identify cases in which a domestic court decides to follow the precedent and thus *stricto sensu* implement the ECJ's doctrine. On the other hand, the instances in which the domestic court ignores the precedents invoked by the parties or where it excludes the applicability of the ECJ's precedent are quite significant as they may reveal potential forms of pushback and backlash against the authority of the ECJ. Nevertheless, the cases might also be distinguished due to different factual or legal

background. In order to capture such forms, the following five proxy categories were developed.

Ignoring: It has been firmly recognised that it matters in which part of the domestic ruling the precedent is cited. Indeed, the premise goes as follows: if the reference does not appear in the court's substantive argumentative reasoning part of the opinion, but it is in the parts summarizing the factual background or submissions of the parties instead, it does not have the capacity to influence the core dispute underlying the case'.[152]

A unique reference is coded as 'ignoring' if the domestic court omits to refer to the ECJ's precedent in the argumentative part of the reasoning altogether even though that precedent has been invoked by one of the parties to the dispute in the summary of their arguments. This category allows us to record instances where national judges do not react to arguments of the parties and rather choose to avoid the engagement with the ECJ's doctrine.

Distinguishing: A unique reference is coded as 'distinguishing' if a domestic court cites the precedent in the reasoning part of its decision, but it distinguishes the precedent from the case at hand due to various factual circumstances or various applicable legislation. This means that the domestic court explicitly explains in which (factual or legal) aspects is the present case different than the case decided by the ECJ.

> Example: Decision of the Municipal Court in Prague No. 10 Af 20/2019, para 56:
>
> The municipal court stated in the argumentative part of the decision: 'Unlike in the above-mentioned case examined by the ECJ, the court did not find the existence of exceptional circumstances which would in any way point to the conclusion that the rules contained in the new customs code should also be applied to legal relations arising before those substantive rules entered into

152 Šipulová, Smekal and Janovský (n 103) 143.

> force. In the court's view, there is no presumption emphasised by the settled case-law referred to in para 21 of the ECJ's judgment *Beemsteboer Coldstore Services BV*, since neither the wording, nor the purpose or the structure of the rules governing of the conditions for remission of customs duties according to the new customs code do imply that they are intended to have such an effect.'

Refusal-overruling: A unique reference to the to the ECJ's precedent is coded as 'refusal-overruling' if a domestic court cites the precedent in the reasoning part of the decision, but it explicitly refuses to apply the precedent because the ECJ had previously overruled the precedent. This means that the domestic court refuses to apply the precedent not because it would question the authority of the ECJ, but because the cited precedent is simply outdated.

> Example: Hypothetical decision:
>
> The domestic court would state in the argumentative part of the decision: 'The conclusion that criminal courts are obliged to disapply certain provisions of the Criminal Code (which provide that the interruption of criminal proceedings concerning serious fraud in relation to VAT had the effect of extending the limitation period by only a quarter of its initial duration) stipulated in the Judgment of 8 September 2015, *Taricco and Others*, Case No. C-105/14, cannot be applied in the present case because the ECJ later overruled this conclusion it the Judgment of 5 December 2017. *M.A.S. and M.B.* Case No. C-42/17'.

Refusal-authority: A unique reference to the to the ECJ's precedent is coded as 'refusal-authority' if the domestic court cites the precedent in the reasoning part of the decision, but it explicitly refuses to apply the precedent because it explicitly questions the authority of the ECJ. These are cases which represent open backlash of the domestic court against the ECJ. Typically, cases like this will be unique and they will be connected to the use of *ultra vires* and *constitutional/national identity* doctrines.

Example: Judgment of the Czech Constitutional Court of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*:

The CCC stated in the argumentative part of the decision: '[…]we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*."

Application: A unique reference to the to the ECJ's precedent is coded as 'application' if a domestic court cites the precedent in the reasoning part of the decision and it applies the precedent to the case at hand. This is 'default category' which means that if no other categories apply, the reference is automatically coded as 'application'.

Example: Decision of the SAC No. 1 As 387/2019-56, para 31:

The SAC stated in the argumentative part of the decision: 'A license plate can be analogically compared to an IP address which is also only connected to certain device. Nevertheless, it [an IP address] is piece of personal data because it enables the identification of a particular natural person who uses that device (confer the Judgement of the Court of Justice of the European Union of 24. 11. 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*, C-70/10, para 51, and […]).'

4.2.2.2 Engagement

The concept of engagement captures the degree of interaction between domestic courts and the cited ECJ's precedents. The aim of this category is to find out whether domestic courts merely refer to the ECJ's case-law without having discussion on the actual content of the precedent, or whether they in fact pro-actively approach the content of the precedents and thus engage in a form of inter-judicial dialogue. In order to capture various forms of engagement, the following four proxy categories were developed.

Latent engagement: A unique reference to the to the ECJ's precedent is coded as 'latent engagement' if the domestic court cites the precedent in the reasoning part of the decision only indirectly as part of another court's case-law, typically via the SAC's, CCC's, ECH's or ECtHR's decision which already interpreted the ECJ precedent before. The latent engagement represents the most passive form of citation as the domestic court does not directly apply the precedent but rather consumes the previously processed information of other actors. The concept allows to trace instances where national judges rely on the authority of typically higher courts in the judicial hierarchy.

Example: Decision of the SAC No. 2 Azs 356/2019-43, para 16:

> The SAC stated in the argumentative part of the decision: 'As the Supreme Administrative Court repeated in the past: "[…] In this way, the Dublin system aims to avoid or even exclude a phenomenon called 'forum shopping', or rather 'asylum shopping' (confer for instance judgement of the Grand Chamber of the European Court of 21. 12. 2011, in joint cases *N.S. and Others*, C-411/10, and *M.E. and Others*, C-493/10, para 79"'

Passive engagement: A unique reference is coded as 'passive engagement' if the domestic court directly cites the precedent in the reasoning part of the decision. When citing the case, the domestic court does not go beyond stipulation of conclusions and statements contained in the precedent. In other words, it does not describe the factual or legal background or wider context of the case. This is 'default category' which means that if no other categories apply, the reference is coded as 'passive engagement'.

Example: Decision of the SAC No. 1 As 387/2019-56, para 16:

> The SAC stated in the argumentative part of the decision: 'The requirement of prioritisation of the objective approach over the subjective one follows from the wide interpretation of the definition of the notion 'personal information' (see para 26 of the recital of the Directive 95/46/EC and the Judgement of

> the Court of Justice of the European Union of 20. 12. 2017, *Peter Nowak v. Data Protection Commissioner*, No. C-434/16, para 34).'

Active engagement: A unique reference is coded as 'active engagement' if the domestic court directly cites the precedent in the reasoning part of the decision and further describes the factual or legal context of the precedent. This means, that the domestic does not merely state the conclusion/rule/opinion contained in the precedent but goes beyond and actively describes factual circumstances of the case or legal rules that were applied in that case. Typically, the domestic court describes the context of the case in order to further explain the conclusion/rule which it derived out of the precedent.

> Example: Decision of the SAC No. 10 Af 20/2019-140, para 53:
>
> The SAC stated in the argumentative part of the decision: 'In the Judgment of 9. 3. 2006 Case No C-293/04, *Beemsteboer Coldstore Services BV*, the ECJ assessed the applicability of the amended version of Article 220 para 2 letter b) of the old customs codex (as amended by the Regulation of the European Parliament and Council (EC) No. 2700/2000 of 16 November 2000) to a customs debt which was incurred before that regulation entered into force. In the reasoning of the judgement, the ECJ explicitly stated that "to the extent to which Article 220(2)(b) of the Customs Code governs the conditions under which a person liable avoids the post-clearance recovery of import duties as the result of an error on the part of the customs authorities, it enacts a substantive rule. As a result, that provision should not, in principle, apply to situations existing before it entered into force'."

Critical engagement: A unique reference is coded as 'critical engagement' if the domestic court directly cites the precedent in the reasoning part of the decision and it also explicitly criticises the reasoning or result of that precedent. In comparison to the 'active engagement', that the domestic does not merely describes factual or legal context of the case, but it also adds its subjective assessment of the reasoning or result of the case. Typically, the domestic court criticises the Court for making errors in judgement, or for overstepping its competence. The variety of potential situations is obviously quite wide, but the decisive factor

is the occurrence of explicit subjective assessment from the side of the domestic court. It is obvious that cases in which lower domestic courts criticised the ECJ's authority will be unique but certain degree of criticism may be expected even from the ordinary courts. In case of doubt regarding the clear division between 'active engagement' and 'critical engagement', the former prevails.

> Example: Judgment of the Czech Constitutional Court of 31.1. 2012, Pl. ÚS 5/12, Slovak Pensions XVII:
>
> The CCC stated in the argumentative part of the decision with regards to the Judgment of the CJEU of 22 June 2011, *Landtova*, C-399/09: '[…]Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.'

4.2.2.3 Technique of Application

The concept of technique of application identifies various ways in which domestic courts apply the ECJ's precedent in their reasoning. The aim of this category is to assess the impact of the ECJ's precedent on the case at hand. If a domestic court decides to apply the precedent, it can use the precedent in numerous ways which have different significance with regards to the domestic court's reasoning and potentially the outcome of the case. The reference may merely support the reasoning of the domestic court and thus have purely formalistic and 'ornamental' argumentative function. Conversely, the reference may represent the 'core argument' in the reasoning of the court.[153] In order to operationalise the degree of significance, numerous proxy variables are used. These proxy variables represent various techniques by which the domestic

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[153] See Petrov (n 103).

court can use the precedent in its reasoning. Such techniques can be in turn 'translated' into the two main degrees of significance – supportive and substantive.[154]

Informative background: A unique reference is coded as 'informative background' if a domestic court uses the precedent to set informative background of the reasoning. Typically, the domestic court cites the precedent in the beginning of its reasoning to introduce or specify the legal context of the applied legislation. In this category, the domestic court does not explicitly consider the facts of the case (be it legal or factual) vis-à-vis the conclusions/rule of the precedent. In other words, the domestic court does not conduct the process of subsumption. As a result, the reference has rather symbolic effect on the court's reasoning.

Example: Decision of the SAC No. 1 As 387/2019, para 26:

> The SAC stated in the argumentative part of the decision: 'The requirement of prioritisation of the objective approach over the subjective one follows from the wide interpretation of the definition of the notion 'personal information' (see para 26 of the recital of the Directive 95/46/EC and the Judgement of the Court of Justice of the European Union of 20. 12. 2017, *Peter Nowak v. Data Protection Commissioner*, No. C-434/16, para 34).'

Legitimisation of outcome: A unique reference is coded as 'legitimisation of national law' if the domestic court uses the precedent to justify specific outcome. This category represents the instances where the domestic court reaches a final or partial conclusion within its reasoning based on the national or EU legislation (or national case-law) while it uses the ECJ's precedent in order to validate that conclusion. To put it simply, the domestic court aims to show that the ECJ's case-law is in line with that conclusion or at least is not in conflict with it. In that way, the ECJ's authority gives 'blessing' to the conclusions derived from other sources of law. Typically, the reference is supposed to add persuasive value to the reached

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[154] Šipulová, Smekal and Janovský (n 104) 154.

outcome. In contrast to the 'informative background', the precedent is cited *after* certain conclusion is reached.

Example: Hypothetical decision:

> The court would state in the argumentative part of the decision: 'The court concludes in accordance with Section 4/a of the Personal Data Protection Act, the notion 'personal data' includes also the IP address. Such conclusion is in line with the Judgement of the Court of Justice of the European Union of 24. 11. 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*, C-70/10, para 51'.

EU-friendly interpretation: A unique reference is coded as 'EU-friendly interpretation' if a domestic court directly uses the ECJ's precedent to interpret national law in an EU-friendly way. This category represents the cases in which the domestic court substantively uses the precedent to interpret and apply national legislative rules. The decisive factor here is that the domestic court explicitly considers the facts of the case (be it legal or factual) vis-à-vis the conclusion/rule of the precedent and this subsumption process then results in application of domestic legislation in line with that conclusion/rule. In other words, the domestic courts concludes that national legislation in question must be interpreted in certain way because of the existence of the ECJ's precedent. In that way, the Court's case-law substantively affects the arguments of the national court.

Example: Decision of the SAC No. 4 Azs 461/2019-49, para 23:

> The SAC stated that: 'Although Section 124 of the Act on the Residence of Foreign Nationals does not work with the notion of vulnerable person, Article 16 of the Return Directive dealing with conditions of detention has a direct effect as it follows from the Judgement of 28 April 2011 in Case No C-61/11 PPU, *El Dridi*, and thus, it is necessary to take it into consideration in present case as well.'

EU law interpretation: A unique reference is coded as 'EU law interpretation' if the domestic court uses the precedent to interpret original EU law source.

The characteristics of this category are the same as in case of 'EU-friendly interpretation' with the difference that the domestic courts concludes that original EU legislation in question must be interpreted in certain way because of the existence of the ECJ's precedent. Thus, the ECJ's authority does not directly influence or change national legal sources as it is the EU legislation which is applied in the case at hand.

> Example: Judgement of the Regional Court in Prague No. 48 A 2/2020- 43, para 18:
>
> The regional court stated: 'Nevertheless, it follows from the later ECJ's case-law (Judgement of 13. 9. 2017, Khir Amayry, C-60/16) that "Article 28(3) of the Dublin III Regulation must be interpreted as meaning that the six week period beginning from the moment when the appeal or review no longer has suspensive effective, established by that provision, also applies when the suspension of the execution of the transfer decision was not specifically requested by the person concerned (para 73)", and that "the detention may also remain necessary in that situation pending the lodging of an appeal or a review" […]'.

National law exclusion: A unique reference is coded as 'national law exclusion' if a domestic court uses the ECJ's precedent to exclude application of national law. In these cases, the domestic court detects a conflict between the national law and the conclusion stipulated in the precedent. As a result, the domestic court refuses to apply the provision of national law and applies EU law instead. Typically, these cases represent the use of the supremacy principle.

> Example: Hypothetical example:
>
> The SAC would state that: 'Section 87l/1/e of the Act on the Residence of Foreign Nationals in the Czech Republic states that "*The Ministry shall revoke a permanent residence permit if the holder of the permit has been convicted by a court of the Czech Republic of a deliberate crime and sentenced to an unconditional term of imprisonment.*" On the other hand, Article 27 para 2 of the Directive No. 2004/38 states that "*Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*" Furthermore, in its Judgement

> of 21 November 2011 C-145/09 *Tsakouridis*, the ECJ stated that in the application of that Directive, a balance must be struck between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed by reference to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending. As a result, both provisions are evidently in conflict, and the latter cannot be applied in the present case.'

EU law exclusion: A unique reference is coded as 'EU law exclusion' if the domestic court uses the ECJ's precedent to exclude application of EU law. The domestic court applies the ECJ's conclusion in order to show that the EU law in fact does not cover the factual circumstances or legal questions such as those in the case at hand. The category differs from the 'distinguishing' because in this case, it is the ECJ's precedent which excludes applicability of EU law to certain type of cases. Furthermore, if the court distinguishes the precedent from the case at hand, it does not necessarily mean that it will not apply EU law as such.

Example: Hypothetical example:

> The court would state that: 'In the Judgement of 9 October 2014, Case No. C-376/14 PPU, *C v M*, para 49, the CJEU explicitly stipulated that "*It is evident, therefore, from both Article 2(11) and Article 11(1) of the Regulation, that the latter article can be applied for the purposes of granting an application for return only if the child was, immediately before the alleged wrongful retention, habitually resident in the Member State of origin*." Since the child in the present case was not habitually resident in the Member State of origin immediately before the alleged wrongful retention, Article 11(1) of the Regulation cannot apply.'

Here, it should be noted that the division between individual proxy variables might not always be clear enough (e.g., the difference between EU-friendly interpretation of national law and interpretation of EU law might be tricky). This should not undermine the feasibility of the analysis as the primary goal is to identify various levels of significance that the precedent has in a particular case – supportive or substantive. The division into the detailed individual categories serves mainly as means to avoid rather straightforward division between the two levels of significance which may turn out to be rather arbitrary and subjective. Furthermore,

trying to identify the cases in which the ECJ's precedents directly influenced the interpretation of national law might bring detailed insights about the degree of authority the ECJ enjoys.

4.2.2.4 Cited Part

This category examines the 'other side' of the citation. In particular, it aims to record the part of the ECJ's precedent which national judges reason with. This might be fruitful in order to assess how national judges work with the operative part of the ruling which is – in traditional view – the binding part of the ECJ's judgements, and how they engage with conclusions stipulated in the justification part of those judgements. In that way, we will be able to explore the authority of the ECJ's stipulations which do not directly represent the outcome of the decided case.

In order to capture this category, the references are either coded as 'general reference' (where the domestic court refers to the operative part of the ECJ's precedent or where the cited part is not specified) or as 'reasoning' (where the domestic court specifically refers to the justification part of the precedent).

4.2.2.5 Other Categories

Apart from the above-mentioned four main concepts which should capture the concept of domestic courts' treatment of ECJ's precedents (for an overview see Table 5), some additional pieces of information are gathered in the course of reading of the selected cases. These should help us with the evaluation of the results.

As these complementary categories represent rather straightforward 'metadata' about the domestic cases, they are not introduced here in detail. They include the following: initiator of the proceedings, subject-matter, successful party, outcome of the case, result of the review.

<table>
<tr><th colspan="5">Treatment of the ECJ's Precedents</th></tr>
<tr><td rowspan="4">Engagement</td><td rowspan="4">How does the domestic court interact with the ECJ's precedent?</td><td>The precedent is cited indirectly as part of other court's case-law.</td><td colspan="2">latent</td></tr>
<tr><td>Domestic court merely cites the precedent.</td><td colspan="2">passive</td></tr>
<tr><td>Domestic court further describes the factual or legal context of the ECJ's precedent.</td><td colspan="2">active</td></tr>
<tr><td>National court explicitly criticises the reasoning/result of the ECJ's precedent.</td><td colspan="2">critical</td></tr>
<tr><td rowspan="5">Applicability</td><td rowspan="5">Does the domestic court follow the ECJ's precedent?</td><td>Domestic court ignores the ECJ's precedent altogether even though it has been invoked by one of the parties.</td><td colspan="2">ignoring</td></tr>
<tr><td>Domestic court distinguishes the ECJ's precedent from the case at hand due to differences in factual circumstances or applicable laws.</td><td colspan="2">distinguishing</td></tr>
<tr><td>Domestic court explicitly refuses to apply the ECJ's precedent because it had been overruled by the ECJ.</td><td colspan="2">refusal-overruling</td></tr>
<tr><td>Domestic court explicitly refuses to apply the ECJ's precedent because it questions the authority of the Court.</td><td colspan="2">refusal-authority</td></tr>
<tr><td>Domestic court applies the ECJ's precedent.</td><td colspan="2">application</td></tr>
<tr><td rowspan="6">Technique of Application</td><td rowspan="6">How does the national court apply the ECJ's precedent in its reasoning?</td><td>Domestic court uses the ECJ's precedent to set informative background of the reasoning.</td><td>informative background</td><td rowspan="2">supportive significance</td></tr>
<tr><td>Domestic court uses the ECJ's precedent to legitimise its conclusions.</td><td>legitimisation of outcome</td></tr>
<tr><td>Domestic court uses the ECJ's precedent to interpret national law in EU-friendly way.</td><td>EU-friendly interpretation</td><td rowspan="4">substantive significance</td></tr>
<tr><td>Domestic court uses the ECJ's precedent to interpret original EU law source.</td><td>EU-law interpretation</td></tr>
<tr><td>Domestic court uses the ECJ's precedent to exclude application of national law.</td><td>national law exclusion</td></tr>
<tr><td>Domestic court uses the ECJ's precedent to exclude application of the original EU law source.</td><td>EU law exclusion</td></tr>
<tr><td rowspan="2">Cited Part</td><td rowspan="2">Which part of the precedent is applied?</td><td>Domestic court cites a passage from the reasoning part of the ECJ's ruling.</td><td colspan="2">reasoning</td></tr>
<tr><td>National court cites the operative part of the ECJ's ruling or refers to the judgement in general.</td><td colspan="2">general reference</td></tr>
</table>

Table 5

4.2.3 Coding Process and Reliability Concerns

Once the treatment patterns were defined, it was possible to come up with a coding scheme and a codebook. The coding scheme, together with the codebook, lies down the coding rules, and hence specifies which elements of the content of a text – mostly described in main categories – are recorded and how.[155] To put it simply, the codebook allows the researcher to record examined treatment patterns with regard to each unique reference to the ECJ's precedent and individual decision of the domestic court in a systematic matter.

Due to the limited space, the full codebook is not included here, however, the definitions of the recorded categories pretty much mirror the definitions provided in the previous section. The codebook includes the typical examples of categories as well so the 'coder' might adhere to them when going through the references. Notably, the actual coding scheme is rather technical and provides detailed instructions how to record the categories into the spreadsheets.

The point of using the codebook when analysing the domestic courts' references to the previous ECJ's case-law is to ensure that researchers are reasonably consistent in recording the categories. Obviously, , some categories are more clear-cut than others – for instance, it is more straightforward to record the outcome of a case than the technique of application of the precedent. Nevertheless, even though certain degree of ambiguity of the decisions is inevitable, using categories as 'codes' represents good research practise which aims to safeguard personal views of the researchers do not bias their work too much. As Hall and Wright aptly put it,

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155 See Marna-Rose Hartmann (n 147) 108. See also Krippendorff (n 142) 129-130.

'the reason systematic content analysis is done at all is the claim of reproducibility, that other researchers using the same methods achieve approximately the same results' [156]

Now, due to the limited resources and scope of this pilot study, I have coded the cases myself and not conducted any reliability tests which would include other coders. This should not, however, discredit the results of the analysis. First, I have built up the categories from the previous similar precedent studies which used the content analysis as well and thus, it is reasonable to expect that other researchers should be able to follow the instructions in the same manner. Secondly, I believe that I have presented the categories in sufficient detail in order to allow others to challenge and verify the reliability. Since the purpose of this pilot study is to induce reproduction of the inquiry with regard to other courts and Member States, it can be expected that the instructions and results will be further scrutinised and possibly adjusted.

4.2.4 Results

It is now possible to start with some general findings about the studied collection of EU law cases. All the 192 EU law decisions of the Supreme Administrative Court contain 385 references to the ECJ's precedents. As a result, this the total number of our analysed units. Unlike the statistics from the *macro-level analysis*, this number do not cover only the unique references, i.e., references to unique ECJ precedents per case, but all the references invoked by the SAC. On average, the SAC judges referred to the ECJ's precedents twice per EU law case.

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[156] See Hall and Wright (n 109), 112.

It is striking that in about 55 % of all EU law cases, the SAC did not cite any ECJ's precedents whatsoever. This clearly supports our finding from the *macro-level* according to which the SAC often adjudicates EU law issues without evoking the ECJ's previous judgements whatsoever. Such finding is even more pressing if one considers that the analysed dataset contains the EU law cases which the SAC itself identified as EU law cases. In other words, in these cases, the SAC solves hard EU law questions, and it does not adhere to ECJ's authority in more than half of them.

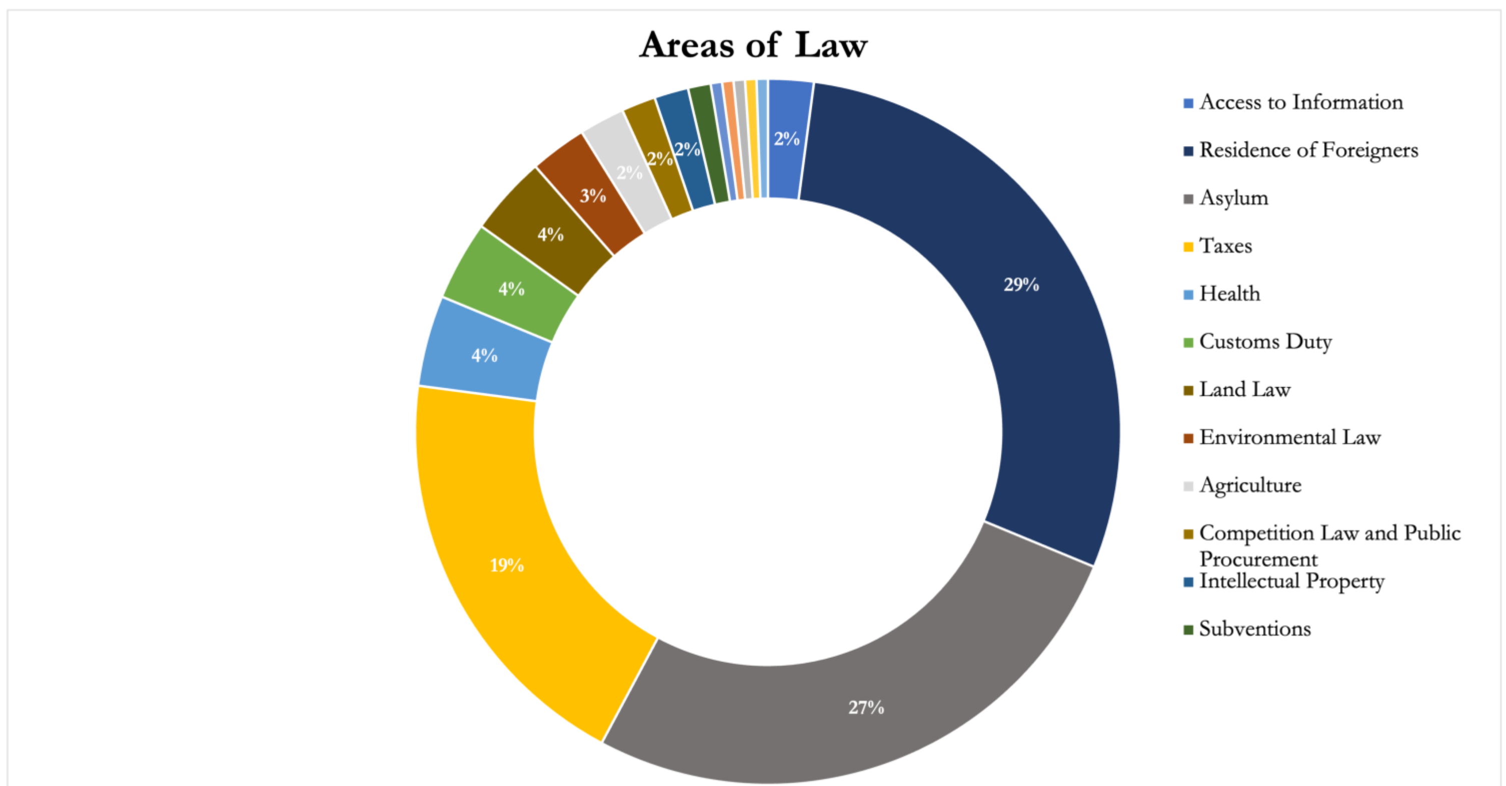

Figure 6

As to other generalities, first Figure 6 illustrates the distribution of legal fields of the examined EU law cases. As we can see, mainly three topics stand out – residence of foreigners[157], asylum, and taxes. Perhaps surprisingly, in 2020, there were not so many EU

[157] These are the cases which deal with the resident status of non-EU nationals.

law cases dealing with environmental law questions – together with other fields, they only represented small portion of EU law cases. It is important to highlight that although the diversity of EU law fields is not high, it will still allow us to explore the ECJ's authority in those various fields which obviously represent majority of the EU law agenda of the SAC.

Finally, it is also worthwhile to mention who *actually* benefited from the EU law litigation in 2020. A public entity representing the government/state was the successful party in 65 % of all analysed cases; individuals won 20 %, private corporations 14%, and NGOs only 1 % of all the EU law cases.

In what follows, I will now present the findings regarding the four major variables capturing the domestic courts' treatment of the ECJ's precedents.

4.2.4.1 Applicability

Let us first explore the ways in which the SAC *applied* the cited ECJ's precedents first. Perhaps surprisingly, Figure 7 shows the SAC's ignored 32 references invoked by the parties of the dispute. This means that SAC's judges did not react to one third of references regarding which the parties explicitly expressed their opinions on the applicability (they only did so in only about one fourth of instances).

One might see these results as evidence of bad practice of the SAC judges who do not react in any way to the arguments raised by other litigation actors. However, such fairly common practice of 'ghosting' the litigants arguments would be surprising considering that the SAC has the reputation of addressing the major arguments of the litigants quite thoroughly. This reputation is supported by the fact that only in 11 cases, the litigants tried to seek review of the SAC's decision at the Czech Constitutional Court in which competence is (among other

things) to consider whether the decision in question violated applicant's right to a fair process (which includes the obligation for courts to give sufficient reasons). Thus, it seems more plausible to claim that the litigants in fact do not do a very good job in identifying the relevant ECJ case-law and thus, the SAC simply disregards those irrelevant references in the substantive part of its decisions. In any event, one can conclude that the parties in fact tried to bring more ECJ's precedents to the EU litigation than the SAC judges were willing to accept.

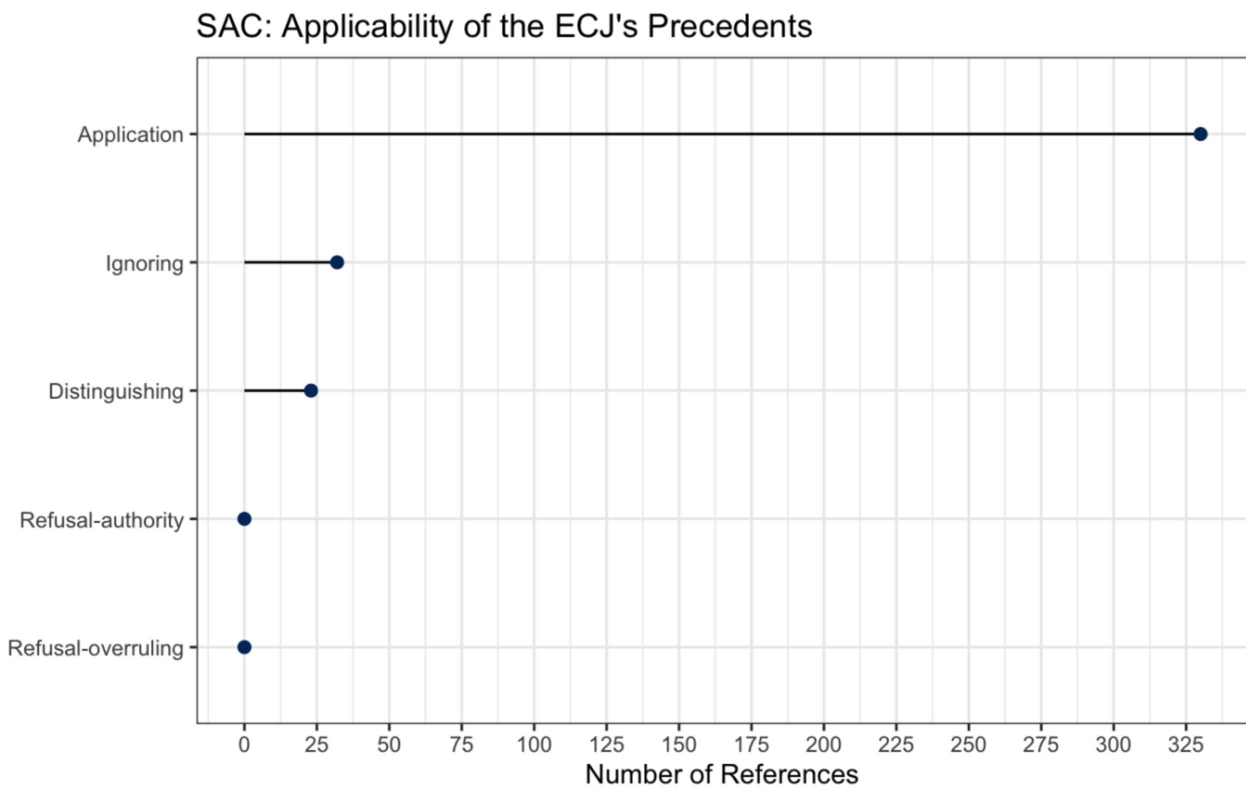

Figure 7

As to other applicability proxies – Figure 7 illustrates that the SAC *applied* the referenced ECJ's precedents to the dispute at hand in majority of the instances (86 %). It only distinguished only about 6 % of the referenced judgements of the Court which suggests that the SAC's strategy is not to undermine the ECJ's authority by excluding its case-law by means of 'mining' and highlighting different factual and legal backgrounds of the cases in question. Since in 2020, the SAC did not openly refuse to apply the ECJ's precedent

in the EU law case while questioning ECJ's authority, it might be plausible to claim that in general, the ECJ's precedents enjoy fairly high normative force. At the very least, these numbers taken together suggest that neither instances of open backlash, nor evident pushback against the normative authority of the Luxembourg's decisions are taking place at the top level of Czech administrative judiciary beyond very rare extreme instances.

4.2.4.2 Engagement

Now, how do SAC judges *engage* with the cited Luxembourg precedents? It is clear from Figure 8 that the SAC judges engage rather passively with majority of the references. In almost 71 % instances, they merely cite and do not go beyond stipulation of conclusions and statements contained in the individual precedent.

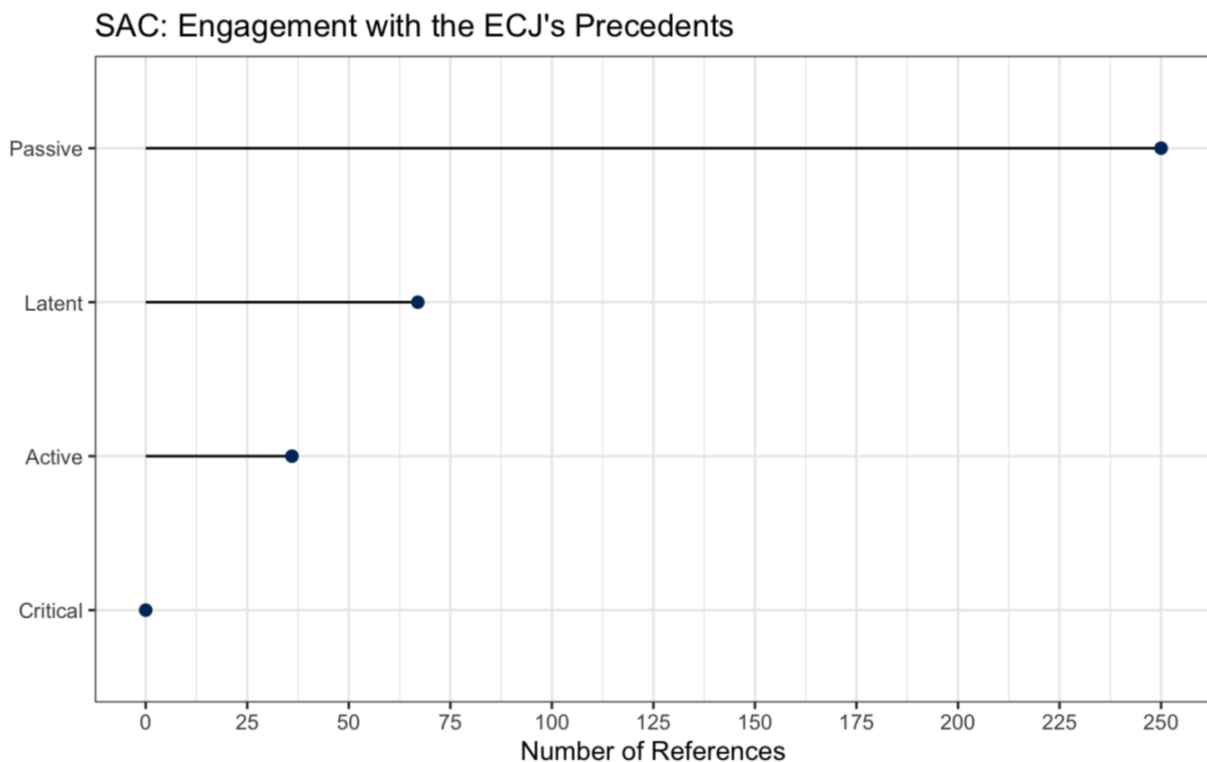

Figure 8

Such number might imply the 'textualization of the precedent' theory according to which judges mostly treat the previous case-law as legislative text. In that way, the SAC judges mostly do not explore the factual or legal background of the ECJ's precedents. This seems surprising as one could expect generally activist and high-quality supreme court judges to creatively engage with individual ECJ judgements more often as they enjoy wider resources (law clerks, analytical departments etc.) to spend on detailed debates regarding the ECJ's case-law. Consequently, such practise implies quite a strong authority of ECJ's holdings.

In that regard, it may be even more striking that the SAC judges also cited the ECJ's case-law indirectly (latently) in fairly high number of instances (in almost 1/5 of them). In those instances, it is not primarily the ECJ's reasoning which guides the lower judges' decision-making; it is rather the interpretation of such reasoning by other courts.

As there is no 'higher' court above the SAC in the judicial hierarchy (except the Constitutional Court and the ECtHR which – as it is well known – apply EU law on somewhat infrequent basis), it can be expected that the SAC judges usually cite the ECJ's precedents via previous judgements of their colleagues from the court. In that way, SAC judges fulfil an internal 'gatekeeping' role with regards to the ECJ's doctrines *vis-à-vis* their colleagues. More importantly, however, the ECJ references get reproduced over time through citation of other ECJ's precedents as well. These are instances where the SAC cites one ECJ precedent which contains references to other Court's case-law. As a result, one might conclude that the practice of 'string citations' or 'LEGO technique' of reasoning (which are not easily detected by the *macro-level* analysis) are not only common in the reasoning of the ECJ, but also occurs fairly often in the domestic adjudication.

Indeed, it is apparent from Figure 8 that SAC judges engaged actively only in the remaining 10 % of the references. Interestingly enough, judges engaged more actively with the references when they distinguished some of the precedents from the disputes in question. In fact, in 10 out of 23 distinguishing instances, SAC judges described the factual or legal background of the precedent. This seems to reflect the premise of Komarek's theory of reasoning with previous cases which expects that '[o]nce the reasoner wants to contest the rule as formulated by the previous court […], the legislative model will be replaced by the case-bound model.'[158]

Nonetheless, it is apparent for instance from Judgement of the SAC of 19 August 2020 No. 2 Azs 241/2020-29, that even the SAC judges sometimes do not 'switch' the modes of reasoning and they do not explain the reasons for distinguishing sufficiently. In that case, in para 31, judges simply rejected to apply the invoked ECJ's case-law because 'it originated from different factual circumstances'. Such reasoning does not seem very transparent. Thus, the quality of the explanation with regards the choice not to apply the ECJ's case-law in the 13 remaining instances should be strictly scrutinised.

Finally, Figure 8 also shows that SAC never openly criticised the ECJ precedents' outcomes or reasoning. Once again, this weakens the speculations about the extensive open pushback against the ECJ's authority taking place within the top levels of Czech judiciary.

4.2.4.3 Technique of Application

At this place, let us now explore the degree of *influence* the cited ECJ precedents had on the SAC's rulings. Figure 9 depicts that the ECJ's references played substantive role in almost

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158 Komárek (n 95) 161.

69 % of the instances. Indeed, only in slightly less than 1/3 of instances, SAC judges cited ECJ's precedent in mere symbolic manner in order to either provide informative background or legitimise the outcome.

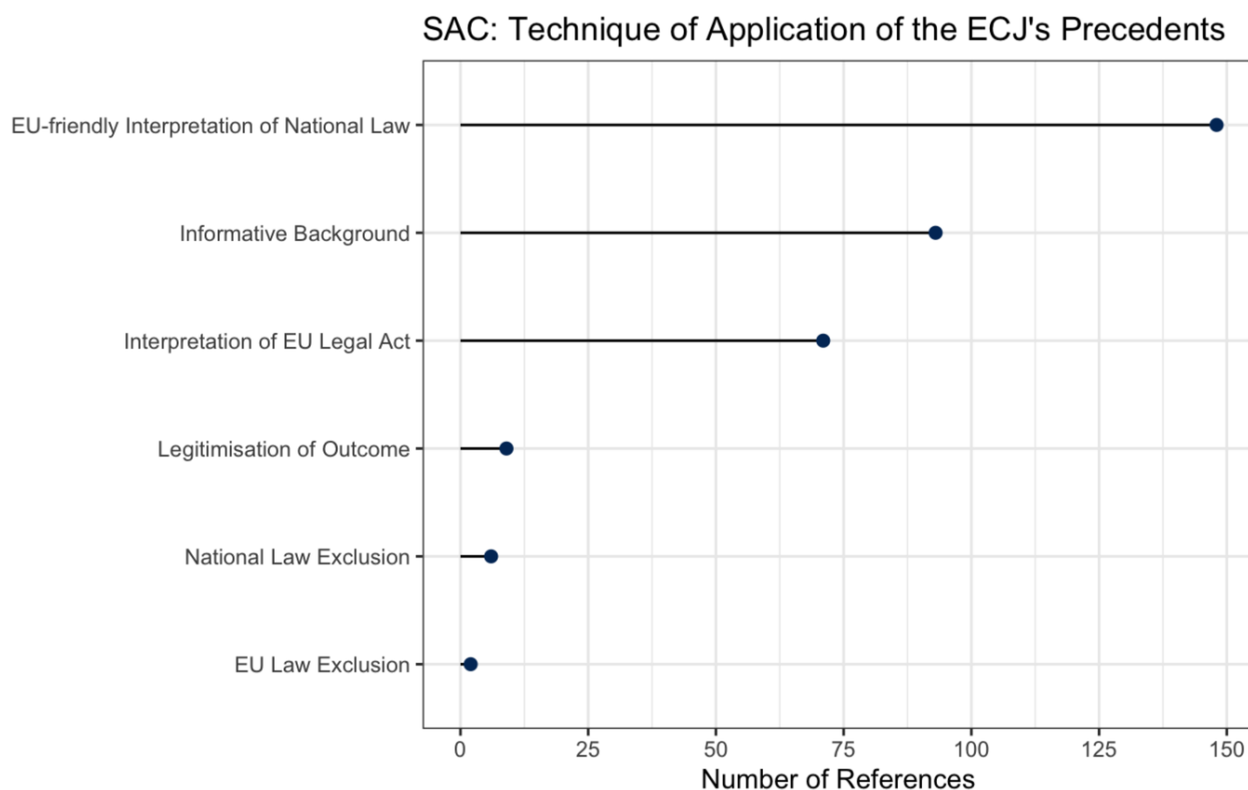

Figure 9

The fact that the SAC's judges mostly do not apply the ECJ's case-law purely in the supportive manner (by setting informative background, or by legitimising the outcomes) could support the view that previous ECJ's case-law enjoys *de facto* authority within domestic adjudication. Especially when considering the fact that the SAC judges mostly passively accept the Court's pronouncements, the effects of the ECJ's doctrines seem to be substantial even when it comes to higher levels of national judiciary.

With regards the substantive influence, two practices stand out – EU-friendly interpretation and interpretation of EU legal acts. It is especially intriguing that in 45 % of the

instances, national judges used the ECJ's precedent to interpret the national law in EU-friendly manner. This finding shed new light on the importance of the principle of consistent interpretation as well as on the scope of *Europeanisation* of national legal orders. It is evident that majority of substantive change 'creeps' into national orders through the interpretative processes.

Nonetheless, it is important to highlight that these descriptive statistics cannot provide us with information whether domestic judges in fact comply with the ECJ's preferences materially, i.e., whether they 'conform' with the outcomes desired by the ECJ. They only supply us with information about *how* domestic judges choose to work with the ECJ's doctrines. Thus, even though one could expect that supreme courts would be more eager to limit the influence of the ECJ by citing its case-law in purely supportive manner, our analysis shows that this is not the SAC's strategy. On the other hand, it is plausible to claim that the way in which the SAC interprets the ECJ's case-law matters as these interpretations indeed substantively influence the applied national legal norms.

Additionally, it should be pointed out that the SAC used the ECJ's case-law 6 times to exclude application of national law. With these references, SAC judges detected a conflict between the national law and the conclusion stipulated in the precedent. Even though such instances are quite unique in comparison to the use of rest of the references, they suggest that the SAC as the supreme court in the national hierarchy is also willing to review the compatibility of EU and national rules openly. In that regard, such cases represent apt candidates for a deeper analysis at the *micro-level* of our analysis.

Overall, these findings on the SAC's technique of application of the ECJ's precedents seem to support our previous findings at *macro-level* according to which the SAC does not often

openly frame issues of conflict of legal orders in the terms of absolute incompatibility where it would have to adhere to the principle of primacy but rather uses doctrines of 'direct effect' and 'consistent interpretation'.[159]

Importantly, these findings are crucial due to considerations of legal certainty and EU law uniformity. If SAC judges identify and decide the open conflict between EU law and national law in a clear-cut manner only on infrequent basis, the transparency and predictability of the application of EU law including ECJ's precedents might be side-lined. Certainly, interpreting specific national norms in individual cases according to the ECJ's doctrine might not be as 'visible' both to the public and to other relevant actors as it is in cases where national judges explicitly review the national legislation and declare in inapplicable in the case at hand due to the existing conflict with EU law legislation as interpreted by the Luxembourg Court.

4.2.4.4 Cited Part

Now, what about the parts of the decisions that the SAC usually works with? SAC judges cited particular passages from the *reasoning* of the ECJ's precedent in about 61 % of instances. This finding strengthens our above-mentioned speculations about the fairly high normative force of the Court's reasonings.

In particular, such findings are crucial when taken together with previous categories. Remember that domestic judges mostly accept the ECJ's conclusions passively and do not engage with them in detail. As a result, it is plausible to claim that there is a realistic possibility that what happens in a significant number of cases is that SAC judges 'cherry-pick'

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[159] See (n 135).

the individual sentences and conclusions from the reasoning of the Court. In that way, they isolate them from the core context of the original precedent.

This could lead to two important conclusions: First, considering that in majority of the instances, references play substantive role in the reasoning of domestic judges, the influence of ECJ's framing and wording of the reasoning might be greater than typically imagined. Secondly, since the reasoning of the ECJ's rulings necessarily contain more information than the operative parts, the discretion of national judges to 'choose' from various normative clues might be wider than originally preferred by the ECJ itself. As a result, the expectation that the ECJ can influence the degree of discretion of national judges by choices it makes in framing the outcomes of the precedents might be questioned. At the very least, Tridimas's famous categorisation of the ECJ's cases on 'outcome cases', 'guidance cases' and 'deference cases' might not be as straightforward as it may seem.[160]

4.2.4.5 Meso-Level Conclusions

To conclude this whole subsection up, the *meso-level* analysis provided us with several more nuanced insights regarding the Supreme Administrative Court's treatment of ECJ precedents. In particular, we explored four main concepts the purpose of which is to explain how national judges apply and engage with that case-law, how significant role the ECJ's precedents play in domestic courts' reasoning, and with which parts of the Luxembourg's opinions national judges usually work.

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[160] See Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 International Journal of Constitutional Law 740.

The analysis confirmed the 'hunch' from the *macro-level* according to which national judges quite often adjudicate EU law issues without evoking previous ECJ's judgements altogether. In general, SAC judges *applied* the referenced ECJ's precedents to the dispute at hand in majority of the instances. Thus, it seems that their strategy is not to undermine the ECJ's authority by distinguishing its case-law by means of 'mining' and highlighting different factual and legal backgrounds of the cases in question. On the other hand, the SAC *engaged* with references rather passively even though those citations substantively *influenced* the reasoning of the SAC in majority of instances. Finally, the mese-level analysis showed that domestic judges cited particular passages from the *reasoning* of the ECJ's precedent in significant number of instances. As a result, the way in which the ECJ frames its reasonings might be more important than typically imagined.

4.3 Micro-level Analysis: Cherry-Picking the Interesting Cases

Turning to the last *micro-level* level our analysis, let us now use the already gained understanding of the broader treatment patterns in order to identify and analyse the most interesting cases in depth. Due to the limited scope of this thesis, I chose to closely examine three domestic saliant cases from different areas – public procurement, taxation, and asylum – with the aim to demonstrate additional significant treatment patterns that could not be identified in the preceding stages.

At the *meso-level*, we have found that the technique of EU-friendly interpretation of national law prevails in instances where the SAC in fact refers to the ECJ's precedents. What the three chosen cases have in common is that they all demonstrate different and more sophisticated ways in which SAC judges approach the principle of consistent interpretation in saliant cases. In particular, they all show that domestic courts use another principle – that of national procedural autonomy[161] creatively enough to accommodate the effects of the ECJ's case-law.

4.3.1 Limits of the Principle of Consistent Interpretation

The first story illustrates how SAC judges use the principle of procedural autonomy to limit their obligation to interpret national law in EU-friendly way.

In Judgement of 19 May 2020 No. 10 As 156/2018-130, the SAC dealt with the following circumstances: The Regional Chamber of Commerce of Ustí nad Labem

161 For a good theoretical overview, see Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach' (2021) 23 Cambridge Yearbook of European Legal Studies 128.

(‘Chamber’) challenged the administrative decision of the Office for the Protection of Competition which imposed a fine on the Chamber as it allegedly entered into a contract without launching a procedure for the award of that contract in accordance with the Act on Public Procurement. The key question the SAC had to consider was whether the Chamber did or did not constitute a ‘body governed by public law’ as defined by the national regulation which implemented respective Directive 2004/18/EC.[162] According to that legislation, one of the definitional characteristics of such body is that it is ‘financed, for the most part, by the State […]’.

Reiterating the reasoning of the lower administrative court, the SAC referred in its reasoning to the ECJ’s *University of Cambridge* case which dealt with the interpretation of such financing means.[163]

However, the Chamber had claimed that the lower administrative court misapplied the ECJ’s *University of Cambridge* case as it did not take into account that the particular conclusions of the precedent concerned another type of body – a university – which pursues the specific purpose of meeting general interest needs, not having an industrial or commercial character as the Chamber does. In this regard, the Chamber claimed that unlike with Cambridge University, the majority of finances the Chamber received from the state did not in any way related to activities which would pursue the general interest and thus, it cannot be considered to be the body governed by public law.

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162 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

163 Case C-380/98 *University of Cambridge* [2000] ECR I-8035.

Now, in para 36 of the judgement, SAC judges plainly disregarded that Chamber's argument as they stated that they 'cannot take it into account' due to the national procedural rule which precludes them to consider new arguments which the applicants had not raised in the original proceedings before the lower administrative court even if they could. Such practice very well represents a way in which domestic judges can and perhaps try to avoid substantive application and engagement with the EU legislation as interpreted by the ECJ.

Firstly, it is highly questionable whether the domestic rule in fact precludes the applicants to argue that the reasoning of the lower administrative court regarding the ECJ's precedent was flawed. Where else should the party question the lower court's interpretation of EU law than at the 'appellate' level before the Supreme Administrative Court?

Secondly – leaving the national doctrinal peculiarities aside – remember that in accordance with the principle of consistent interpretation, national courts are expected to do 'whatever lies within their jurisdiction' and interpret domestic law 'as far as possible, in the light of the wording and the purpose' of relevant EU provisions to achieve the result pursued by the EU law.[164] Even though it remains formally for the Member States to create rules governing administrative litigation, under certain circumstances, EU law (as interpreted by the ECJ) precludes application of a domestic procedural rule whose effect is to prevent the national court from considering of its own motion whether a measure of domestic law is compatible with a provision of EU law.[165]

Consequently, one finds it problematic that the SAC plainly rejected the argument provided by the Chamber regarding the alternative interpretation of the ECJ's precedent

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164 See (n 14).

165 (n 18).

and only invoked national formal procedural rule without even acknowledging that under certain circumstances, EU requires national judges to at least consider the possibility of applying EU law to the fullest effect in a given case.

The point of this example is to show that the concept of national procedural autonomy might represent a 'hidden' path for domestic courts to limit Luxembourg's authority. Raising the principle of national procedural autonomy can be far less visible than case distinguishing or open criticism. As others have shown, similar and many other procedural rules exist in other Member States as well.[166] Thus, domestic judges' use of those rules should be scrutinised carefully since it enjoys wide potential for pushback against the ECJ – as the present case demonstrates.

4.3.2 The Principle of Consistent Interpretation as Means of Enforcement of the Settled Case-Law

The second example tells the opposite side of the story. It shows how SAC judges use the principle of consistent interpretation of ECJ's precedents to pressure compliance with its established case-law from the part of other state actors.

In Judgment of 12 June 2020 No. 5 As 219/2019-49, the SAC quashed the decisions of both the lower administrative court and the Ministry of Interior which refused the Kurdish applicant's request for international protection. In the course of its reasoning, the SAC cited its long-standing case-law interpreting among other things ECJ's precedents on notions such

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[166] Franziska Grashof, *National Procedural Autonomy Revisited: Consequences of Differences in National Administrative Litigation Rules for the Enforcement of European Union Environmental Law - The Case of the EIA Directive* (Europa Law Publishing 2015) 164-170.

as 'acts of physical or mental violence' or 'serious harm', and strictly pointed out that the reviewed decisions did not follow such established case-law.

However, what is more interesting is that at the end of its ruling, the SAC acknowledged that the instances of non-compliance with its long-standing case-law on the side of the Ministry of Interior have occurred too frequently in the past. Consequently, it 'threatened' the administrative body that should it not follow the SAC's binding opinion, administrative courts would have to grant the applicant the international protection on their own motion. Interestingly enough, the SAC recalled the *Torubarov* case in which the ECJ stated that in instances like these, national courts are required disapply the national law that would prohibit them from proceeding in that way.[167] In other words, compare to the first example, the SAC potentially chose to surpass the national procedural rules.

As a result, this approach demonstrates well that the SAC does not hesitate to use the principle of consistent interpretation of ECJ precedents to pressure administrative bodies to comply with its settled judicature in instances where systemic non-compliance occurs. Notably, the SAC is willing to do so without threatening to refer the preliminary reference to the ECJ. Consequently, such approach sheds some more light on the so far prevailing view that it is mostly through preliminary reference mechanism that domestic courts strategically pressure other domestic state actors.[168]

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[167] Case C-556/17 *Torubarov* [2019] EU:C:2019:626.

[168] (n 38).

4.3.3 The Principle of Consistent Interpretation as Means of Hierarchical Judicial Conflicts

The third story is the story of judicial wars. The third example demonstrates how SAC judges approach their obligation of EU-friendly interpretation and the principle of national procedural autonomy when solving conflicts withing judicial hierarchy. What follows is the so called '*AGROBET* saga'.

The circumstances of the dispute were as follows: Initially, the corporation *AGROBET* submitted VAT returns for several tax periods in which it reported excess VAT of about EUR 180 000. The Tax Office seriously doubted the validity of some of the *AGROBET*'s rapeseed oil transactions and thus initiated inspection to inquire whether the company met the conditions to benefit from the VAT exemption. *AGROBET*, in turn, appealed against procedure and requested the payment of a portion of the excess VAT since it claimed that some transactions were not covered by that tax inspection. In particular, *AGROBET* argued that the withholding of the excess VAT that it had declared, a substantial portion of which was not questioned by the tax authority, was disproportionate and in violation of EU law. Subsequently, the Tax Office rejected those complaints on the ground that no provision of Czech Tax Code provided for the issue of a partial notice of assessment of excess VAT in the sum of the undisputed amount.

AGROBET then challenged the tax authority's decisions in several judicial proceedings. In the first line of the proceedings, the lower administrative court first granted *AGROBET*'s application and ordered the tax authority to assess the excess VAT for a specific tax period in the amount that was not covered by the tax investigation procedures in question,

referring in particular to Article 183 of the VAT Directive[169] and the ECJ's *Molenheide and Others*.[170]

However, this first lower court's judgement was later set aside by the first Judgment of the SAC of 11 May 2017 No. 6 Afs 264/2016-44. In that decision, the SAC questioned the lower court's interpretation of *Molenheide and Others* and stated that since the Czech Tax Code made no express provision for drawing up a partial notice of assessment of excess VAT, the tax authority could not assume the power to do so. In other words, the SAC used the national procedural autonomy 'trump card'.

Nevertheless, in the second line of the proceedings, such view of the SAC was challenged. Even though the lower administrative court obediently followed the SAC's reasoning in the following second line of proceedings, it explicitly expressed its doubts about its compatibility with the ECJ's case-law. Now, in the subsequent appeal against this second decision, another panel of the SAC decided to challenge the reading of the ECJ's case-law employed by the other SAC panel in the first judgement. It posed the preliminary question to the ECJ in which it claimed that according to the ECJ's case-law, the withholding of excess VAT must not go beyond what is necessary for the successful completion of the investigation and that the tax authority should be able to refund the portion of the excess VAT which is not covered by that investigation.

Interestingly enough, before the ECJ itself decided the preliminary question, the Czech Constitutional Court in different case declared that withholding of the undisputed portion

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169 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

170 Case C-286/94 *Garage Molenheide and Others v Belgische Staat* [1997] ECR I- 7281.

of the excess VAT violates the fundamental property rights of companies.[171] Thus, it confirmed the second view of the latter SAC panel even before the ECJ resolved the disputed question. Ultimately, the ECJ also confirmed the second view of the SAC in *AGROBET* case in which it – in rather cryptic manner – confirmed that that the VAT Directive, considered in the light of the principle of fiscal neutrality, cannot be in principle interpreted as excluding, both the possibility of identifying an undisputed portion of the excess VAT and a partial refund of that excess.[172] Furthermore, it specified the conditions under which a tax authority can do so. Nevertheless, in accordance with the principle of national procedural autonomy, the ECJ did not comment on *how* a tax authority should proceed procedurally.

Following both the ECJ's answer and the decision of the Constitutional Court, the SAC in the second Judgement of 13 August 2020 No. 1 Afs 271/2017-191 overruled the original view of the other SAC panel and interpreted the national legislation in the EU-friendly manner as it concluded that even if the Czech Tax Code does provide the tax authority with specific procedural rule, the portion of the excess VAT which is not covered by that investigation can still be refunded by that authority.

This rather complicated *AGROBET* saga demonstrates well that domestic judges at various levels of judicial hierarchy can use both the principles of consistent interpretation and national procedural autonomy in quite creative ways to resolve the judicial conflicts.

The example of such 'judicial war' that revolved around the interpretation of ECJ's case-law and included all existing levels within judicial hierarchy reiterates the point of this

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171 Decision of the CCC of 22 February 2019 No. II. ÚS 819/18.

172 Case C-446/18 *AGROBET CZ* [2020] EU:C:2020:369.

whole section – there is number of ways in which SAC judges approach the principle of consistent interpretation in saliant cases and those approaches sometimes clash.

4.3.4 Micro-Level Conclusions

To conclude this whole section up, the *micro-level* analysis allowed us to inquire some of the more sophisticated methods used by the domestic courts to widen or limit the ECJ's authority by means of the principle of consistent interpretation. In particular, it revealed that the use of another principle – that of national procedural autonomy – plays a significant role regarding domestic judges' treatment of the ECJ's precedents. The in-depth analysis of the three 'cherry-picked' salient cases from different areas of law allowed us to describe such finding in detail.

5 CONCLUSION

Often, we find an evident discrepancy between what domestic judges *ought* to do as European Union judges and what they *actually* do. This project explored how domestic judges treat the case-law of the European Court of Justice in the run-of-the-mill adjudication outside the preliminary reference procedure. I argued here that the ECJ *formally* instructs all national judges to follow its previous rulings and as a result, the Luxembourg's jurisprudence theoretically enjoys precedential force in the wider sense. Nevertheless, I showed that *in reality*, there is a great variety of patterns in how national judges work with the Court's previous case-law.

In order to trace and assess those patterns, a broader concept of judicial treatment of previous ECJ's case-law was presented. This allowed us to move beyond the traditional conceptions and indicators of compliance and assess more broadly the actual effects of the ECJ's authority within the domestic adjudication on the one hand, and the influence of domestic judges on the development of the EU law on the other.

The three-level methodological framework for empirical analysis surpasses the qualitative-quantitative divide by combining a rather novel form of automated text analysis together with more traditional types of content analysis of the judicial decisions. It is such combination that enables us to see not only the big picture of domestic judges' citation practice, but also to zoom-in on the more nuanced ways in which domestic judges apply and engage with the Court's precedents.

The pilot study on the Czech Supreme Administrative Court brought several intriguing findings. The trend of invoking the ECJ's rulings steadily increases over the years.

Nevertheless, although the SAC enjoys the reputation of young, activist, and open court, it argues with the Luxembourg's case-law only in about 5 % of all its decisions. This suggests that SAC judges often adjudicate EU law issues without referring to the ECJ's previous judgements altogether. Such finding shakes the somewhat naïve narrative of the ECJ according to which national judges should not creatively interpret EU law norms on their own, because they ought to 'either ask, or follow the previous case-law'. If one considers that more than 90 % of the ECJ's rulings have not yet appeared in the SAC's decisions, it is reasonable to claim that the overall effect of the ECJ's case-law on the SAC's adjudication remains somewhat limited.

On the other hand, our analysis showed that once SAC judges decide to cite ECJ precedents, they mostly apply the referenced ECJ's precedents to the dispute at hand. Indeed, since instances of distinguishing are quite rare, it is not the SAC's strategy to undermine the ECJ's authority by disregarding its jurisprudence by means of 'mining' and highlighting different factual and legal backgrounds of the cases in question. Considering that we found no instances of explicit refusal to apply the ECJ's precedent, the analysis suggests that neither open backlash, nor evident pushback against the normative authority of the Luxembourg's decisions is taking place at the top level of Czech administrative judiciary.

The fact that when cited, ECJ's case-law enjoys fairly high level of authority is further supported by other findings. SAC judges engage rather passively with majority of the references – in most instances, they merely cite and do not go beyond stipulation of conclusions and statements contained in the individual precedent. Additionally, in about 2/3 of instances, those references play substantive role in the SAC's reasoning meaning that they are not invoked in purely supportive manner (by setting informative background,

or by legitimising the outcomes). In other words, when SAC judges cite the case-law, they do not work creatively with it, but it often influences their reasoning substantively.

Interestingly enough, our analysis shows that SAC judges mostly use the ECJ's doctrines to interpret national law in EU-friendly manner. This suggests that they prefer adhering to doctrines of direct effect and consistent interpretation rather than framing issues of conflict of legal orders in the terms of absolute incompatibility. Thus, it seems that majority of substantive change 'creeps' into Czech administrative legal order through the interpretative processes.

The pilot study also suggests that SAC judges cited particular passages from the reasoning of the ECJ's precedent in about 61 % of instances. Such finding implies that the influence of ECJ's framing and wording of the reasoning might be greater than typically imagined. Indeed, considering they mostly accept the ECJ's conclusions passively and do not engage with them in detail, SAC judges seem to argue with the ECJ's precedents in rather 'textualized' and legislative mode of reasoning.

Nonetheless, the *micro-level* analysis has shown that is saliant cases, SAC judges are also able to work with the ECJ's rulings and the principle of consistent interpretation in a more sophisticated and strategic manner. They use the principle of national procedural autonomy creatively enough to accommodate the effects of the ECJ's case-law in different aspects.

Now, it is evident that this project and the pilot study presented here cannot address all the potential research questions concerning the interactions between the ECJ and domestic courts outside preliminary reference procedure. However, it offers some fresh insights into the EU judicial system and on the authority of both the ECJ and domestic judges.

At the very least, it contributes to the reconstruction of a more realistic picture of EU adjudication by introducing and readjusting the methodological framework for empirical study of domestic courts' treatment of previous ECJ's decisions. Not only can be this approach used for future studies of domestic courts in other Member States, it can also be used to reveal noteworthy interactions between individual levels of national judiciary as well as to explore factors which motivate national judges to treat ECJ's precedents in various ways. Such research endeavours are left for the future.

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