

The Slovenian Constitutional Court and EU Law: Some Aspects and Future Challenges

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Summary: This article critically discusses the application of EU law before the Slovenian Constitutional Court. This Court is the highest guardian of the rule of law and human rights in the Constitution of Slovenia. It has arguably been the most open Slovenian state supervisory institution to influence foreign, comparative, and international laws and practices. As this article illustrates, after Slovenia acceded to the EU in May 2004, but in particular over the past years, the Slovenian Constitutional Court has increased references to EU law. On several occasions, EU law was also a critical factor in deciding and reasoning the cases. Even though the Slovenian Constitutional Court often not only refers in its decisions to EU law but also bases its decisions on it, there rest some uncertainties regarding the application of the Charter on Fundamental Rights of the EU and direct references to the Court of Justice of the EU through preliminary questions remain few and far between. The article mentions the potential constitutional reforms in Slovenia, namely introducing a selective jurisdiction of the Constitutional Court, which could be problematic without comprehensive changes in the Slovenian judicial system as it might not only far further limit the protection of human rights and fundamental freedoms, but it could also undermine the correct application of EU law in the Slovenian legal order. In conclusion, this article points out some aspects of the future adjudication of the Slovenian Constitutional Court when applying EU law that need to be further elaborated or reconsidered.

Keywords: Slovenian Constitutional Court, EU law, Charter of Fundamental Rights of the EU, preliminary reference procedure, judicial ideology

Citation: VATOVEC, K.; LETNAR ČERNIČ, J. The Slovenian Constitutional Court and EU Law: Some Aspects and Future Challenges. *European Studies – the Review of European law, Economics and Politics*, 2023, vol. 10, no. 2, pp. 50–77, DOI: 10.2478/eustu-2023-0012.

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Acknowledgement: Paper supported by VEGA no 1/0091/23 “Limits of European Integration in the Slovak Constitutional Order”.

1. Introduction

Courts form an important and indeed indispensable part of democratic societies. Their role within the European Union (EU) is noteworthy. The Court of Justice of the EU (CJEU) ensures that the EU law is observed in interpreting and applying the Treaties.¹ However, the courts of the EU member states must be noticed. As the “enforcers of EU law in their own right”,² they, too, form part of and play a vital role in the judiciary of the EU.³ As the former judge of the European Court of Justice Allan Rosas argued: although the national courts are not one of the EU’s institutions, “they can be conceived as ›EU courts‹ as they are called upon to apply not only national (state) law but also Union (federal) law, sometimes on quite a regular basis”.⁴ Their importance is not only attached to the preliminary ruling procedure, where the CJEU relies on the cooperation of national courts in developing the EU’s legal system, maintaining its effectiveness, achieving a uniform interpretation of EU law, and assisting in the effective judicial protection of individuals. It, in fact, applies to the responsibility the national courts share with the CJEU of respecting and protecting the EU law as being part of the national law, correctly applying the EU law, adjudicating on EU law, and enforcing it in national proceedings.⁵

This article focuses on the application of EU law by the Constitutional Court of the Republic of Slovenia (hereinafter referred to as the Slovenian Constitutional Court or, simply, the Constitutional Court), which is “an autonomous and independent state authority”.⁶ It is the highest guardian of the Slovenian constitutional democracy and the rule of law. One of the principal constitutional functions of the

¹ As stipulated in Article 19(1) of the Treaty on European Union (TEU) (Consolidated version). OJ C 202, 7. 6. 2016.

² CRAIG, P., DE BŮRCA, G. *EU Law: Text, Cases, and Material*. 6th edition. Oxford University Press, 2015, p. 500.

³ ROSAS, A. The National Judge as EU Judge: Some Constitutional Observations. *SMU Law Review*. 2014, vol. 67, no. 4, p. 718.

⁴ Ibid.

⁵ On Constitutional Court being an equally important actor in the process of Europeanisation of national law despite the fact that the CJEU is often credited to play a leading role in shaping as well as protecting the EU law, see VATOVEC, K. Evropeizacija ustavnosodne presoje prek Listine Evropske unije o temeljnih pravicah. *Dignitas: revija za človekove pravice = the Slovenian journal of human rights*. 2019, nos. 83–84, pp. 27–52.

⁶ Article 1(2) of the Constitutional Court Act [Zakon o Ustavnem sodišču]. Official Gazette RS, Nos. 64/07—official consolidated text etc. (the CCA).

Constitutional Court is to protect fundamental values on which Slovenia rests. It is “the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms”.⁷ The Constitutional Court exercises extensive powers, determined mostly by the Constitution.⁸ In terms of their significance for protecting constitutionality and legality and preventing violations of human rights and fundamental freedoms as well as the share of the workload, the most important powers of the Constitutional Court are the review of the constitutionality and legality of regulations and the power to decide on constitutional complaints regarding alleged violations of human rights and fundamental freedoms.

The article is divided into five main parts. Section 2 provides the backdrop and briefly discusses the EU law in the Slovenian constitutional system and the role of the Constitutional Court. Section 3 presents and analyses measuring ideology and EU law’s presence in the Slovenian Constitutional Court case law. Thereafter, Section 4 critically examines the application of the Charter of Fundamental Rights of the EU (EU Charter) in the Slovenian constitutional system. Section 5 describes traits of the judicial dialogue between the Slovenian Constitutional Court and the CJEU. Equipped with this knowledge, finally, section 6 discusses some prospects for future challenges in the adjudication of the Slovenian Constitutional Court when applying EU law.

2. On the Slovenian Constitutional Court and the position of EU law in the Slovenian constitutional system

Like many potential constitutional systems, the Slovenian constitutional system, subscribes to the approach of “reasonable” dualism, which means that international treaties are not *per se* directly applicable in the Slovenian legal order. The Slovenian constitutional system requires an act of ratification to introduce international treaties domestically. As a result, the Slovenian parliament first ratifies the laws by adopting a special law. Those laws are published in the Official Journal of the Republic of Slovenia. As such, international treaties are translated into the Slovenian domestic constitutional system. Ratified and published treaties are directly applicable and create international obligations for the state to adopt in its national legal order appropriate national legal acts by which it ensures

⁷ Article 1(1) of the CCA.

⁸ Regarding the powers of the Slovenian Constitutional Court, see Article 160 of the Constitution of the Republic of Slovenia [Ustava Republike Slovenije]. Official Gazette RS, Nos. 33/91-I etc. (the Constitution of Slovenia).

compliance with such obligations.⁹ Individuals can resort to them in proceeding before administrative and judicial organs.

By acceding to the EU, Slovenia transferred the exercise of part of its sovereign rights to the EU on the basis of Article 3a of the Constitution of Slovenia.¹⁰ In the Slovenian legal system, this constitutional provision is also relevant for the position of EU law, providing that legal acts and decisions adopted within the framework of the EU apply in Slovenia in accordance with the legal regulation of the EU.¹¹ As held by the Slovenian Constitutional Court but also stressed in theory, this constitutional provision establishes an internal constitutional legal foundation on the basis of which all state authorities, including the Constitutional Court, when exercising their competences, must apply EU law in accordance with the EU legal order.¹² The Constitutional Court has repeated on many occasions: “The effect of EU law in the internal legal order thus depends on the rules that regulate the functioning of the EU at a given moment. Such concerns the fundamental principles of EU law that are enshrined in the TEU and the TFEU or that the CJEU has developed through its case law. Due to the third paragraph of Article 3a of the Constitution, the fundamental principles that define the relationship between internal law and EU law are at the same time also internal constitutional principles that have the same binding effect as the Constitution.”¹³

Being the EU member state since 2004 and considering the numerous competencies in many areas conferred on the EU, it is not surprising that the Slovenian Constitutional Court is often confronted with cases where EU law is legally decisive and needs to be applied in cases at issue. The Slovenian Constitutional Court has already held that it must interpret national law in light of EU law to ensure its

⁹ The Constitution of Slovenia states in Article 8 that “Laws and other regulations must comply with generally accepted principles of international law and with treaties binding on Slovenia. Ratified and published treaties shall be applied directly.”

¹⁰ Article 3a of the Constitution of Slovenia; see also Constitutional Court Order No. U-I-65/13, 26 September 2013, ECLI:SI:USRS:2014:U.I.65.13, para. 6.

¹¹ Article 3a(3) of the Constitution of Slovenia.

¹² See, e.g., Constitutional Court Order No. U-I-65/13, op. cit. 10, para. 6; Constitutional Court Decision No. U-I-146/12, 14 November 2013, ECLI:SI:USRS:2013:U.I.146.12, para. 32. The first and second paragraphs of Article 3a of the Constitution of Slovenia contains the procedural and substantive conditions for the transfer of the exercise of a part of sovereign rights to the EU (AVBELJ, M. Slovensko ustavno pravo v odnosu do prava EU. In: KAUČIČ, I. (ed.). *Pomen ustavnosti in ustavna demokracija, Znanstveni zbornik Dvajset let Ustave Republike Slovenije*. Ljubljana: Ustavno sodišče Republike Slovenije, 2012, p. 346). See also, AVBELJ, M. In: AVBELJ, M. (ed.). *Komentar Ustave Republike Slovenije*, Del: 1. Nova Gorica, Nova univerza, Evropska pravna fakulteta, 2019, pp. 66–74.

¹³ Constitutional Court Decision No. U-I-146/12, op. cit. 12, para. 32.

full effectiveness.¹⁴ As an illustration serves a commercial dispute, in which the complainant claimed the nullity of a contractual term on the basis of which it was allegedly not entitled to the reimbursement of VAT concerning a project financed from European sources.¹⁵ Since the field of financing from cohesion funds is regulated by the EU, the Constitutional Court stressed that courts must interpret national legislation in light of EU law and in conformity with its purpose.¹⁶

Moreover, the Constitutional Court has not refused the power to review the constitutionality of a national law that transposes an EU directive to the national legal order.¹⁷ Directives are binding as to the result to be achieved upon each member state to which they are addressed, but they leave to the national authorities the choice of form and methods.¹⁸ The Constitutional Court emphasised in its case law, that member states, when transposing a directive, are obliged to take into account, to the greatest possible extent, the result set out in a directive, but they must also, within the limits of these possibilities, choose a transposition that is not only EU consistent but also constitutionally compatible.¹⁹ If, for example, the Slovenian Constitution requires that a certain directive because of its content is transposed in national law by laws (and not by implementing acts, e.g., rules, government regulations), then only such transposition is considered to be constitutionally compatible.

3. Measuring ideology and the presence of EU law in the case law of the Slovenian Constitutional Court

The Slovenian legal order follows the continental tradition of legal thought. Slovenian courts generally subscribe to the objective approach to law, which derives its authority from the legal form and the hierarchy that a particular legal norm occupies in the legal order. Judges often present themselves as ideologically

¹⁴ See, e.g., Constitutional Court Decision No. Up-2012/08, 5 March 2009, ECLI:SI:USRS:2009:Up.2012.08, para. 9; Constitutional Court Decision No. U-I-146/12, op. cit. 12, para. 34.

¹⁵ Constitutional Court Decision No. Up-1133/18, 31 March 2022, ECLI:SI:USRS:2022:Up.1133.18.

¹⁶ *Ibid.*, para. 26.

¹⁷ Constitutional Court Order No. U-I-113/04, 7 February 2007, ECLI:SI:USRS:2007:U.I.113.04, paras. 11–12; Constitutional Court Decision No. U-I-37/10, 18 April 2013, ECLI:SI:USRS:2013:U.I.37.10, para. 11.

¹⁸ Article 288(3) of the Treaty on the Functioning of the European Union (TFEU) (Consolidated version). OJ C 202, 7. 6. 2016.

¹⁹ Constitutional Court Decision No. Up-1303/11, U-I-25/14, 21 March 2014, ECLI:SI:USRS:2014:Up.1303.11, para. 7.

neutral and objective.²⁰ They fiercely reject any application of judicial ideology. Nonetheless, in more than three decades, the Slovenian Constitutional Court has developed a more discursive approach to law based on the confrontation of opposing arguments and their persuasiveness.

The Slovenian Constitutional Court, which publishes its decisions, allows for careful and diligent study of its decisions and separate opinions and measuring judicial ideology. The research group working on a project, “Measuring Judicial Ideology at the Slovenian Constitutional Court,” developed a multidimensional methodological approach to measure judicial ideology. We divided it into economic, social, and authoritarian sub-dimensions of judicial ideology. The economic dimension measures whether a judge is more inclined to protect the free market and its freedoms or justify state intervention. The social dimension of judicial ideology measures the extent to which a judge protects the rights of minorities in the relationship with the majority and collective interests in Slovenian society.²¹ Finally, the authoritarian dimension measures whether a judge is more inclined to protect the rights of individuals or prefers to protect and realize the interests of different branches of government.²² We have also measured how the Slovenian Constitutional Court refers to EU and international laws, which we present in the current article. Such a multidimensional approach has allowed us to capture the various shades of ideology of individual mandates of the Constitutional Court and individual judges of the Constitutional Court based on rigorous scientific methodology.²³ We measured judicial ideology and the presence of international law in three mandates of the Constitutional Court (1993–1996, 2002–2006, 2011–2016).²⁴ We carefully selected approximately twenty essential decisions from each term based on their prominence, as highlighted in the court’s annual reports and other criteria. Avbelj and Šušteršič have elaborated on the selection criteria, which included: “decisions that the Court itself has declared as important in its annual reports”; “decisions not taken unanimously, or with concurring or dissenting separate opinions”; “decisions on important legal and social issues that relate to our definition of the three ideological dimensions”; “decisions of a precedential character or with important social consequences”; and “decisions related

²⁰ See, for instance, AVBELJ, M. The sociology of (Slovenian) constitutional democracy. *Hague Journal on the Rule of Law*. 2018, vol. 10, no. 3, pp. 35–57; AVBELJ, M. Contextual Analysis of Judicial Governance in Slovenia. *German Law Journal*. 2018, vol. 19, no. 7, pp. 1902–1930.

²¹ LETNAR ČERNIČ, J. Družbena dimenzija sodniške ideologije v sodni praksi prvih treh mandatov slovenskega ustavnega sodišča. In: AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021, pp. 95–114.

²² LETNAR ČERNIČ, J. Authoritarian Dimension of Judicial Ideology of the Slovenian Constitutional Court. *Hrvatska i komparativna javna uprava*, 2020, vol. 20, no. 4, pp. 733–760.

²³ AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021.

²⁴ Ibid.

to highly controversial issues in the political and public discussions”.²⁵ Overall, the Constitutional Court’s 336 decisions were examined, coded, and assessed.²⁶

The project Measuring Judicial Ideology also measured the presence of an international dimension in the Slovenian Constitutional Court’s judicial decision-making.²⁷ We examined whether decisions refer to EU law, whether they refer to foreign law or international law, and whether they refer to the case law of, for example, the CJEU or the European Court of Human Rights (ECtHR).²⁸ We measured the presence of an international dimension on a scale of 1 to 4 in the decisions, where position 1 indicates that the Constitutional Court did not refer to international legal sources, and 4 indicates that it heavily relied on such sources in its decisions. These positions portray whether the international dimension is present in the Constitutional Court’s decisions.

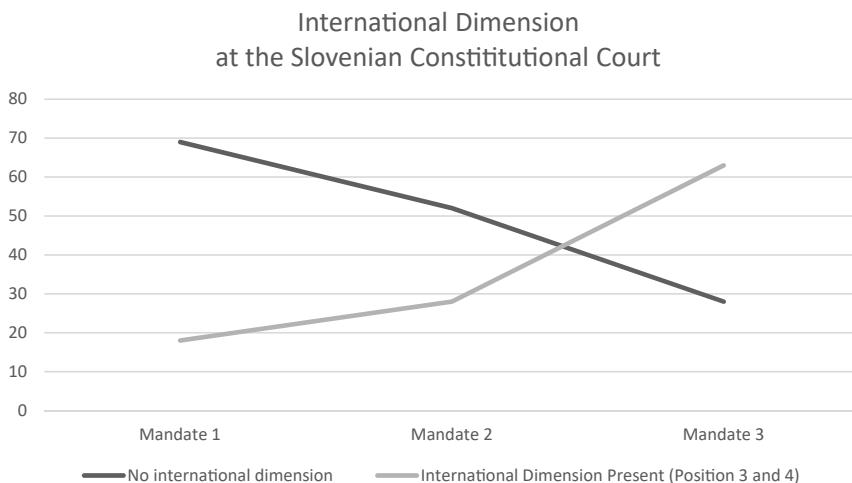
Position 1 signifies that the Constitutional Court’s decision does not include any reference to EU law, or foreign law or international law, as well as no references to the case law of the CJEU, the ECtHR, or any other foreign court. Position 1 thus encompasses all judgments that lack a foreign dimension. Position 2 describes decisions where the Constitutional Court or any judge referred to EU law, foreign law, international decisions, or international law. In some cases, it was sufficient to only briefly reference EU law, foreign law, foreign doctrine, foreign case law, or regional or international court case law. As the designation implies, that position refers at least to some extent to EU law or international law or foreign law.

²⁵ AVBELJ, M., ŠUŠTERŠIČ, J. Conceptual Framework and Empirical Methodology for Measuring Multidimensional Judicial Ideology. *DANUBE: Law, Economics and Social Issues Review*, 2019, vol. 10, no. 2, p. 148. See LETNAR ČERNIČ, J., op. cit. 22, pp. 733–760.

²⁶ Ibid.

²⁷ AVBELJ, M., BATAGELJ, P., CIGOJ, M., LETNAR ČERNIČ, J., JEVŠEK PEZDIR, A., ŠUŠTERŠIČ, J., ŠUŠTERŠIČ, S., VATOVEC, K., Obvladovanje ideologije in politike na ustavnem sodišču. *Pravna praksa: PP, časopis za pravna vprašanja*. 2020, vol. 39, no. 33, pp. 24–29; AVBELJ, M., ŠUŠTERŠIČ, J., op. cit. 25; AVBELJ, M., ŠUŠTERŠIČ, J., VATOVEC, K., JEVŠEK PEZDIR, A., LETNAR ČERNIČ, J., ŠUŠTERŠIČ, S. Pojemovni okvir in empirična metodologija za merjenje večdimenzionalne ideologije na sodiščih. *Pravna praksa: PP, časopis za pravna vprašanja*, 2018, vol. 37, no. 44, pp. II–VIII.

²⁸ See in detail, AVBELJ, M., BATAGELJ, P., CIGOJ, M., VATOVEC, K. Ustavno sodišče in mednarodna dimenzija. In: AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021, pp. 115–142.

Chart 1 International Dimension at the Slovenian Constitutional Court

Source: AVBELJ, M., BATAGELJ, P., CIGOJ, M., VATOVEC, K., *op. cit.* 28, p. 128.

Positions 3 and 4, on the other hand, signify a more substantial presence of EU law or foreign and international law or international decisions in the Constitutional Court's rulings. Position 3 denotes decisions where the Constitutional Court used references to EU law, foreign or international law, but these references were not the main persuasive argument affecting the outcome. Although an international dimension is included, it is not the determining factor in the decision-making process. Under position 3, the Constitutional Court uses international references as additional support for its already-formed conclusions, thereby enhancing the reasoning. Position 4 represents cases where references to EU law, foreign or international law or international decisions were the most critical factor. This means that references to EU law, international law, foreign law, comparative practices, and case law from regional courts played a central role in the Constitutional Court's decision and its reasoning. Hence, position 4 reflects cases where the international dimension was pivotal in the decision-making process.

Our research indicates that the Constitutional Court referred to international legal sources in more than half of the 336 decisions examined.²⁹ The number of such references has increased from one Constitutional Court mandate to the

²⁹ Ibid.

next, with a particularly noticeable rise in the second and third mandates compared to the first. It is noteworthy that the lowest number of decisions without international references occurred during the third mandate. Moreover, there was a significant increase from the first to the third mandate in cases where the international dimension was critical, especially where the Constitutional Court invoked international law in positions 3 or 4. This trend suggests a growing reliance on EU law, foreign law or international law in the Constitutional Court's decision-making, highlighting the importance the Constitutional Court places on inter-institutional and international comparative dialogue with other supreme courts in Europe and beyond.³⁰

The increase in references to EU law has been particularly marked since Slovenia's accession to the EU in May 2004. This trend continued into the Constitutional Court's fourth mandate and can be attributed to global and regional developments, as well as increased interactions and cooperation among higher courts. Judges are more integrated into the European judicial environment, engaging in dialogues, exchanging best practices, and sharing decisions, fostering cooperation between courts.³¹ Another factor is the increase in references to the CJEU and its case law, but also to EU law as such, likely due to the growing body of EU legislation and the consequential binding nature of EU law on member states' courts.

In conclusion, our analysis of the Slovenian Constitutional Court's decisions reveals that the Court engages with international dimensions in at least four distinct ways: by omitting them entirely, by making passing references, by relying on them to a substantial degree in its reasoning, or by allowing them to be decisive in specific cases.³²

4. The application of the EU Charter in the Slovenian constitutional system

With the entry into force of the Lisbon Treaty, the EU Charter,³³ with its set of civil, political, social, and economic rights, has become a legally binding source having "the same legal value as the Treaties",³⁴ and therefore forms part of EU primary law.³⁵ As such, the EU Charter is a tool of integrating and accelerating

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Charter on Fundamental Rights of the European Union. OJ C 202, 7. 6. 2016.

³⁴ Article 6(1) of the TEU.

³⁵ The legal system of the EU is based on the TEU, the TFEU, and the EU Charter.

fundamental rights within the EU as well as a tool of Europeanization that shapes and develops the EU human rights regime.³⁶ It is also important to note that the EU Charter cannot be removed from the multi-level system within which it operates alongside the established human rights and fundamental freedoms, determined by the European Convention on Human Rights (ECHR), and constitutional human rights and fundamental freedoms on a member state level. The protection of EU Charter fundamental rights is indeed intertwined and complemented by the protection of constitutional and conventional rights.³⁷ So far as the EU Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR; hence, a potentially more extensive protection given by EU law is upheld.³⁸ Moreover, if the EU Charter recognises fundamental rights as they result from the constitutional traditions common to the member states, those rights need to be interpreted in harmony with those traditions.³⁹

Based on the Constitutional Court case law, it can be argued that the Court has not yet applied the EU Charter as a direct (formal) criterion for its review. The EU Charter served, above all, as an additional argument for the interpretation of constitutional provisions. In a few cases, however, the Constitutional Court defined the content of constitutional provisions by referring to the content of the EU Charter.

By Decision No. U-I-109/10, the Constitutional Court reviewed the constitutionality of a provision of the municipal ordinance, by which Ljubljana Municipality determined that the name of a street would be “Titova cesta” [“Tito Street”].⁴⁰ Josip Broz Tito was the Marshal of Yugoslavia and later President for life of the Socialist Federal Republic of Yugoslavia, whose name symbolises the post-war totalitarian communist regime, which was marked by extensive and gross violations of human rights and fundamental freedoms.⁴¹ When reviewing the constitutionality of the municipal ordinance, the Constitutional Court proceeded from the principle of respect for human dignity, which as a fundamental value permeates the entire legal order and has, therefore, also an objective significance in the functioning of authority, both in concrete proceedings and when adopting legislation.⁴² It noted: “As a special constitutional principle, the

³⁶ VATOVEC, K. op. cit. 5, p. 27.

³⁷ Ibid., p. 29.

³⁸ Article 52(3) of the EU Charter.

³⁹ Article 52(4) of the EU Charter.

⁴⁰ Constitutional Court Decision No. U-I-109/10, 26 September 2011, ECLI:SI:USRS:2011:U.I.1 09.10.

⁴¹ Ibid., para. 15.

⁴² Ibid., para. 8.

principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic”.⁴³ Under the assessment of the Constitutional Court, the principle of democracy exceeds, by its substance and significance, the definition of the state order as merely a formal democracy, as it substantively defines the Republic of Slovenia as a constitutional democracy, thus as a state, in which the acts of authorities are legally limited by constitutional principles, human rights, and fundamental freedoms.⁴⁴ In the reasoning of the Decision, the Constitutional Court referred also to the legally binding EU Charter, more precisely to its preamble, which states that “[c]onscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”⁴⁵ Moreover, the Constitutional Court established that the EU Charter protects human dignity also as a special human right, as it determines already in Article 1 that it is inviolable and must be respected and protected.⁴⁶ It then decided that the challenged ordinance was inconsistent with the Constitution of Slovenia.

The Constitutional Court case law provides examples where the Constitutional Court has interpreted a constitutional right in harmony with the right, determined in the EU Charter. In this way, the EU Charter serves as an (additional) tool for the interpretation of constitutional human rights or fundamental freedoms. In Decision No. U-I-92/07, the Constitutional Court reviewed the legislation of the registration and activities of religious communities in Slovenia.⁴⁷ When interpreting the constitutional right to religious freedom, the Constitutional Court considered a number of international and regional instruments (e.g. International Covenant on Civil and Political Rights, the ECHR), which define the content and the scope of this human right. It did not forget to mention the EU Charter, which guarantees freedom of thought, conscience, and religion in Article 10(1).⁴⁸

An interesting case regarding the application of the EU Charter by the Slovenian Constitutional Court was Decision No. U-I-59/17, adopted in 2019.⁴⁹ In this case, the Constitutional Court decided on the constitutionality of several

⁴³ Ibid., para. 10.

⁴⁴ Ibid.

⁴⁵ Ibid., para. 6.

⁴⁶ Ibid.

⁴⁷ Constitutional Court Decision No. U-I-92/07, 15 April 2010, ECLI:SI:USRS:2010:U.I.92.07.

⁴⁸ Ibid., para. 78.

⁴⁹ Constitutional Court Decision No. U-I-59/17, 18 September 2019, ECLI:SI:USRS:2019:U.I.59.17.

provisions of the Aliens Act that regulated the special legal regime governing the treatment of persons who express an intention to submit an application for international protection during a time of changed circumstances in the field of migration. The legislature temporarily and on a certain territory substituted the general provisions of the International Protection Act, which regulate the handling of international protection applications differently (i.e. normally).⁵⁰ The special legal regime entailed that the Police should perform an identification procedure and establish the identity of the alien in conformity with the law that regulates the tasks and powers of the Police, and that, notwithstanding the provisions of the law regulating international protection, the Police would reject such motion as inadmissible and transfer the alien to the relevant neighbouring country if in the neighbouring EU member state from which the alien entered the state there are no systemic deficiencies related to asylum procedures and reception conditions for applicants that might expose them to the risk of torture or inhuman or degrading treatment.⁵¹

The Constitutional Court assessed the challenged provisions from the viewpoint of their conformity with the well-known international legal principle of *non-refoulement*, determined also by Article 18 of the Constitution of Slovenia. Regarding the application of the EU Charter, the Constitutional Court established the systematic approach it will follow when dealing with cases that fall in the scope of EU law and where the EU Charter should be applied. It emphasized: “When assessing whether the national regulation refers to the implementation of EU law within the meaning of Article 51 of the Charter, the following needs to be assessed: (i) whether the objective of the national legislation is the implementation of EU law; (ii) what the nature of the national legislation is and whether in addition to the objectives encompassed by EU law it also pursues other objectives; (iii) and whether there exists a special regulation of EU law in that field that can affect this field”.⁵²

Based on that premises, the Constitutional Court had no doubt that the challenged provisions fell within the scope of EU law. When assessing the provisions and determining the substance of human rights and fundamental freedoms, the Constitutional Court took into consideration primary EU law, in particular the EU Charter and the case law of the CJEU.⁵³ It held that it “may apply national standards regulating the protection of fundamental rights if the application thereof does not jeopardise the level of protection guaranteed by the EU Charter as interpreted by the CJEU and does not interfere with the primacy, unity, and

⁵⁰ Ibid., para. 41.

⁵¹ Ibid., para. 44.

⁵² Ibid., para. 23.

⁵³ Ibid., paras. 22–25.

effectiveness of EU law”;⁵⁴ as was highlighted in the CJEU’s judgement in the *Melloni* case.⁵⁵ From the established constitutional case law and the case law of the ECtHR and the CJEU, it followed that the right determined by Article 18 of the Slovenian Constitution cannot be limited, and interferences therewith are inadmissible.⁵⁶

From the examined decisions, we can conclude that the Constitutional Court refers in its decisions to the EU Charter and the relevant case of law of the CJEU on a consistent basis. Nonetheless, challenges remain. They are mostly related to general uncertainties as to the conditions for constitutional complaints and constitutionality review requests to pass an admissibility stage. Moreover – recalling Article 51(1) of the EU Charter determining that its provisions apply “to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law”⁵⁷ – an analysis of the Constitutional Court’s decisions reveals that sometimes an explanation is missing as to why the Constitutional Court mentioned the EU Charter or whether it even considered that the case at issue concerned the “implementation of EU law” or the “scope of EU law”, which, as a triggering element, would suggest the application of the EU Charter. As a result, the Constitutional Court could improve consistency and coherence in the application of the EU Charter in different cases.

5. The judicial dialogue between the Slovenian Constitutional Court and the CJEU

The preliminary reference procedure provided in Article 267 of the TFEU is a cornerstone of the EU legal system and the mechanism stemming from much-needed cooperation between the CJEU and national courts.⁵⁸ It provides “a meeting point” between EU and national law and facilitates a dialogue between courts,

⁵⁴ *Ibid.*, para. 25.

⁵⁵ Judgement of the CJEU (Grand Chamber) in the case *Melloni*, C-399/11, 26 February 2013, ECLI:EU:C:2013:107, para. 60.

⁵⁶ Constitutional Court Decision No. U-I-59/17, op. cit. 49, para. 62.

⁵⁷ In this respect, it is worth recalling the Explanations relating to the Charter of Fundamental Rights, which are considered to be “a valuable tool of interpretation intended to clarify the provisions of the Charter” (Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14. 12. 2007, p. 17).

⁵⁸ More on the preliminary reference procedure, see, e.g., LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford University Press, 2014, pp. 215–250; 456–479; KROMMENDIJK, J. *National Courts and Preliminary References to the Court of Justice*. Edward Elgar Publishing Limited, 2021.

i.e. national and the CJEU.⁵⁹ The CJEU is the authority on the interpretation and application of EU law, however, the role of national courts is seemingly important in using this mechanism in order to apply EU law, protect the integrity of the EU legal system and enforce the individual rights under EU law.

The Slovenian Constitutional Court maintains the judicial dialogue with the CJEU when necessary to properly apply EU law. From its case law, it can be concluded that the cooperation in the preliminary reference procedure depends on the type of proceedings before the Constitutional Court. Namely, the Constitutional Court differentiates between the abstract judicial review and the constitutional complaints procedure. Whereas the former shows the inclination of the Constitutional Court towards leading the horizontal judicial discourse with the CJEU, in the latter, the Court declines its role as “a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” and considers that referring a question to the CJEU is, in fact, a duty of the regular courts.⁶⁰

The Constitutional Court thus understands its duty to refer questions for preliminary rulings when assessing the constitutionality of a national legislation. It has done so for the first time in the case concerning the constitutionality of the Slovenian Banking Act, which implemented EU crisis-management mechanisms, including the European Commission’s Banking Communication⁶¹ instructions providing burden-sharing (i.e. bail-in) measures and the criteria for the compatibility of state aid granted to the financial institutions with the EU internal market rules.⁶² The Constitutional Court stayed the proceedings for the review of constitutionality and submitted to the CJEU a number of preliminary questions relating to the validity and interpretation of the Banking Communication, as well as a question relating to the interpretation of the Directive on the reorganization

⁵⁹ TRIDIMAS, G., TRIDIMAS, T. National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure. *International Review of Law and Economics*, 2004, vol. 24, no. 2, pp. 127–128.

⁶⁰ As the Constitution of Slovenia stipulates in Article 127(1), it is the Supreme Court that is the highest court in the state.

⁶¹ Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (the Banking Communication). OJ C 216, 30. 7. 2013. By way of the constitutional challenge to the Slovenian Banking Act, the Banking Communication was indirectly challenged too, which raised the awareness of the existence of EU soft law in Slovenia. For more see AVBELJ, M., VATOVEC, K. The Uneasy Reception of EU Soft Law in Slovenian Legal Order. In: ELIANTONIO, M. KORKEA-AHO, E., STEFAN, O. (eds.). *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. Oxford: Hart Publishing, 2021, pp. 219–232.

⁶² Constitutional Court Decision No. U-I-295/13, 19 October 2016, ECLI:SI:USRS:2014:U.I.295.13.

and winding up of credit institutions.⁶³ It had to proceed in such a manner because concerns regarding the interpretation and validity of the Banking Communication and concerns regarding the interpretation of the mentioned Directive were raised during its decision-making. Since the CJEU is the only authority competent to interpret EU law and assess secondary EU law's validity, the Constitutional Court's approach was legally correct. It then proceeded without delay as soon as the CJEU adopted the judgement in the *Kotnik* case.⁶⁴

The Banking Act allowed the Bank of Slovenia to compulsorily write off or convert (into shares) eligible liabilities that had already existed before its entry into force. The Constitutional Court held that there is no duty of the state stemming from the Constitution of Slovenia to reimburse creditors, by means of state aid, the money they privately invested where investments transpired to be economically unsuccessful.⁶⁵ However, as the Constitutional Court stressed, in order for compensatory protection to be consistent with the Constitution it must be effective.⁶⁶ It established that the judicial protection provided by the Banking Act was not effective, as the legislature failed to take into account the significantly weaker position of the holders of eligible liabilities or to strike a fair balance between their position and that of the Bank of Slovenia.⁶⁷ The Constitutional Court concluded that the Banking Act together with the Resolution and Compulsory Dissolution of Banks Act were inconsistent with the Constitution.⁶⁸

To date, without referring questions for preliminary ruling the Constitutional Court twice stayed the proceedings to review the constitutionality of the Slovenian legislation transposing directives until the CJEU adopted a decision in

⁶³ Constitutional Court Order No. U-I-295/13, 6 November 2014, ECLI:SI:USRS:2014:U.I.295.13.

⁶⁴ Judgement of the CJEU (Grand Chamber) in the case *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, C-526/14, 19 July 2016; ECLI:EU:C:2016:570.

⁶⁵ Constitutional Court Decision No. U-I-295/13, op. cit. 61, para. 112.

⁶⁶ *Ibid.*, para. 116.

⁶⁷ *Ibid.*, paras. 128–129.

⁶⁸ The Constitutional Court referred questions for preliminary ruling in several other cases, for example, in proceedings to review the constitutionality of the Police Tasks and Powers Act concerning the processing of passengers name record data (Constitutional Court Order No. U-I-152/17, 3 September 2020, ECLI:SI:USRS:2020:U.I.152.17). After the judgement of the CJEU in the case *Banka Slovenija* (C-45/21, 13 September 2022, ECLI:EU:C:2022:670), the Constitutional Court abrogated the entire Act on the Judicial and Out-of-Court Protection Procedure for Former Holders of Eligible Liabilities of Banks (Constitutional Court Order No. U-I-4/20, 14 January 2021, ECLI:SI:USRS:2023:U.I.4.20; and Constitutional Court Decision, 16 February 2023, ECLI:SI:USRS:2023:U.I.4.20). In 2023, the Constitutional Court adopted Order No. U-I-104/22, 13 April 2023, ECLI:SI:USRS:2023:U.I.104.22, and Order No. U-I-205/19, U-I-230/19, 26 October 2023, ECLI:SI:USRS:2023:U.I.205.19, stayed the proceedings and submitted preliminary questions to the CJEU.

its proceedings. In Case No. U-I-65/13, the applicant requested a review of the constitutionality of several provisions of the Electronic Communications Act by which Slovenia transposed the Data Retention Directive (Directive 2006/24/EC) in its legal order.⁶⁹ The fundamental allegation contained in the request was that, on the basis of the Data Retention Directive, Slovenia imposed on service providers the obligation to retain as a precautionary measure the traffic and location data of all users, i.e. regardless of whether the users themselves gave rise to reasons for such an interference with their rights. The Constitutional Court deemed that the alleged unconstitutionality essentially referred to communication and information privacy rights.⁷⁰ The challenged provisions transposed the obligations imposed by the Data Retention Directive, which meant that their transposition entailed the application of EU law.⁷¹ The Constitutional Court established that the allegations regarding the unconstitutionality of the Electronic Communications Act contain allegations regarding the inconsistency of the Data Retention Directive with Articles 7 and 8 of the EU Charter.⁷² It then held that “a decision on the validity of the Data Retention Directive is of key importance for a review of the constitutionality” of the national legislation.⁷³ As the substance of the alleged unconstitutionality matched the reasons due to which the proceedings on the validity of the Data Retention Directive were already pending before the CJEU in cases C-293/12 and C-594/12, the Constitutional Court decided not to submit a request for a preliminary ruling to the CJEU, but rather stayed the proceedings until the CJEU adopted a judgment.⁷⁴ The CJEU declared the Data Retention Directive invalid because the EU legislature extended the limits imposed by compliance with the principle of proportionality.⁷⁵ The Constitutional Court held that by declaring the Data Retention Directive invalid, the obligation of member states to transpose the requirements from the Directive in the national legal order ceased.⁷⁶ It further established that the challenged act disproportionately interfered with the right to

⁶⁹ Constitutional Court Order No. U-I-65/13, op. cit. 10.

⁷⁰ Ibid., para. 5.

⁷¹ Ibid., para. 6.

⁷² Ibid., para. 8.

⁷³ Ibid.

⁷⁴ Ibid., para. 9.

⁷⁵ Judgment of the CJEU (Grand Chamber) in the joined cases *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung and others*, C-293/12 and C-594/12, 8 April 2014, ECLI:EU:C:2014:238.

⁷⁶ Constitutional Court Decision No. U-I-65/13, 3 July 2014, ECLI:SI:USRS:2014:U.I.65.13, para. 12.

the protection of personal data determined by the first paragraph of Article 38 of the Constitution of Slovenia and thus abrogated it.⁷⁷

It has already been mentioned that the Constitutional Court acts differently in constitutional complaint proceedings. In these proceedings, it refuses to engage in a dialogue with the CJEU and argues that the role of “a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” belongs to a regular court.⁷⁸ An example is the case No. Up-1056/11, in which the Constitutional Court decided on a constitutional complaint filed against a judgment of the Supreme Court.⁷⁹ In a tax case involving the calculation of value-added tax, during the entire proceedings, the applicant referred to the case law of the CJEU, from which it followed, in his opinion, that he should not have been taxed for selling two plots of land that he had bought as a natural person. The applicant proposed that the Supreme Court stay the proceedings and submit the case to the CJEU for a decision. The Supreme Court dismissed the applicant’s reference to the case law of the CJEU as unfounded, as allegedly the factual circumstances were different, and did not take a position on his motion to submit the case to the CJEU.⁸⁰ The Constitutional Court first established that the regulation of the value-added tax has been at least partially transferred to the EU.⁸¹ Even though it is a field in which the conduct of member states is not entirely determined by EU law, member states cannot regulate this field by national regulations when the EU regulates this field by its own legal act.⁸²

In its Decision, the Constitutional Court established that the CJEU is an independent, impartial court constituted by law in the sense of the first paragraph of Article 23 of the Constitution of Slovenia.⁸³ The answer to a question regarding the interpretation of EU law or the validity and interpretation of secondary legal acts of the EU was of essential importance for the final decision in this dispute.⁸⁴ Furthermore, there was no doubt that the Supreme Court is a court in the sense of Article 267 of the TFEU because it fulfils all criteria determined by the case law

⁷⁷ Ibid., para. 28. The Constitutional Court has already adopted similar approach in case No. U-I-113/04, see Constitutional Court Order, 8 July 2004, ECLI:SI:USRS:2007:U.I.113.04, and Constitutional Court Decision, *op. cit.* 17.

⁷⁸ As the Slovenian Constitution stipulates in Article 127(1), it is the Supreme Court that is the highest court in the state.

⁷⁹ Constitutional Court Decision No. Up-1056/11, 21 November 2013, ECLI:SI:USRS:2013:Up.1056.11.

⁸⁰ Ibid., para. 4.

⁸¹ Ibid., para. 5.

⁸² Ibid.

⁸³ Ibid., para. 6.

⁸⁴ Ibid., para. 9.

of the CJEU.⁸⁵ In order for the Constitutional Court to be able to assess whether the individual was ensured judicial protection before a court constituted by law and whether the separation of jurisdiction determined by Article 267 of the TFEU was taken into consideration, there is the necessary precondition that the court at issue has adopted a sufficiently clear position with regard to the questions related to EU law.⁸⁶ This also includes explaining why, despite the party's motion to stay proceedings and to submit the case to the CJEU, the court decided not to proceed in such a manner.⁸⁷ In the case at issue, the Constitutional Court established that, concerning EU law, the Supreme Court adopted a position regarding which it was not clear whether it were based on the case law of the CJEU due to deficient reasoning, nor did it adopt a position regarding the motion to submit the case to the CJEU for a preliminary ruling.⁸⁸ With regard to the above, the Constitutional Court established a violation of the complainant's right to a court constituted by law determined by the first paragraph of Article 23 of the Constitution of Slovenia, abrogated the challenged judgment, and remanded the case to the Supreme Court for new adjudication.

This helps explain why the Slovenian Constitutional Court considers that it has no mandatory duty to refer a question to the CJEU, and at the same time, its approach does not breach EU law. In case the Constitutional Court decides that the regular court violated a constitutional human right or fundamental freedom, it remands the case to the regular court for new adjudication and therefore that court has a possibility, in fact, a duty, to follow the reasoning of the Constitutional Court and, if necessary, respond by submitting the case to the CJEU for a preliminary ruling.

While there is a possibility that the dialogue between the national court and the CJEU might be disrupted, in Slovenia, it can be concluded that the dialogue concerning the preliminary ruling procedure has recently been impaired between the Supreme Court and the Constitutional Court. In Case No. Up-1133/18, the Constitutional Court decided on the constitutional complaint of a complainant who, in a commercial dispute, claimed the nullity of a contractual term on the basis of which it was allegedly not entitled to the reimbursement of value-added tax concerning the implementation of a project financed from European structural funds.⁸⁹ The complainant argued that the case raised a question of EU law interpretation and application. Throughout the proceedings, he has referred to EU law, including the case law of the CJEU. He has continuously motioned the

⁸⁵ Ibid., para. 10.

⁸⁶ Ibid., para. 13.

⁸⁷ Ibid.

⁸⁸ Ibid., para. 16.

⁸⁹ Constitutional Court Decision No. Up-1133/18, *op. cit.* 15.

courts to stay the proceedings and refer the case to the CJEU for a preliminary ruling. The first and second instance courts took a different view and held that, on the basis of EU law, a member state has the right of choice whether it will deem value-added tax a justified expenditure that can be reimbursed. They did not submit the case to the CJEU for a preliminary ruling. The Supreme Court did not grant leave to appeal holding that the conditions for granting such were not met and it did not adopt a position as to the complainant's motion that the case be submitted to the CJEU for a preliminary ruling.⁹⁰

The Constitutional Court first examined whether the case raised questions of the application and interpretation of EU law, including the case law of the CJEU and the obligation to refer a case to the CJEU for a preliminary ruling. It found that the case at issue concerned funding from cohesion policy funds, which (also) falls within the scope of regulation of the EU.⁹¹ The Constitutional Court clarified that the right to a reasoned judicial decision, which is protected by Article 22 of the Constitution of Slovenia, is of special importance also in EU law.⁹² It is determined by Article 296 of the TFEU (for the institutions and authorities of the EU) and in Article 47 of the EU Charter as a fundamental right, which requires the decision-making authority to take account of the parties' submissions by carefully and impartially examining all the relevant elements of the case and by providing detailed reasons for its decision, with the obligation to provide sufficiently specific and concrete reasons for the decision to enable the person concerned to be informed of the reasons for refusing his or her motion.⁹³ The competent national court must adopt a position as to the motion for a preliminary ruling by the CJEU with sufficient clarity and must, in doing so, take into consideration the criteria that stem from Article 267 of the TFEU and the case law of the CJEU.⁹⁴

As the Constitutional Court emphasised, the duty to provide reasoning also applies when the national procedural regulation determines that a court may only substantiate its decision by referring to the fact that the conditions for considering the case are not fulfilled (a so-called abbreviated reasoning).⁹⁵ Therefore, the Supreme Court, even in cases when it does not grant leave to appeal, must state the reasons why it did not refer the case to the CJEU for a preliminary ruling, unless motions to refer the case to the CJEU are unsubstantiated, manifestly unfounded,

⁹⁰ Ibid., para. 6.

⁹¹ Ibid., para. 7.

⁹² Ibid., para. 17.

⁹³ Ibid.

⁹⁴ Ibid., para. 18-19.

⁹⁵ Ibid., para. 22.

or nonsensical or they constitute an abuse of procedural rights.⁹⁶ In the case at issue, the Constitutional Court held that the Supreme Court failed to substantiate why it did not grant the complainant's motion to refer the case to the CJEU for a preliminary ruling. However, the motion was not manifestly unfounded, in fact, it was reasoned, the complainant even suggested how the question to the CJEU for a preliminary ruling would be phrased, and importantly, the proposed question for a preliminary ruling was of decisive importance for adjudication.⁹⁷ Following that reasoning, the Constitutional Court concluded that the Supreme Court violated the right to a substantiated judicial decision determined by Article 22 of the Constitution of Slovenia and the right to judicial protection determined by the first paragraph of Article 23 of the Constitution of Slovenia. It abrogated the challenged order and remanded the case to the Supreme Court.⁹⁸ This case raises at least two important questions.

1. The Supreme Court has an established case law of giving a short, abbreviated reasoning when the leave to appeal is not granted. According to the ruling of the Constitutional Court in Case No. Up-1133/18, the Supreme Court should change its case law when there is a reasoned motion to refer the case to the CJEU for a preliminary ruling (even when it considers that the conditions for granting an appeal were not met) due to the fact that it is the last instance court. Indeed, the Supreme Court had problems with the decision of the Constitutional Court, and it lodged a request for a preliminary ruling in the case *Kubera*, C-144/23, which is now pending before the CJEU.⁹⁹ The request concerns proceedings before the Supreme Court relating to the grant of leave to bring an appeal on a point of law in which the Supreme Court does not consider the issue of whether it is required to refer a question to the CJEU for a preliminary ruling.
2. In proceedings for a review of the constitutionality or legality of regulations, the Constitutional Court rejects a request or petition by an order, unless all procedural requirements are fulfilled. These orders might be short in length and unreasoned. It can be argued that the Constitutional Court itself could breach a duty to refer a question to the CJEU for preliminary ruling if it rejects a petition or request, because it considers that the procedural requirements are not fulfilled, however at the same time ignoring or not responding properly to a party's request that a reference for a preliminary ruling be made to the CJEU. In particular, this is a challenge for the Constitutional Court

⁹⁶ Ibid., para. 33.

⁹⁷ Ibid., para. 34.

⁹⁸ Ibid., para. 35.

⁹⁹ Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 9 March 2023, Case *Kubera*, C-144/23, OJ C 271, 31. 7. 2023, p. 14.

in light of its long-standing appeal to adopt constitutional amendments that would facilitate its work, primarily by authorising the Constitutional Court to decide freely which petitions or constitutional complaints it would consider.¹⁰⁰ The free choice of the Constitutional Court in determining whether to accept petitions and constitutional complaints for consideration on the merits, namely introducing a selective jurisdiction of the Constitutional Court without appropriate adjustments to the judicial system, may pose challenges from the point of view of the correct application of EU law.

It is also important to mention Case No. Up-1348/19, where the applicants requested the Constitutional Court to accept the constitutional complaint against the judgement dismissing the applicants' request for judicial protection. The Market Inspectorate instituted minor offence proceedings against the applicants arguing that they had engaged in a misleading commercial practice regarding the advertised price advantage.¹⁰¹ It concluded that the price comparison misled or could have misled the average consumer into thinking that he or she was buying the items during a limited promotional period for a price that was lower than usual, and imposed a fine.¹⁰² The applicants referred to the CJEU's case law, EU law and to decisions of the Austrian and German courts arguing that the decision of the Market Inspectorate was not in line with EU law. They further requested that the first instance court seek a preliminary ruling from the CJEU.¹⁰³ A judge of the first instance court dismissed the applicants' request for judicial protection. At the same time, it did not in any way address the applicants' request for a preliminary ruling from the CJEU.¹⁰⁴ In their constitutional complaint the applicants argued that the first instance court had not provided sufficient reasoning and it had not submitted the question for a preliminary ruling to the CJEU. The Constitutional Court decided to reject the constitutional complaint arguing that "the applicants had not made a reasoned proposal for exceptional consideration of an otherwise inadmissible constitutional complaint".¹⁰⁵ The ECtHR, before which the applicants filed an application, unanimously held that there had been a violation of the right to a fair hearing, determined by Article 6(1) of

¹⁰⁰ See, e.g., An Overview of the Work for 2022, The Constitutional Court of the Republic of Slovenia, Ljubljana 2023, pp. 8 and 17.

¹⁰¹ Judgement of the ECtHR in *Rutar and Rutar Marketing d.o.o. v. Slovenia*, application no. 21164/20, 15 December 2022, para. 5.

¹⁰² *Ibid.*, para. 8.

¹⁰³ *Ibid.*, para. 9–11.

¹⁰⁴ *Ibid.*, para. 12.

¹⁰⁵ Constitutional Court Order No. Up-1348/19, 24 December 2019, ECLI:SI:USRS:2019:Up.1348.19.

the ECHR.¹⁰⁶ It emphasised that the applicants' request that the first instance court seek a preliminary ruling from the CJEU "was not *prima facie* redundant", nonetheless "the reasons given in the judgement at issue shed no light on the grounds relied upon by the [...] Court to dismiss the applicants' request to seek a preliminary ruling and in fact leave open the possibility that this request was simply disregarded".¹⁰⁷ The ECtHR deemed that the first instance court had a duty to give reasons for its refusal to make a reference for a preliminary ruling and that the Slovenian Constitutional Court has jurisdiction to decide such cases only on an exceptional basis.¹⁰⁸ Nonetheless, the ECtHR concluded "that neither the [first instance] Court nor the Constitutional Court addressed in any way the applications' request to seek a preliminary ruling, nor any other of their legal arguments".¹⁰⁹ The above reasoning suggests that the ECtHR does not find that the Constitutional Court takes EU law and international human rights obligations seriously when it ignores or fails to provide reasons for the rejection of the request for a preliminary ruling.

6. Future Challenges

The relationship between constitutional law and EU law has been complex in various national fora.¹¹⁰ Although the Slovenian Constitutional Court refers to and applies EU law in its decisions, there is still room for improvement. As the previous analysis illustrated, the Constitutional Court has not fully internalized EU law in its practice. There are cases where the argumentation is lacking regarding why the EU Charter was (not) invoked. The Constitutional Court could diligently explain the application of EU Charter in its adjudication, in particular when the applicant refers to the EU Charter and when the condition of "implementing Union law" is fulfilled. The instance of judicial dialogues through preliminary reference procedure has been relatively rare. This is, however, a mechanism that

¹⁰⁶ Judgement of the ECtHR in *Rutar and Rutar Marketing d.o.o. v. Slovenia*, application no. 21164/20, 15 December 2022, para. 64.

¹⁰⁷ *Ibid.*, para. 60.

¹⁰⁸ *Ibid.*, para. 63.

¹⁰⁹ *Ibid.*

¹¹⁰ See, e.g., Polish Constitutional Court, decision of 11 May 2005, Case K 18/04; Czech Constitutional Court, decision of 8 March 2006, Case Pl. US. 50/04; German Federal Constitutional Court, decision of 30 June 2009, Case 2 BvE 2/08; Spanish Constitutional Court, declaration of 13 December 2004, Case DTC 1/2004; Belgian Council of State, decision of 5 November 1996, Case no. 62.922; Italian Constitutional Court, decision of 18 December 1973, Case no. 183/1973; Constitutional Court of the Republic of Lithuania, decision of 14 March 2006, Joint Cases 17/02-24/03-22/04; French Conseil d'État, decision of 3 December 2001, Case no. 226514.

allows, indeed encourages, the argumentative discourse between the Constitutional Court (as well as all national courts) and the CJEU.

Moreover, a plethora of the highest domestic courts have pronounced themselves on the relationship between EU law and constitutional law.¹¹¹ For instance, the Constitutional Court of the Czech Republic observed that it “cannot entirely overlook the impact of [Union] law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with [Union] law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from [Union] law”.¹¹² The Slovenian Constitutional Court, as we have mentioned, adopted the position “that the fundamental principles that define the relationship between internal law and EU law are at the same time also internal constitutional principles that have the same binding effect as the Constitution.”¹¹³ On many occasions, it has held that “[t]he most important fundamental principle is that of the primacy of EU law.”¹¹⁴ The principle of primacy of EU law provides that in the case of conflict between EU law and domestic law, EU law always prevails. It is, however, not clear from the case law of the Constitutional Court whether it considers the principle of primacy to be absolute or indeed it comes with exceptions. Is the position of the Slovenian Constitutional Court to apply the principle of primacy only if EU law respects domestic constitutional legal orders, particularly the rule of law, human rights, fundamental freedoms, and the principle of constitutional democracy, as has been the case in some EU member states? If EU law does not respect the rule of law, human rights, and constitutional democracy, the principle of primacy might come into question. The Constitutional Court has not yet elaborated on the issue of potential conflict between EU law and domestic law. In such a case, the Slovenian Constitutional Court should enter into judicial dialogue with the CJEU and persuasively explain why the Slovenian constitutional system prevails over

¹¹¹ WALKER, N. The Idea of Constitutional Pluralism. *Modern Law Review*, 2002, vol. 65, no. 3, pp. 317-359; WALKER, N. Sovereignty and Differentiated Integration in the European Union. *European Law Journal*, 1998, vol. 4, no. 4, pp. 355-388; BURCHARDT, D. The relationship between the law of the European Union and the law of its Member States – a norm – based conceptual framework. *European Constitutional Law Review*, 2019, vol. 15, no. 1, pp. 73-103; ROSAS, A. European Union Law and National Law: A Common Legal System? In: KAR-JALAINEN, K., TORNBORG, I., PURSIAINEN, A. (eds.). *International Actors and the Formation of Laws*. Cham: Springer, 2022, pp. 11-28.

¹¹² Constitutional Court of the Czech Republic, op. cit. 110, part VI.

¹¹³ Constitutional Court Decision No. U-I-146/12, op. cit. 12, para. 32.

¹¹⁴ See, e.g., Constitutional Court Decision No. U-I-295/13, op. cit. 62, para. 67; Constitutional Court Decision No. Up-1133/18, op. cit. 15, para. 25.

EU law. Such a dialogue arguably enables it to construct its own constitutional identity, at least in a relationship to EU law.¹¹⁵

Clarifying the relationship between Slovenian constitutional law and EU law is also essential regarding potential constitutional reforms in Slovenia. Limiting the selection of cases at the admissibility level, potential reforms, that would further restrict the acceptance rate before the Slovenian Constitutional Court, could significantly curtail the protection of human rights and fundamental freedoms in the Slovenian legal system additionally the correct application of EU law might be at risk. It would be helpful if the Constitutional Court explicitly addressed how introducing its selective jurisdiction would impact the application of EU law in the Slovenian constitutional legal system. This is particularly relevant when uncertainties arise regarding the Supreme Court's duty to refer questions to the CJEU for a preliminary ruling, when it does not grant leave to appeal. These questions are essential for ensuring the correct application of EU law and effective protection of human rights and fundamental freedoms, including the right to a reasoned judicial decision. This article has drawn attention to the potential disagreement between the Slovenian Constitutional Court and the Supreme Court, which is notable in the case *Kubera*, still pending before the CJEU.

In short, the Slovenian Constitutional Court could provide more straightforward guidance as to protecting the position of the Constitution in the domestic legal system while also ensuring respect for the primacy of EU law and indeed for a correct application of EU law. Clarifying the relationship between EU law and the Slovenian constitutional law and elaborating on how to proceed with a potential constitutional reform related to the selective jurisdiction of the Constitutional Court would help eliminate uncertainties and strengthen the rule of law in the Slovenian constitutional system.

List of references

Books and articles

An Overview of the Work for 2022. The Constitutional Court of the Republic of Slovenia. Ljubljana 2023, available at <<https://www.us-rs.si/publications/?lang=en>> (accessed 19 February 2024).

¹¹⁵ FARAGUNA, P. Constitutional Identity in the EU—A Shield or a Sword? *German Law Journal*, 2017, vol. 18, no. 7, pp. 1617–1640; KÖRTVÉLYESI, Z., MAJTÉNYI, B. Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary. *German Law Journal*, 2017, vol. 18, no. 7, pp. 1721–1744; KOVÁCS, K. The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts. *German Law Journal*, 2017, vol. 18, no. 7, pp. 1703–1720.

- AVBELJ, M. Article 3a of the Constitution of Slovenia. In AVBELJ, M. (ed.). *Komentar Ustave Republike Slovenije*, Del: 1. Nova Gorica, Nova univerza, Evropska pravna fakulteta, 2019, pp. 66–74.
- AVBELJ, M. Contextual Analysis of Judicial Governance in Slovenia. *German Law Journal*, 2018, vol. 19, no. 7, pp. 1902–1930.
- AVBELJ, M. Slovensko ustavno pravo v odnosu do prava EU [Slovenian Constitutional Law in Relation to EU Law]. In: KAUČIČ, I. (ed.). *Pomen ustavnosti in ustavna demokracija, Znanstveni zbornik Dvajset let Ustave Republike Slovenije [The Importance of Constitutionality and Constitutional Democracy, 20 Years of the Constitution of the Republic of Slovenia, Collection of Scientific Papers]*. Ljubljana: Ustavno sodišče Republike Slovenije, 2012.
- AVBELJ, M. The sociology of (Slovenian) constitutional democracy. *Hague Journal on the Rule of Law*, 2018, vol. 10, no. 3, pp. 35–57.
- AVBELJ, M., BATAGELJ, P., CIGOJ, M., LETNAR ČERNIČ, J., JEVŠEK PEZDIR, A., ŠUŠTERŠIČ, J., ŠUŠTERŠIČ, S., VATOVEC, K. Obvladovanje ideologije in politike na ustavnem sodišču. *Pravna praksa: PP, časopis za pravna vprašanja*. 2020, vol. 39, no. 33, pp. 24–29.
- AVBELJ, M., BATAGELJ, P.; CIGOJ, M., VATOVEC, K. Ustavno sodišče in mednarodna dimenzija. In: AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021, pp. 115–142.
- AVBELJ, M., ŠUŠTERŠIČ, J. Conceptual Framework and Empirical Methodology for Measuring Multidimensional Judicial Ideology. *DANUBE: Law, Economics and Social Issues Review*, 2019, vol. 10, no. 2, 129–159.
- AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021.
- AVBELJ, M., ŠUŠTERŠIČ, J., VATOVEC, K., JEVŠEK PEZDIR, A., LETNAR ČERNIČ, J., ŠUŠTERŠIČ, S. Pojemovni okvir in empirična metodologija za merjenje večdimenzionalne ideologije na sodiščih. *Pravna praksa: PP, časopis za pravna vprašanja*. 2018, vol. 37, no. 44, pp. II–VIII.
- AVBELJ, M., VATOVEC, K. The Uneasy Reception of EU Soft Law in Slovenian Legal Order. In: ELIANTONIO, M. KORKEA-AHO, E., STEFAN, O. (eds.). *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. Oxford: Hart Publishing, 2021, pp. 219–232.
- Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia [Temeljna ustavna listina o samostojnosti in neodvisnosti Republike Slovenije]. Official Gazette RS, Nos. 1/91-I, and 19/91 – corr.
- BURCHARDT, D. The relationship between the law of the European Union and the law of its Member States – a norm – based conceptual framework. *European Constitutional Law Review*, 2019, vol. 15, no. 1, pp. 73–103.
- Charter on Fundamental Rights of the European Union. OJ C 202, 7. 6. 2016.
- Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (the Banking Communication). OJ C 216, 30. 7. 2013.
- Constitution of the Republic of Slovenia [Ustava Republike Slovenije]. Official Gazette RS, Nos. 33/91-I etc.

- Constitutional Court Act [Zakon o Ustavnem sodišču]. Official Gazette RS, Nos. 64/07 – official consolidated text etc.
- CRAIG, P., de Búrca, G. *EU Law: Text, Cases, and Material*. 6th edition. Oxford University Press, 2015.
- Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14. 12. 2007.
- FARAGUNA, P. Constitutional Identity in the EU—A Shield or a Sword? *German Law Journal*. 2017, vol. 18, no. 7, pp. 1617–1640.
- KÖRTVÉLYESI, Z., MAJTÉNYI, B. Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary. *German Law Journal*. 2017, vol. 18, no. 7, pp. 1721–1744.
- KOVÁCS, K. The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts. *German Law Journal*. 2017, vol. 18, no. 7, pp. 1703–1720.
- KROMMENDIJK, J. *National Courts and Preliminary References to the Court of Justice*. Edward Elgar Publishing Limited, 2021.
- LENAERTS, K., MASELIS, I., GUTMAN, K. *EU Procedural Law*. Oxford University Press, 2014.
- LETNAR ČERNIČ, J. Družbena dimenzija sodniške ideologije v sodni praksi prvih treh mandatov slovenskega ustavnega sodišča. In: AVBELJ, M., ŠUŠTERŠIČ, J. (eds.). *Ideologija na sodiščih*. Nova Gorica: Nova univerza, 2021, pp. 95–114.
- LETNAR ČERNIČ, J. Authoritarian Dimension of Judicial Ideology of the Slovenian Constitutional Court. *Hrvatska i komparativna javna uprava*, 2020, vol. 20, no. 4, pp. 733–760.
- ROSAS, A. European Union Law and National Law: A Common Legal System? In: KARJALAINEN, K., TORNERBERG, I., PURSIANEN, A. (eds.). *International Actors and the Formation of Laws*. Cham: Springer, 2022, pp. 11–28.
- ROSAS, A. The National Judge as EU Judge: Some Constitutional Observations. *SMU Law Review*. 2014, vol. 67, no. 4, pp. 717–727.
- Treaty on European Union (Consolidated version). OJ C 202, 7. 6. 2016.
- Treaty on the Functioning of the European Union (TFEU) (Consolidated version). OJ C 202, 7. 6. 2016.
- TRIDIMAS, G., TRIDIMAS, T. National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure. *International Review of Law and Economics*. 2004, vol. 24, no. 2, pp. 125–145.
- VATOVEC, K. Evropeizacija ustavnosodne presoje prek Listine Evropske unije o temeljnih pravicah, [Europeanization of the constitutional court's case law through the Charter of Fundamental Rights of the European Union]. *Dignitas: revija za človekove pravice = the Slovenian journal of human rights*. 2019, nos. 83–84, pp. 27–52.
- WALKER, N. Sovereignty and Differentiated Integration in the European Union. *European Law Journal*. 1998, vol. 4, no. 4, pp. 355–388.
- WALKER, N. The Idea of Constitutional Pluralism. *Modern Law Review*. 2002, vol. 65, no. 3, pp. 317–359.

Court cases

- Belgian Council of State, decision of 5 November 1996, Case no. 62.922.
- Czech Constitutional Court, decision of 8 March 2006, Case Pl. US. 50/04.
- Constitutional Court of the Republic of Lithuania, decision of 14 March 2006, Joint Cases 17/02-24/03-22/04.
- Constitutional Court of the Republic of Slovenia, Decision No. Up-2012/08, 5 March 2009, ECLI:SI:USRS:2009:Up.2012.08.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-92/07, 15 April 2010, ECLI:SI:USRS:2010:U.I.92.07.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-109/10, 26 September 2011, ECLI:SI:USRS:2011:U.I.109.10.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-37/10, 18 April 2013, ECLI:SI:USRS:2013:U.I.37.10.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-146/12, 14 November 2013, ECLI:SI:USRS:2013:U.I.146.12.
- Constitutional Court of the Republic of Slovenia, Decision No. Up-1056/11, 21 November 2013, ECLI:SI:USRS:2013:Up.1056.11.
- Constitutional Court of the Republic of Slovenia, Decision No. Up-1303/11, U-I-25/14, 21 March 2014, ECLI:SI:USRS:2014:Up.1303.11.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-295/13, 19 October 2016, ECLI:SI:USRS:2014:U.I.295.13.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-59/17, dated 18 September 2019, ECLI:SI:USRS:2019:U.I.59.17.
- Constitutional Court of the Republic of Slovenia, Decision No. Up-1133/18, 31 March 2022, ECLI:SI:USRS:2022:Up.1133.18.
- Constitutional Court of the Republic of Slovenia, Decision No. U-I-4/20, 16 February 2023, ECLI:SI:USRS:2023:U.I.4.20.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-113/04, 8 July 2004, ECLI:SI:USRS:2007:U.I.113.04.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-113/04, 7 February 2007, ECLI:SI:USRS:2007:U.I.113.04.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-65/13, 26 September 2013, ECLI:SI:USRS:2014:U.I.65.13.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-295/13, 6 November 2014, ECLI:SI:USRS:2014:U.I.295.13.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-152/17, 3 September 2020, ECLI:SI:USRS:2020:U.I.152.17.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-4/20, 14 January 2021, ECLI:SI:USRS:2023:U.I.4.20.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-104/22, 13 April 2023, ECLI:SI:USRS:2023:U.I.104.22.
- Constitutional Court of the Republic of Slovenia, Order No. U-I-205/19, U-I-230/19, 26 October 2023, ECLI:SI:USRS:2023:U.I.205.19.
- French Conseil d'État, decision of 3 December 2001, Case no. 226514.

German Federal Constitutional Court, decision of 30 June 2009, Case 2 BvE 2/08.

Italian Constitutional Court, decision of 18 December 1973, Case no. 183/1973.

Judgement of the CJEU (Grand Chamber) in the case *Melloni*, C-399/11, 26 February 2013, ECLI:EU:C:2013:107.

Judgment of the CJEU (Grand Chamber) in the joined cases *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung and others*, C-293/12 and C-594/12, 8 April 2014, ECLI:EU:C:2014:238.

Judgement of the CJEU (Grand Chamber) in the case *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, C-526/14, 19 July 2016; ECLI:EU:C:2016:570.

Judgement of the CJEU in the case *Banka Slovenija*, C-45/21, 13 September 2022, ECLI:EU:C:2022:670.

Judgement of the ECtHR in *Rutar and Rutar Marketing d.o.o. v. Slovenia*, application no. 21164/20, 15 December 2022.

Polish Constitutional Court, decision of 11 May 2005, Case K 18/04.

Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije (Slovenia) lodged on 9 March 2023, Case Kubera, C-144/23, OJ C 271, 31. 7. 2023.

Spanish Constitutional Court, declaration of 13 December 2004, Case DTC 1/2004.