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## The Relationship of the Supreme Courts of the Slovak Republic with the Court of Justice of the European Union

- **ABSTRACT:** *The judicial authorities of the Member States of the European Union have an important duty to ensure the full effect of EU legal norms at the national level, as they are obliged to fully apply EU law and protect the individual rights conferred by that law. This article focuses on the relationship among the highest judicial bodies of the Slovak Republic, namely the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, with the Court of Justice of the European Union, which ensures the uniform interpretation and application of Union law. In this context, this article examines the extent to which the Slovak Supreme Court uses the preliminary ruling procedure, as well as its decisions, to consider the requirements of Union law can be examined, resulting from the case-law of the Court of Justice in accordance with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on the European Union. It also examines the cooperation between the general courts of the Slovak Republic and the Court of Justice of the European Union in the context of the preliminary ruling procedure, and how the Slovak constitutional order meets the requirements of Union law.*
- **KEYWORDS:** European Union law, Constitutional Court of the Slovak Republic, Supreme Court of the Slovak Republic, Supreme Administrative Court of the Slovak Republic, case-law of the Court of Justice.

### 1. Introduction

The practical relevance of the question of the relationship between national judicial authorities, particularly the supreme courts of the Member States of the European Union (hereinafter Union or EU), and the Court of Justice of the EU

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(hereinafter the CJEU) lies in the evaluation of the functioning of the judicial system of the EU, which the Union and national courts together constitute. All these courts are responsible for monitoring compliance with Union law, which is applied at both the Union and national levels. While the CJEU is charged with ensuring the effective and uniform application of Union law and safeguarding its autonomy, it is the task of the national courts or tribunals, in accordance with the principle of sincere cooperation enshrined in Article 4(3) Treaty on the EU (hereinafter TEU), to ensure the application of Union law in the Member States.<sup>1</sup> In fulfilling this responsibility, the national courts are, in fact, Union courts of general scope which, within their territorial scope, ensure the comprehensive application of Union law.<sup>2</sup> There is no hierarchical relationship of superiority or subordination between the CJEU and national courts but, as the Court itself emphasises, a relationship of cooperation.<sup>3</sup>

Although the mechanism of the Union's judicial system is primarily determined by primary EU law and supplemented by the case-law of the Court of Justice (hereinafter also the Court),<sup>4</sup> given the role of the national courts or tribunals, it is also intertwined with the legal systems of the Member States. In this context, Article 19(1) TEU imposes an obligation on the Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Thus, in the absence of Union legislation, national legal systems must designate the competent courts and establish procedural rules to be applied in actions concerning the protection of individual rights arising under Union law.<sup>5</sup> The procedural discretion of Member States is limited by the principles of equivalence and effectiveness, which also bind the national courts or tribunals in ensuring the effective judicial protection of Union rights.<sup>6</sup>

## 2. Relationship between EU law and the Slovak legal order

To define the relationship between the supreme courts of the Member States and the CJEU, it is necessary to draw attention not only to the EU legal order or the case-law of the Union courts, but also to the national constitutional orders, including the interpretation of their provisions by the constitutional courts of the

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1 Opinion of the Court (Full Court) of 8 March 2011, ECLI:EU:C:2011:123, paras. 66–69.

2 Judgment of the Court of 13 March 2007, C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 38.

3 Judgment of the Court of 22 June 2010, joined cases C-188/10 and C-189/10 *Melki and Abdeli*, ECLI:EU:C:2010:363, para. 51.

4 According to Art. 19(1) TEU: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.' The Civil Service Tribunal was established in 2004 as the only special court, and ceased to exist in 2016.

5 Judgment of the Court of 19 November 2019, C-585/18 *A.K.*, ECLI:EU:C:2019:982, para. 115.

6 See e.g. Judgment of the Court of 15 April 2008, C-268/06 *Impact*, ECLI:EU:C:2008:223, para. 55.

Member States. Similarly, as Member States regulate the relationship between national and international laws under their constitutions, they are required to address the requirements arising from Union law. Its status is regulated by most national constitutions independent of the regulation of the relationship to international law in specific provisions adopted by states, either in connection with their accession to the Union (or even to the Communities) or through the ratification of one of the revision treaties.<sup>7</sup>

In this context, the question of the nature of Union law, which is characterised by specific features that distinguish it from international law, is relevant. From the perspective of its application by the national authorities of the Member States, it is closer to national law than to international law. In this regard, the CJEU highlights that ‘by contrast with ordinary international treaties,’ the founding treaties created ‘its own legal system,’ which ‘became an integral part of the legal systems of the Member States’ and which the courts of the Member States are bound to apply.<sup>8</sup> According to the CJEU, this new legal order is characterised by its independence from both international law and the national legal orders of the Member States.<sup>9</sup> However, based on international treaties concluded between Member States, the international legal basis of the EU’s legal order cannot be denied. It also includes international agreements concluded by the Union with third countries or international organisations.<sup>10</sup> Therefore, some authors prioritise the international law character of Union law.<sup>11</sup> Others go even further, insisting that, despite certain specificities, Union law should be considered international law and not a new legal order *sui generis*.<sup>12</sup> In this context, the question arises of whether Union law can be considered a self-contained regime of international

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7 Exceptions are e.g. the constitutions of the Netherlands or Luxembourg, whose provisions regulating the relationship between national and international law also apply to Union law. Separate constitutional provisions have been adopted e.g. by the Czech Republic, Austria, or Slovakia in connection with their accession to the Union, and by Germany or France when ratifying the Maastricht Treaty.

8 Judgment of the Court of 15 July 1964, C-6/64 *Costa v. ENEL*, ECLI:EU:C:1964:66.

9 The Court of Justice first characterised Community (now Union) law as a ‘new legal order of international law’ in its judgment of 5 February 1963, C-26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1. Subsequently, he began to refer to it as ‘own legal system’ or ‘new legal order’, i.e. he no longer referred to its connection with international law. He first referred to it as ‘own legal system’ in his judgment of 15 July 1964, C-6/64 *Costa v. ENEL*, ECLI:EU:C:1964:66. He subsequently reiterated this position in e.g. his judgment of 19 November 1991, C-6 and 9/90 *Francovich and Bonifaci*, ECLI:EU:C:1991:428, para. 31; and his judgment of 20 September 2001, C-453/99 *Courage*, ECLI:EU:C:2001:465, para. 19. He referred to it as a ‘new legal order’ in e.g. Opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 65; or in the more recent judgment of 10 December 2018, C-621/18 *Wightman and Others*, ECLI:EU:C:2018:999, para. 44.

10 See Judgment of the Court of 30 September 1987, C-12/86 *Demirel*, ECLI:EU:C:1987:400, para. 7; and Judgment of the Court of 30 April 1974, C-181/73 *Haegeman*, ECLI:EU:C:1974:41, para. 5.

11 See e.g. Schilling, 1988, pp. 677–681.

12 See e.g. Funke, 2010, p. 118.

law.<sup>13</sup> Such a subsystem is not completely closed to international law but shows a higher degree of independence, which is expressed in particular by the existence of special sanctioning norms.<sup>14</sup>

The relationship between Slovak and international law is defined by Article 1(2) of the Constitution of the Slovak Republic (hereinafter ‘the SR Constitution’), according to which: ‘The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.’<sup>15</sup> According to some authors, the aforementioned provision can be considered a basic norm of reception; however, it is not accepted by most of the professional public.<sup>16</sup> Although not applicable per se, it plays an important role in the interpretation of other constitutional and legal provisions.<sup>17</sup> According to the Constitutional Court of the Slovak Republic, it ‘applies to all international obligations of the Slovak Republic regardless of their content, and establishes the obligation to fulfil them.’<sup>18</sup> The Slovak Republic’s obligation to comply with all international obligations is one of its most important constitutional principles.<sup>19</sup> The primacy of selected international treaty obligations over legal norms is established by Article 7(5) of the Slovak Constitution, according to which

International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.<sup>20</sup>

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13 See e.g. Ionita, L. A., n.d., pp. 39–59.

14 Šturma, 2013, p. 314.

15 Constitution of the Slovak Republic [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 20 June 2023).

16 Jankuv, 2009, p. 32. His opinion is not shared by e.g. Jánošíková, 2013, p. 253.

17 Čorba, 2002, p. 704.

18 Order of the Supreme Court of the Slovak Republic, PL. ÚS 44/03 from 21 October 2010, translated by the author.

19 Čorba, 2002, p. 705.

20 Constitution of the Slovak Republic [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 20 June 2023). Moreover, within the transitional and final provisions, Art. 154c(1) of the SR Constitution mentions the precedence of certain international treaties concluded before the establishment of the Slovak Republic, according to which ‘International treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act, shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms’. According to Art. 154c(2) of the SR Constitution, this includes ‘Other international treaties which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act,... if so provided by a law.’

The Constitutional legislator considers these treaties part of the Slovak legal order and assigns them a place in the hierarchy of legal norms between the Constitution and constitutional laws, and other laws. The use of the term “law” in this case therefore means that it is a law in the literal sense, as a result of the legislative powers of the National Council of the Slovak Republic.<sup>21</sup> The basic prerequisite for priority under Article 7(5) of the SR Constitution is the promulgation of an international treaty in the manner laid down by law.<sup>22</sup> However, in light of Article 1(2) of the SR Constitution, in which the Slovak Republic declares its international law obligations, a number of questions not answered by the SR Constitution arise, such as the resolution of a possible conflict between an international and a constitutional norm or the possibility of precedence in the application of international law beyond the wording of Article 7(5) of the SR Constitution, as for example in the case of self-executing international treaties that have not been promulgated in the manner laid down by law.<sup>23</sup> Some authors are also critical of the fact that the SR Constitution does not regulate in detail the relationship with international law in general but focuses only on certain categories of international treaties.<sup>24</sup>

The relationship between the Slovak and EU legal orders is regulated by Article 7(2) of the SR Constitution, according to which

The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2).<sup>25</sup>

According to the wording of the second sentence of Article 7(2) of the SR Constitution, the primacy of Union law thus applies exclusively concerning statutory or regulatory norms, but not to constitutional provisions. This interpretation

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21 Balog, 2009, p. 574.

22 Pursuant to para. 20(7) of Act No. 400/2015 Coll. on the Legislative Drafting and the Collection of Laws of the Slovak Republic, the full text of the treaty is required to be published by means of a notification of the Ministry of Foreign Affairs, which must include information on the decision of the National Council of the Slovak Republic that it is an international treaty that takes primacy over the laws.

23 Giba and Valuch, 2016, pp. 82–88.

24 Klučka, 2001, p. 1.

25 Constitution of the Slovak Republic [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 20 June 2023).

is contrary to the settled case-law of the Court of Justice, according to which a Member State may not rely on its constitutional order to undermine the validity or effectiveness of EU law.<sup>26</sup> It is also questionable to give primacy exclusively to legally binding Union acts that are part of secondary law, because, according to the Court of Justice, all binding rules of Union law take precedence. Thus, a literal interpretation leads to the conclusion that the legal basis for the direct application of the founding treaties on the territory of the Slovak Republic is the aforementioned Article 7(5) of the SR Constitution.<sup>27</sup> This is also indicated by the wording of two resolutions of the National Council of the Slovak Republic referring to the Treaty of Accession between the Slovak Republic and the EU and the Lisbon Treaty as international treaties under Article 7(5) of the SR Constitution, which take precedence over the laws.<sup>28</sup> However, both treaties can clearly be considered international treaties ‘for whose exercise a law is not necessary, and... which directly confer rights or impose duties on natural persons or legal persons.’<sup>29</sup>

However, the correctness of such a conclusion is undermined by the wording of Article 144(2) of the SR Constitution, according to which

If a Court assumes that other generally binding legal regulation (i.e. any other than those referred to in Article 144(1) of the SR Constitution – author’s note),<sup>30</sup> its part, or its individual provisions which concern a pending matter contradicts the Constitution, constitutional law, international treaty pursuant to Article 7(5) (i.e. including treaties which form part of the primary EU law? – author’s question), or law, it shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Article 125(1). Legal

26 See in particular the following judgments of the Court: of 26 May 2016, C-273/15 *Ezernieki*, ECLI:EU:C:2016:364, para. 53; of 15 January 2013, C-416/10 *Križan and Others*, ECLI:EU:C:2013:8, para. 70; of 8 September 2010, C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61; of 13 December 1979, C-44/79, *Hauer*, ECLI:EU:C:1979:290, para. 14; and of 11 December 1970, C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 3.

27 This opinion was originally held by e.g. Dobrovičová, 2007, p. 66; or Jánošíková, 2013, p. 253. The opposite view, according to which the primacy of Union law over the Slovak legal order follows from Art. 7(2) of the SR Constitution, was expressed by, e.g. Drgonec, 2007, p. 125; or Siman and Slašťan, 2012, pp. 394, 395.

28 See National Council Orders No. 365 of 1 July 2003 and No. 809 of 10 April 2008. In contrast, in National Council Resolution No 1596 of 11 May 2005, the Treaty establishing a Constitution for Europe is referred to as an international treaty pursuant to Art. 7(2) in conjunction with Art. 7(5) of the SR Constitution.

29 Art. 7(5) of the SR Constitution. [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 20 June 2023).

30 According to Art. 144(1) of the SR Constitution, judges ‘...in decision making shall be bound by the Constitution, by constitutional law, by international treaty pursuant to Art. 7(2) and (5), and by law.’

opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for the Court.<sup>31</sup>

In contrast, it is settled case-law of the Court of Justice that the national court is under an obligation of its power, within the scope of its jurisdiction, to ensure the full effectiveness of the Union provisions and to protect the rights conferred on individuals by EU law.<sup>32</sup> To that extent, all national judicial authorities are obliged, on their initiative, to directly apply effective Union law and interpret national law in accordance with the requirements of the EU legal order to the maximum extent possible.<sup>33</sup> If they conclude that an interpretation in conformity with Union law is not possible, they must not apply national provisions that are incompatible with Union law, but must, following the EU principle of loyalty, apply the provisions of Union law directly to the full extent of their scope.<sup>34</sup> Subordination of primary Union law to Article 7(5) of the SR Constitution, therefore, leads to the undesirable result of placing the national court in a position in which it must decide to proceed either in accordance with Article 144(2) of the SR Constitution or in a consistent manner in accordance with the settled case-law of the Court of Justice.<sup>35</sup>

It follows then that it is necessary to abandon the literal interpretation of the term 'legally binding acts' used in the second sentence of Article 7(2) of the SR Constitution and to interpret the provision in question in conformity with Union law in such a way that it applies to the entire legal order of the Union. Otherwise, the procedure set out in Article 144(2) of the SR Constitution would constitute an obstacle to the full effectiveness of Union law, on the grounds that it would reserve the resolution of a discrepancy between a Union provision and a national provision to an authority other than the national court that ensures the application of Union law.<sup>36</sup> This fact was probably considered by the Constitutional Court of the Slovak Republic when it stated that although the term 'legally binding acts' is capable of raising problems related to the determination of its precise scope, it

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31 Constitution of the Slovak Republic [Online]. Available at: <https://www.prezident.sk/upload-files/46422.pdf> (Accessed: 20 June 2023).

32 Judgments of the Court of 19 November 1991, C-6 and 9/90 *Francoovich and Bonifaci*, ECLI:EU:C:1991:428, para. 32; and of 28 June 2001, C-118/00 *Larsy*, ECLI:EU:C:2001:368, para. 52.

33 Judgments of the Court of 18 July 2007, C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para. 60; and of 27 October 2009, C-115/08 *ČEZ*, ECLI:EU:C:2009:660, para. 138.

34 Judgment of the Court of 27 October 2009, C-115/08 *ČEZ*, ECLI:EU:C:2009:660, para. 138. See further in particular the judgments of the Court of 4 February 1988, C-157/86 *Murphy and Others*, ECLI:EU:C:1988:62, para. 11; and of 26 September 2000, C-262/97 *Engelbrecht*, ECLI:EU:C:2000:492, paras. 38–40.

35 See in particular Judgment of the Court of 9 March 1978, C-106/77 *Simmmenthal*, ECLI:EU:C:1978:49, paras. 21–24.

36 See e.g. Judgment of the Court of 4 December 2018, C-378/17 *Minister for Justice and Equality and Commissioner of the Garda Síochána*, ECLI:EU:C:2018:979, paras. 3537.

can undoubtedly be concluded that the Treaty on the Functioning of the EU (hereinafter ‘TFEU’) is also a legally binding act.<sup>37</sup> Subsequently, it emphasised that

through ... Article 7(2) of the Constitution, ... a specific sub-category of international treaties has been created within the national constitutional framework, the specific and distinguishing features of which include the fact that they are treaties by which the Slovak Republic has conferred the exercise of part of its powers on the European Communities and the European Union (translated by the author).<sup>38</sup>

It included in this sub-category The Treaty of Accession (between the Slovak Republic and the EU), and via it the TFEU and the TEU.<sup>39</sup> With regard to the competence of the general courts to initiate proceedings under Article 125(1) of the SR Constitution on the grounds of their doubts about the compatibility of national legal provisions with the treaties of the primary law of the Union, the Constitutional Court of the Slovak Republic, concerning the application of the principle of the primacy of EU law, referred to the judgment of the Court of Justice in the *Simmenthal* case.<sup>40</sup> Despite the wording of Article 130(1) of the SR Constitution, the general courts in such a case are not among those entitled to bring proceedings, but it is for them to assess the compatibility of the legislation to ensure the full effectiveness of Union law.<sup>41</sup> In this context, they may refer the matter to the preliminary ruling procedure, in which

It is not for the Court...to rule on the compatibility of national legislation with [Union] law. On the other hand, the Court does have jurisdiction to supply the national court with a ruling on the interpretation of [Union] law so as to enable that court to rule on

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37 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

38 *Ibid.*, pp. 76, 77.

39 *Ibid.*, pp. 77, 78.

40 *Ibid.*, pp. 78, 79. The Constitutional Court referred in particular to paras. 17 and 24 of the judgment of the Court of 9 March 1978, C-106/77 *Simmenthal*, ECLI:EU:C:1978:49. According to Art. 125(1) of the SR Constitution: ‘(1) The Constitutional Court shall decide on the conformity of a) laws .... b) government regulations, generally binding legal regulations of Ministries and other central state administration bodies ... c) generally binding regulations pursuant to Art. 68 ... d) generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration pursuant to Art. 71 para. 2 ... with international treaties promulgated in the manner laid down by a law...’

41 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09. According to Art. 130(1) SR Constitution: ‘The Constitutional Court shall initiate proceedings (on the conformity of legislation – author’s note) if it brings a proposal... (d) a court...’

such compatibility,<sup>42</sup> as the Constitutional Court also highlighted in its judgment.<sup>43</sup>

In the context of delineating the relationship between EU law and the constitutional framework of the Slovak Republic, it is necessary to emphasise that the SR Constitution lacks an explicit expression of the material core that could represent Slovak constitutional identity. According to Article 4(2) TEU, the Union respects the national identity of its member states ‘inherent in their fundamental structures, political, and constitutional...’. However, the SR Constitution does not make reference to terms such as constitutional or national identity. On the contrary, the Constitutional Court of the Slovak Republic has repeatedly affirmed the existence of an implicit material core of the Constitution, the basic elements of which are ‘the principles of a democratic and legal state and, among them, the principle of separation of powers and the related independence of the judiciary’ (translated by the author).<sup>44</sup> These elements can be considered components of the constitutional identity of the Slovak Republic. According to the Constitutional Court,

the material core of the Constitution serves as constraints for the framers of the Constitution in the sense that it prevents or renders it impossible for them to dismantle the existing constitutional order and its democratic essence through formal-legalistic means, to establish an undemocratic regime, and legitimize it through the same means.<sup>45</sup>

Therefore, the same limitation must also apply to the revision and legislative processes within the Union.

### **3. Cooperation between the courts of the Slovak Republic and the CJEU**

The judicial authorities of the Member States have an important duty to ensure the full effect of EU law at the national level, as they are obliged to apply Union law to the full extent of their powers and to protect the rights conferred on individuals

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42 Judgment of the Court of 23 September 2004, C-414/02 *Spedition Ulustrans*, ECLI:EU:C:2004:551, para. 23. See also the judgments of the Court of 29 November 2001, C-17/00 *De Coster*, ECLI:EU:C:2001:651, para. 23; of 6 June 1984, C-97/83 *Melkunie*, ECLI:EU:C:1984:212, paras. 7; and of 17 December 1970, C-30/70 *Scheer*, ECLI:EU:C:1970:117, para. 4.

43 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

44 Finding of the Constitutional Court of the Slovak Republic of 30 January 2019, Case No. PL. ÚS 21/2014.

45 *Ibid.*, translated by the author.

by that law.<sup>46</sup> This obligation, which is not expressly mentioned in the founding Treaties, was derived by the Court of Justice from the principle of sincere cooperation.<sup>47</sup> As already mentioned, the national courts, together with the courts of the CJEU, constitute the judicial system of the Union, which serves both to ‘ensure consistency and uniformity in the interpretation of EU law,’<sup>48</sup> and to ensure judicial review of compliance with the Union’s legal order.<sup>49</sup> In this context, it is necessary to emphasise the key importance of the preliminary ruling procedure introduced by Article 267 TFEU, which is the cornerstone of the entirety of the judicial system as conceived.<sup>50</sup>

According to the Court of Justice, the purpose of the preliminary ruling procedure is to ensure that EU law has the same effect in all Member States under any circumstances and thus to avoid divergent interpretations.<sup>51</sup> The national courts are therefore entitled, and in some cases even obliged, to refer a question to the Court if, in the cases they are hearing and deciding, a question arises as to the interpretation of a provision of EU law or the validity of an act of the institutions of the Union.<sup>52</sup> However, a question referred for a preliminary ruling cannot concern the interpretation or validity of a provision of national law, even where it has been adopted to transpose a provision of EU directives.<sup>53</sup> The task of

46 Judgment of the Court of 9 March 1978, C-106/77 *Simmenthal*, ECLI:EU:C:1978:49, para. 21. See also the judgments of the Court of 13 March 2007, C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 38; of 19 June 1990, C-213/89 *Factortame and others*, ECLI:EU:C:1990:257, para. 19; and also opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 68.

47 In this context, the Court has expressly referred to the principle of sincere cooperation e.g. in its judgments of 14. December 1995, C-312/93 *Peterbroeck*, ECLI:EU:C:1995:437, para. 12; of 19 June 1990, C-213/89 *Factortame and others*, ECLI:EU:C:1990:257, para. 19; of 10 July 1980, C-811/79 *Ariete*, ECLI:EU:C:1980:195, para. 12; of 10 July 1980, C-826/79 *Mireco*, ECLI:EU:C:1980:198, para. 13; or of 16 December 1976, C-45/76 *Comet*, ECLI:EU:C:1976:191, para. 12.

48 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C:2018:158, para. 35; which adopts verbatim the wording of the Court’s Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 174.

49 Judgment of the Court, 3 October 2013, C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 90. See also opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

50 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C:2018:158, para. 35; which adopts verbatim the wording of the Court’s Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 174.

51 Opinion of the Court 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

52 Under Art. 267(1) TFEU, the Court of Justice has competence to assess the validity of ‘acts of the institutions, bodies, offices or agencies of the Union’ as well as to interpret the founding Treaties and Union acts, i.e. in general the complete EU law, with the exception of the area of the common foreign and security policy (see the last sentence of Art. 24(1) TEU, as Art. 275 TFEU).

53 See the judgments of the Court of 17 January 2013, C-23/12 *Zakaria*, ECLI:EU:C:2013:24, para. 29; of 19 September 2006, C-506/04 *Wilson*, ECLI:EU:C:2006:587, para. 34; of 20 October 2005, C-511/03 *Ten Kate Holding Musselkanaal and others*, ECLI:EU:C:2005:625, para. 25; and of 12 October 1993, C-37/92 *Vanacker a Lesage*, ECLI:EU:C:1993:836, para. 7.

verifying the compatibility of national rules with Union law thus falls exclusively to the judicial authorities of the Member States, which are provided by the Court of Justice with the interpretative means under EU law enabling them to assess that compatibility.<sup>54</sup> The preliminary ruling mechanism thus provides ‘to national judges a means of eliminating difficulties that may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States’.<sup>55</sup> Furthermore, it enables the coherence, full effect and autonomy, and ultimately the specific nature of the law created by the founding treaties to be ensured.<sup>56</sup> Consequently, the preliminary ruling procedure thus establishes ‘a dialogue between the Court of Justice and the courts... of the Member States’ and is ‘an instrument of cooperation’ between them.<sup>57</sup> Thus, the Court ensures the uniform interpretation and application of Union law, while the resolution of specific disputes remains within the competence of the national courts.

Immediately after the accession of the Slovak Republic to the EU, Slovak courts made only limited use of the possibility of referring questions for a preliminary ruling to the Court of Justice. While during the first five years (i.e. from 1.5.2004 to 30.4.2009) they only initiated 2 preliminary rulings, during the next five years (i.e. from 1.5.2009 to 30.4.2014) there were already 22, and in the following period of approximately nine years (i.e. from 1.5.2014 to the present) up to 55.<sup>58</sup> The first preliminary ruling procedure initiated by a Slovak court, the Regional Court in Prešov, ended with a Court of Justice order on the lack of jurisdiction to rule on the questions raised.<sup>59</sup> The Supreme Court of the Slovak Republic was the second Slovak court to refer questions for a preliminary ruling. In this case, the Court referred in its reasoned order to its previous case-law.<sup>60</sup> It was not until the third preliminary ruling initiated by a Slovak court, again by the Supreme Court of the Slovak Republic, that was ended with a judgment of the Court.<sup>61</sup> An interesting perspective is that of the conclusions of the ‘Slovak’ preliminary rulings. Out

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54 Judgment of the Court of 23 September 2004, C-414/02 *Spedition Ulustrans*, ECLI:EU:C:2004:551, para. 23. See also the judgments of the Court of 29 November 2001, C-17/00 *De Coster*, ECLI:EU:C:2001:651, para. 23; of 6 June 1984, C-97/83 *Melkunie*, ECLI:EU:C:1984:212, para. 7; and of 17 December 1970, C-30/70 *Scheer* ECLI:EU:C:1970:117, para. 4.

55 Opinion of the Court 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

56 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C:2018:158, para. 37. See also opinions 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 176; and 1/09, 8 March 2011, ECLI:EU:C:2011:123, paras. 67, 83.

57 Judgment of the Court of 5 December 2017, C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936, paras. 22, 23.

58 Data obtained through the search form on the website of the CJEU. [Online] Available at: <https://curia.europa.eu/juris/recherche.jsf?language=en/> (Accessed: 13 June 2023).

59 Order of the Court of 25 January 2007, C-302/06 *Kovalský*, ECLI:EU:C:2007:64.

60 Order of the Court of 21 May 2008, C-456/07 *Mihal*, ECLI:EU:C:2008:293.

61 Judgment of the Court of 8 March 2011, C- 240/09 *Lesoochránárske zoskupenie VLK*, ECLI:EU:C:2011:125.

of a total of 71 proceedings initiated by the Slovak courts, only 38 ended with a decision on the merits, that is, with a judgment of the Court of Justice, which the national court was subsequently obliged to consider when resolving specific cases. Of the remaining 33 proceedings, 7 were terminated by a reasoned order referring to the previous case-law of the Court of Justice, another 15 proceedings were terminated on the grounds that the national court itself withdrew a question referred for a preliminary ruling, and 11 proceedings were terminated on the ground of inadmissibility. A number of the preliminary ruling proceedings were initiated by national courts which, according to the CJEU, cannot be regarded as 'judicial authorities' within the meaning of Article 267 TFEU.<sup>62</sup> Overall, it can thus be assessed that almost half of the 'Slovak' preliminary rulings unnecessarily prolonged the length of the proceedings before the national courts. Furthermore, it can be noted that not all courts of the Slovak Republic cooperate with the Court of Justice to the same extent. For example, while the Regional Court in Prešov has submitted 14 references for a preliminary ruling, the Regional Courts in Banská Bystrica and Nitra have not yet initiated even one such reference.

#### **4. Relationship of the Constitutional Court of the Slovak Republic to the CJEU**

The Constitutional Court of the Slovak Republic (hereinafter 'the Constitutional Court') is an independent judicial body for the protection of constitutionality. In particular, it decides on the conformity of national legislation of lower legal force with the Constitution, constitutional laws, and international treaties of the Slovak Republic. It also decides on individual constitutional complaints brought by natural and legal persons against the decisions of public authorities if they infringe their constitutional rights. It also resolves conflicts of competence between central state administrative bodies unless the law stipulates that such disputes are to be decided by another state body. Its main function is to interpret the SR Constitution and constitutional laws. Even before the accession of the Slovak Republic to the EU, the Constitutional Court had to deal with requirements arising from the rules of international law, such as the European Convention on Human Rights. From the outset, its decision-making has been based on the case-law of the European Court of Human Rights and has been characterised by an effort to apply European standards of protection. Following the accession of the Slovak Republic to the EU, the Constitutional Court had several opportunities to comment on the relationship of the Slovak legal order and Slovak public authorities with EU law.

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<sup>62</sup> Preliminary rulings have been initiated e.g. by the Council of the Public Procurement Office (C-521/22, C-520/22).

Of particular significance was the ruling of 26 January 2011, in which the Constitutional Court for the first time expressed its opinion on the alleged incompatibility of the provisions of Slovak law with EU law.<sup>63</sup> In this proceeding, a group of deputies from the National Council of the Slovak Republic contested the incompatibility of the provisions of Act No. 581/2004 Coll. on Health Insurance Companies and Supervision of Health Care with Articles 18, 49, 54, and 63 TFEU. The Constitutional Court first confirmed that it was entitled in proceedings on the compatibility of legislation to examine the compatibility of national law with the founding Treaties or with EU law. Subsequently, he referred to the principle of the primacy of Union law, as it follows from the settled case-law of the Court of Justice, stating that the general court, within the scope of its jurisdiction, applies the provisions of EU law and

is obliged to ensure the full effect of those provisions and to disapply *ex officio* any national provision, even if it is a later provision, which is incompatible with Community (now EU – author’s note) law, without first having to request or await its annulment by legislative or other constitutional procedure.<sup>64</sup>

Furthermore, the Constitutional Court underlined that to ensure the full effect of Union law, the general court may, if necessary, refer a question to the Court of Justice for a preliminary ruling. It also emphasized that the principle of the primacy of EU law does not bind only the general courts but all public authorities, which are therefore ‘obliged *ex officio* not to apply national law which, in their opinion, is incompatible with European Union law’ (translated by the author).

From the point of view of EU law, the Constitutional Court has an important role to perform when it supervises whether the general courts have complied with their obligation to refer a question for a preliminary ruling in the cases defined in Article 267 TFEU and in the relevant case-law of the Court of Justice.<sup>65</sup> It performs this review in the context of the complaints procedure under Article 127(1) of the SR Constitution. The violation of the fundamental right to effective judicial protection guaranteed by Article 46(1) of the SR Constitution and, simultaneously, of the right to a fair trial under Article 6(1) of the European Convention on Human Rights as a result of the failure to refer a question for a preliminary ruling was

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63 Finding of the Constitutional Court of 26 January 2011, Case No. PL. ÚS 3/09.

64 *Ibid.*, translated by the author.

65 The courts or tribunals of the Member States are obliged to refer a question to the Court of Justice for a preliminary ruling if there is no judicial remedy under national law against their decisions and, simultaneously, they need to obtain an interpretation of EU law to decide the dispute. In addition, that obligation arises for all courts which, in deciding a dispute have doubts as to the validity of a legal act of the Union.

first established by the Constitutional Court in its ruling of 19 October 2011.<sup>66</sup> It follows from that judgment that there is a breach of those rights where the failure to refer for a preliminary ruling has a fundamental impact on the decision on the substance of the case, with the result that the party to the proceedings is deprived of the right to have the Court's interpretation of EU law form part of the legal basis for the substantive decision. This means that the Constitutional Court does not regard any failure to comply with the obligation to refer a question for a preliminary ruling as a violation of fundamental rights, but only one that can be regarded as

a fundamental and qualified failure in deciding whether (not) to refer a question for a preliminary ruling, which may consist in an arbitrary or, at first sight, completely incorrect failure to refer a question for a preliminary ruling to the Court of Justice in a case where the court itself was in doubt as to the interpretation of EU law.<sup>67</sup>

Another important decision of the Constitutional Court confirming its constructive relationship with the Court of Justice is the order of 6 April 2011.<sup>68</sup> Following the case-law of the Court, the Constitutional Court confirmed that

'the master' of the decision to refer a question for a preliminary ruling are not the parties to the proceedings or the court superior to the referring court, but it is the referring court and the referring court itself that has concluded that it needs the interpretative assistance of the Court of Justice in order to reach a qualified decision in conformity with the law of the European Union.<sup>69</sup>

This approach is in accordance with the Court's statement in its judgment in the *Cartesio* case that

in a situation where a case is pending, for the second time, before a court sitting at the first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national

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66 Finding of the Constitutional Court of the Slovak Republic of 19 October 2011, Case No. IV ÚS 108/2010.

67 *Ibid.*, translated by the author.

68 Order of the Constitutional Court of the Slovak Republic of 6 April 2011, Case No. II ÚS 128/2011.

69 Translated by the author.

law whereby a court is bound on points of law by the rulings of a superior court.<sup>70</sup>

The Constitutional Court thus confirmed the autonomy of the general court in deciding whether to refer a question for a preliminary ruling to the detriment of the binding legal opinion of a superior court – that is, the Constitutional Court – as expressed in its earlier decision. However, this does not prevent the Constitutional Court from reminding other Slovak courts, including other supreme judicial authorities, that the conditions for suspending proceedings and referring questions for a preliminary ruling to the Court of Justice are fulfilled.<sup>71</sup>

The Constitutional Court brought its first and thus far only reference for a preliminary ruling in 2019 concerning the interpretation of Article 35(4) and (5) of Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal electricity market.<sup>72</sup> The reference was made in the context of proceedings initiated by the President of the Slovak Republic on the grounds of the alleged incompatibility of the national provisions relating to the nomination and dismissal of the chairperson of the Network Industries Regulatory Authority as well as the participation of representatives of national ministries in price regulation proceedings before that body with the SR Constitution, in conjunction with Union law.<sup>73</sup> According to the President of the Slovak Republic, the provisions of Slovak Act No. 250/2012 Coll. on the regulation of network industries, as amended by Act No. 164/2017 Coll., did not respect the obligation to ensure the independence of the regulatory authority arising from the aforementioned provisions of the Directive.<sup>74</sup> The Court of Justice did not accept that opinion when it declared the Slovak legislation compatible with the requirements of the Directive.

In summary, it can be concluded that from the outset the Constitutional Court accepted the specificities of membership in the EU and the requirements for national courts arising from the founding treaties, as reflected in the Court of Justice's case-law. As regards its relationship with the Court, as early as 2008 it stated that in exercising its powers, it may also find itself in a position where it would also be subject to the obligation to refer a question for a preliminary ruling.<sup>75</sup> This situation has so far arisen in only one case, namely in the context of proceedings initiated by the President of the Slovak Republic. The Constitutional Court also monitors whether the general courts comply with the obligation to refer questions for a preliminary ruling to the Court of Justice, where a breach

70 Judgment of the Court of 16 December 2008, C-210/06 *Cartesio*, ECLI:EU:C:2008:723, para. 94.

71 See e.g. Order of the Court of 8 October 2020, C-621/19 *Weindel Logistik Service*, ECLI:EU:C:2020:814, para. 35.

72 Judgment of the Court of 11 June 2020, C-378/19 *Prezident Slovenskej republiky*, ECLI:EU:C:2020:462.

73 *Ibid.*, para. 2.

74 *Ibid.*, para. 12.

75 Order of the Constitutional Court of the Slovak Republic of 3 July 2008, IV. ÚS 206/08.

of that obligation has had a fundamental impact on the decision on the merits of the case. Simultaneously, it respects their independence in deciding whether to refer for a preliminary ruling to the detriment of the binding legal opinion of the Constitutional Court itself, as expressed in its earlier decision.

## 5. Relationship of the Supreme Court of the Slovak Republic to the CJEU

The Supreme Court of the Slovak Republic (hereinafter ‘the Supreme Court’), as the highest authority of the general judiciary, ensures uniform interpretation and application of the law within the framework of decision-making on appeals against decisions of lower courts in Slovakia. Immediately after the accession of the Slovak Republic to the EU, the Supreme Court was one of the most active Slovak courts in referring questions for a preliminary ruling. So far, it has submitted a total of 26 references for preliminary ruling, 17 of which have resulted in a decision on the merits.<sup>76</sup> Of the remaining nine proceedings, five were terminated by reasoned order<sup>77</sup> and four were suspended because the Supreme Court withdrew the reference for a preliminary ruling.<sup>78</sup> While in the first ten years after accession to the Union (i.e. from 1.5.2004 to 30.4.2014) the Supreme Court initiated a total of nine preliminary rulings, in the next nine years or so (i.e. from 1.5.2014 to the present day), there have been 17 preliminary rulings. Similar to the Constitutional Court, the Supreme Court also considers the obligations of the highest judicial authorities arising from Union law, which is continuously supplemented by CJEU case-law in its decision-making activity. When referring questions for a preliminary ruling, it did not hesitate to criticise the practice of the Constitutional Court, accusing it of failing to consider the relevant case-law of the Court of Justice relating to the application of EU law.<sup>79</sup>

76 See the judgments of the Court in cases C-186/20, *HYDINA SK*, ECLI:EU:C:2021:786; C-857/19, *Slovak Telekom*, ECLI:EU:C:2021:139; C-447/18, *UB*, ECLI:EU:C:2019:1098; C-376/18, *Slovenské elektrárne*, ECLI:EU:C:2019:1068; C-534/16, *BB construct*, ECLI:EU:C:2017:820; C-533/16, *Volkswagen*, ECLI:EU:C:2018:204; C-89/16, *Szoja*, ECLI:EU:C:2017:538; C-76/16, *INGSTEEL a Metrostav*, ECLI:EU:C:2017:549; C-73/16, *Puškár*, ECLI:EU:C:2017:725; C-243/15, *Lesoochrannárske zoskupenie VLK*, ECLI:EU:C:2016:838; C-543/12, *Zeman*, ECLI:EU:C:2014:2143; C-68/12, *Slovenská sporiteľňa*, ECLI:EU:C:2013:71; C-165/11, *PROFITUBE*, ECLI:EU:C:2012:692; C-599/10, *SAG ELV Slovensko*, ECLI:EU:C:2012:191; C-504/10, *Tanoarch*, ECLI:EU:C:2011:707; C-416/10, *Križan*, ECLI:EU:C:2013:8; C-240/09, *Lesoochrannárske zoskupenie VLK*, ECLI:EU:C:2011:125.

77 See orders of the Court in cases C-113/20, *Slovenský plynárenský priemysel*, ECLI:EU:C:2020:772; C-621/19, *Weindel Logistik Service SR*, ECLI:EU:C:2020:814; C-459/13, *Široká*, ECLI:EU:C:2014:2120; C-456/07, *Mihal*, ECLI:EU:C:2008:293; C-302/06, *Kovalský*, ECLI:EU:C:2007:64.

78 See orders of the Court in cases C-78/20, *M.B.*, ECLI:EU:C:2021:738; C-919/19, *X.Y.*, ECLI:EU:C:2021:650; C-495/18, *YX*, ECLI:EU:C:2019:808; C-113/17, *QJ*, ECLI:EU:C:2018:731.

79 Judgment of the Court of 27 September 2017, C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 31.

From the perspective of the requirements of Union law, it is relevant, for example, the judgment of 1 August 2014, in which the Supreme Court of the Slovak Republic confirmed that in the event of a lack of compliance with national legislation, Union law has application primacy.<sup>80</sup> Specifically, it formulated the obligation of the Regional Court in Košice to refrain from applying the provisions of para. 79(2) of Act No. 222/2004 Coll. on value-added tax to give effect to EU law, unless that provision can be interpreted in conformity with Union law, that is to say, in accordance with Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax. In relation to the application of the principle of primacy in the present case, the Court of First Instance held that there are no subsidiary procedural legislative rules in the Slovak Republic, not only in tax proceedings but also in judicial proceedings, for reviewing the legality of a decision of the tax administrator. The tax administrator does not have the power to refer questions to the Court of Justice for a preliminary ruling. The Supreme Court of the Slovak Republic has concluded that the administrative court, in the context of a binding legal opinion, must express itself unequivocally as to whether the question is one whose legal aspect has already been resolved by the case-law of the Court of Justice (the *acte éclairé* doctrine) and, in such a case, determine the legal procedure to be applied by the tax authorities in subsequent proceedings. However, if this question has not yet been settled by the case-law of the Court of Justice, it is necessary for the administrative court to refer a question for a preliminary ruling or, where appropriate, to summarise the arguments to the Supreme Court of the Slovak Republic for a preliminary ruling.

As regards more recent case-law, we can point to, for example, the judgment of 30 July 2019 in which the Supreme Court, in relation to Directive 2006/112/EC on the common system of value-added tax, drew attention to the need for an interpretation of national law in conformity with Union law, in accordance with the case-law of the CJEU.<sup>81</sup> As further stated, the decisions of the Court of Justice constitute a legally binding interpretation of the VAT Directive and are a source of law within EU Member States. Consequently, in general terms, he inferred from Article 7(2) of the SR Constitution, as well as from the principle of the primacy of Union law *per se*, the obligation of public authorities to interpret all national provisions in conformity with Union law, so that their application would contribute to the fulfilment of the requirement to ensure effective judicial and administrative protection of the rights that natural and legal persons derive under the EU *acquis*, while expressly stressing that ‘EU law prevails over national law in the event of a conflict between its legal provisions and those of a Member State.’ Also noteworthy in this judgment is the express reference to the case-law of the Court of Justice as a source of Union law.

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80 Order of the Supreme Court of the Slovak Republic of 1 August 2014, 3Sžf/44/2013.

81 Judgment of the Supreme Court of the Slovak Republic of 30 July 2019, 1Sžfk/24/2018.

In the same sense, in its judgment of 7 August 2019, the Supreme Court referred to the Court of Justice's order in Case C-120/15 Kozvber, stating that, in view of the principle of the primacy of Union law, the case-law of the Court of Justice takes primacy over explicit legal provisions.<sup>82</sup> In this context, it referred to the wording of Article 7(2) of the SR Constitution, according to which

legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic'. He then stated that 'the decisions of the CJEU are generally binding legal acts and have the nature of a source of law with higher legal force than (national) law.'<sup>83</sup>

The Supreme Court, therefore, refrained from a literal interpretation of the term 'legally binding acts of the Union,' which is usually used to refer to secondary law, and interpreted the provision concerned in conformity with Union law, in such a way that it encompasses the entire legal order of the Union, including the case-law of the Court of Justice. This interpretation is consistent with the approach of the Constitutional Court, which, as noted above, has also identified the Treaty on the Functioning of the EU as a legally binding act.<sup>84</sup>

Considering the number of references for a preliminary ruling brought by the Supreme Court and the fact that it regularly refers to the case-law of the Court of Justice, it may be stated that the Supreme Court respects the obligations imposed on it by EU law and the Court of Justice's role of ensuring the uniform interpretation and application of Union law. In its decisions, the Supreme Court has explicitly referred to the case-law of the Court of Justice as a source of Union law, repeatedly emphasised the need for an interpretation of the Slovak legal order in conformity with Union law, and confirmed the primacy of Union law in the event of a collision between its legal provisions and Slovak legal provisions.

## **6. Relationship of the Supreme Administrative Court of the Slovak Republic to the CJEU**

The Supreme Administrative Court of the Slovak Republic (hereinafter 'the Supreme Administrative Court') was established in 2021 as part of the reform of the judiciary as the highest authority in matters of administrative justice. Its responsibility is to review the decisions of administrative courts in cassation complaint proceedings, and thus ensure the legality of the decisions of

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82 Judgment of the Supreme Court of the Slovak Republic of 7 August 2019, 3Sžfk/31/2018.

83 Translated by the author.

84 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

administrative courts in providing protection for the subjective rights and legally protected interests of natural and legal persons against the unlawful exercise of public authority by public administration bodies. The Supreme Administrative Court is also the guarantor of the lawful conduct of elections, as it decides, among other things, on proceedings concerning the registration of lists of candidates for elections to the National Council of the Slovak Republic and elections to the European Parliament, on matters concerning the constitutionality and legality of elections to local self-government bodies, and on actions for the dissolution of political parties and movements. Furthermore, it has been entrusted with the competence to decide on the disciplinary liability of judges, prosecutors, and other persons designated by law.

Although there has been insufficient time since the establishment of the Supreme Administrative Court to comprehensively assess its relationship with the CJEU, it is noteworthy that it has only recently, in 2023, referred its first three questions for a preliminary ruling.<sup>85</sup> More detailed information is currently available only on the questions raised in the *BONUL* case, which concern the interpretation of Article 47(1) and (2) and Article 51(1) and (2) of the Charter of Fundamental Rights of the EU.<sup>86</sup> The Court of Justice has still not had sufficient time to respond to any of the questions raised by the Supreme Administrative Court. Furthermore, it should be noted that in its previous case-law, the Supreme Administrative Court regularly referred to the case-law of the Court of Justice and considered the requirements of EU law.<sup>87</sup> In that connection, its judgment may be noted confirming the primacy of EU law, in which the Supreme Administrative Court held that the national legislation in the second sentence of Article 89(2) of Act No 404/2011 on the residence of foreign nationals, which does not allow for the imposition of alternatives to detention, was incompatible with the provisions of Union law.<sup>88</sup> Moreover, he stressed that national legislation would remain unapplied and the administrative authority would adopt an individual approach to detention in accordance with the principle of proportionality, taking into account the possibility of using the more favourable measures offered by Article 89(1) of the Act on the Residence of Aliens. Only if it concludes that other sufficiently effective and milder coercive measures cannot be applied in a concrete case and that the third-country national is at risk of absconding or is evading or otherwise hindering the preparation of his/her

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85 The cases are C-151/23 *ZSE Elektrárne*, ECLI:EU:C:2023:751 reference for a preliminary ruling lodged on 14 March 2023; C-185/23 *BONUL*, reference for a preliminary ruling lodged on 22 March 2023; and the C-370/23 *City of Rimavská Sobota*, reference for a preliminary ruling lodged on 13 June 2023.

86 Order of the Supreme Administrative Court of the Slovak Republic of 28 February 2023, 25 Snr 1/2021-250.

87 See e.g. the judgment of the Supreme Administrative Court of the Slovak Republic of 26 August 2022, 5Sžfk/46/2020, paras. 40–48.

88 Judgment of the Supreme Administrative Court of the Slovak Republic of 22 July 2022, 1Sak/12/2022, para. 39.

return or the execution of his/her removal, will it decide on the detention of the third-country national as an ultima ratio measure.

## 7. Conclusions

According to the experience developed thus far, it can be concluded that there is a relationship of cooperation between the highest judicial authorities of the Slovak Republic and the CJEU. It is precisely this relationship that corresponds to the Court's vision and is the cornerstone of the functioning of the Union's judicial system. In their decision-making activities, the Slovak supreme judicial authorities often refer to the case-law of the Court of Justice and consider the requirements of Union law, which are constantly being shaped by that case-law. Accordingly, the Supreme Courts have repeatedly referred to the principle of the primacy of Union law and the need for an interpretation of the Slovak legal order in conformity with Union law. In this way, both the Constitutional Court and the Supreme Court have proceeded, for example, to interpret the second sentence of Article 7(2) of the Slovak Constitution, which gives primacy to legally binding acts of the Union over Slovak laws, by including other sources of Union law, namely the founding treaties and the case-law of the Court of Justice of the EU, under the concept of 'legally binding acts.' The Supreme Court has so far been the most active in referring questions for a preliminary ruling, as the Supreme Administrative Court has only recently been established and the Constitutional Court has so far referred only one question for a preliminary ruling. Although the Constitutional Court has not departed from the case-law of the Court of Justice, several questions remain unanswered regarding the relationship between the Slovak constitutional order and Union law, in particular the acceptance of the primacy of Union law over constitutional provisions. In conclusion, it can be assessed that the supreme judicial authorities have always sought to respect the case-law of the CJEU and have in no context questioned its role in providing a binding interpretation of all provisions of Union law, including those governing the competences of the Union and its institutions.

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