

MARKO NOVAK*

Dialogue between the Slovenian Highest Courts and the Court of Justice of the European Union**

- **ABSTRACT:** *The relationship between European Union (EU) law and national Slovenian law progressed across three different stages starting from the beginning of this century to date, as discussed by EU and Slovenian legal theorists. The first one, just before Slovenia's entry into the EU, considered the EU an international organisation and EU law a type of public international law. It was dismissed even before Slovenia joined the EU, with an amendment to the Constitution, and was succeeded by the second, supranationalist, view that required maximum restraint by national courts while dealing with EU issues. Finally, about a decade ago, the third pluralist view of EU law vis-à-vis national law emerged, calling the particularly highest national courts to enter a more critical dialogue with the Court of Justice of the European Union (CJEU).*

Although Slovenian theorists have been actively discussing the relationship between EU and national law before and immediately after Slovenia joined the EU, it seems that practising lawyers and judges needed time to adapt to the new law. Finally, in 2009, the first reference for a preliminary ruling was made by Slovenian courts. Soon after, the Slovenian Supreme Court made its first preliminary ruling reference and, in nearly 20 years since, proved itself to be the most frequent interlocutor with the CJEU from Slovenia. It regularly cites CJEU cases in its case laws, and demands that lower courts follow them wherever appropriate. From the highest national courts in Slovenia, the Constitutional Court joined the dialogue with the CJEU last. It has made four preliminary ruling references to the CJEU and demonstrated restraint vis-à-vis reviewing legal issues touching upon EU law.

The legal culture (including public opinion) in Slovenia has predominantly been pro-EU. This applies to the internal legal culture, namely lawyers who support

* Full professor of jurisprudence and constitutional law; European Faculty of Law, New University, marko.novak@epf.nova-uni.si. Former president of the Slovenian Judicial Council.

** Acknowledgement: I would like to thank Dr Saša Sever, a legal advisor at the CJEU, for all his suggestions and comments that I followed in this paper.



liberal democratic values such as the rule of law, human rights, and democracy. As long as the EU remains dedicated to these values, in such an environment, the highest Slovenian courts are not expected to show a bolder attitude vis-à-vis CJEU case law.

- **KEYWORDS:** Court of Justice of the European Union, Slovenian Constitutional Court, Slovenian Supreme Court, transfer of sovereign rights, preliminary ruling reference, restrained constitutional review

1. Introduction: Historical background

With Slovenia joining the European Union (EU) in 2004, its courts became EU courts. However, in the first years following the accession, there were hardly any cases involving EU law before the Slovenian courts. Gradually, lawyers and judges became acquainted with EU law, but it took five years of Slovenia being a member of the EU before one of its courts made the first reference for a preliminary ruling to the Court of Justice of the EU (CJEU) in 2009. That first case, which had symbolic significance, has been the worst such reference made so far,¹ in which the court having made the reference followed the CJEU's opinion but all other courts that followed did not. There was a court that adjudicated a case in contrast to the CJEU decision, whose judgement became final.²

The EU member states' national courts can dialogue with the CJEU in informal³ and formal ways. The latter includes: (i) the application of CJEU case

1 See, for example, CC-403/09 *Detiček* Case, ECLI:EU:C:2009:810. This was a divorce case in Rome, fought between an Italian father and Slovenian mother, in which the child's custody was awarded to the father. However, before the proceedings ended, the mother took the daughter to Slovenia. The father requested for the daughter to be sent back through enforcement based on the EU Regulation on the Mutual Recognition of Judicial Decisions. Nevertheless, the first instance court in Slovenia made a different decision awarding custody of the child to the mother based on the allegedly applicable international convention. Although the case was clear according to EU law in the sense of the supremacy of EU law even over conventional (international) law, on appeal, the higher court made a reference for a preliminary ruling by the CJEU by asking whether, based on the EU regulation on the Mutual Recognition of Judicial Decisions, a national court may make a different decision from another national court that first began the proceedings. In his commentary on that case, a Slovenian professor of civil procedure law argued that perhaps it would be better for the Slovenian Court not to have asked such an ("embarrassing") question (Galič, 2013). Yves Bot, the advocate general in the case, designated the case or reaction from the first instance court as a type of "judicial nationalism." See also Sever, 2009, p. 25.

2 Novak, 2021, p. 71. The findings originated from an EU JMM (Erasmus +) research project carried out from 2016 to 2019.

3 Judges of the Constitutional and Supreme Courts are, like their EU peers, members of the European Judicial Network. Through the e-platform, they have access to various documents including preliminary ruling references and national judgments that are

law in judicial decisions by national courts; and (ii) preliminary ruling requests submitted to the CJEU and following its decisions in subsequent proceedings. Both varieties of dialogue with the EU Court are discussed separately in this paper, in relation to the two highest Slovenian courts.⁴

After joining the EU, Slovenian courts have submitted 39 requests for preliminary rulings to the CJEU, of which 24 and 4 were lodged by the Supreme and Constitutional Courts, respectively. The Supreme Court is the most frequent dialogue companion of the CJEU when it comes to making preliminary ruling references.⁵ Except the first one, all preliminary ruling references made so far by Slovenian courts seem to have been necessary and reasonable. They typically concerned pieces of unclear autonomous EU legal texts for which uniform interpretation across the EU was needed. There were two different ways in which the courts followed the decision provided by the CJEU: (i) either the requesting and all other courts dealing with the case or any other similar case followed the CJEU's opinion minutely, or (ii) that was not the case, so the Supreme Court in a subsequent proceeding corrected a too-formalist reaction by the referring court

interesting from the point of view of applying EU law. The Presidents of the Slovenian Supreme and Constitutional Courts participate in a yearly forum (i.e. *Forum des magistrats*) organized by the CJEU for the presidents of Supreme and Constitutional Courts. Judges of both courts can participate in judicial exchanges at the CJEU. They regularly visit the EU Court. According to Art. 113 of the Slovenian Courts Act, all Slovenian preliminary ruling references are sent to the Supreme Court to inform this highest court in the hierarchy of Slovenian ordinary courts, because pursuant to the Courts Act, it is responsible for the provision of uniform case law in the judicial system.

- 4 After the adoption of the 1991 RS Constitution, it was not clear which the highest court in Slovenia is, because both claimed to be so. This jurisdictional struggle was finally resolved by the position commonly shared in Art. 127 of the RS Constitution, which states that 'The Supreme Court is the highest court in the state.' However, the RS Constitutional Court has, according to Chapter VIII of the RS Constitution, special jurisdiction including constitutional review and the right to decide on constitutional complaints (dealing with human rights violations). Thus, it is the highest court in the state in the said area of law.
- 5 There have been preliminary ruling references submitted from the areas of taxation, banking, civil, family, labour, customs, and asylum law, and public procurement, state subsidies, customer protection law, and EU judicial cooperation. However, none came from among the EU criminal and competition laws – both of which are important areas of EU law. From the first-instance courts, the administrative court has made four references. From non-judicial bodies, the State Audit Commission submitted three requests for a preliminary ruling concerning public procurement procedures. The fact that lowest courts in Slovenia are not inclined to enter such a dialogue with the CJEU seems to be a Slovenian particularity within the EU (Sever, 2023). The reasons for this are probably both practical and epistemic. The practical ones perhaps lie in the fact that their dockets are the busiest in the Slovenian judicial systems. The more you go up the judicial pyramid, the less busy the courts are with cases. The Supreme Court is the only one in the state that does not have the "judicial norm" (the required number to cases to deal with on a yearly basis). The epistemic reasons for frequent references to the CJEU deals with a better knowledge and greater experience the more one climbs up the judicial ladder.

to the CJEU's opinion.⁶ There was a third situation, where (iii) the Supreme Court made a reference to the CJEU, however, the CJEU decided something completely different than what was asked for, and thus the Supreme Court could not apply the decision.⁷

After introducing the subject in Section 1, I explain the position of EU law in the hierarchy of legal acts in the Slovenian legal order, and how its theoretical perception shifted from a sheer idea of the supremacy of EU law espoused by early Slovenian legal theorists to the concept of heterarchy⁸ or pluralism of different legal orders defended by subsequent legal theorists, thus considering it a matter of fact that the latter idea has not (yet) been fully taken by the Slovenian highest courts. In Section 2, I discuss the special features of the dialogue of the Slovenian Constitutional and Supreme Courts with the CJEU, through which its doctrine on the position of EU law in the Slovenian legal order can be discerned, and disclose their formal relationships with the EU Court. Finally, I conclude with a short evaluation of the role of the Slovenian highest courts so far in the EU and Slovenian legal orders as the highest EU member state courts, which is important for the development of EU and Slovenian law.

2. EU law and the Slovenian legal order: From a supranational model to heterarchy

Sometime before Slovenia joined the EU, in 2004, a discussion was held among lawyers on the manner in which the supranational effect of EU law was to be determined in the Slovenian Constitution.^{9,10} At the time, everyone was aware that becoming a member of the EU entailed some limitation to national sovereignty. However, it was unclear in what way that should be ordained constitutionally. At that point, the difference between international and EU law was not entirely set.

6 See, e.g. C-603/10 *Pelati* Case, ECLI:EU:C:2012:639; Sever, 2011a, pp. 25–26; Novak, 2021, pp. 85–86.

7 See Ministry of Defence Case No. C-749/19 – the opinion concerning the second question.

8 Heterarchy is a 'system of organization where the elements of the organization are unranked (non-hierarchical) or where they possess the potential to be ranked in a number of ways' (Crumbly, 1995).

9 *Zbornik Dnevi javnega prava 2003* (Proceedings of the 2003 Days on Public Law); *Zbornik Dnevi slovenskih pravnikov 2003* (Proceedings of the 2003 Days on Slovenian Lawyers).

10 In relation to "constitutional identity" (see, e.g. Jacobsohn, 2010), the word "identity" does not appear explicitly anywhere in the Slovenian Constitution. However, the Slovenian Constitutional Court that also does not use that word explicitly, has described, in many cases, the design of the Slovenian Constitution as one pertaining to constitutional democracy with the central role of human rights in it, which also follows from the Preamble of the RS Constitution.

There were two different views. The first did not find a need to amend the Constitution believing that extant Article 8 (on placing international law within the hierarchy of the constitutional system)¹¹ was enough.¹² As Slovenia opted for a *quasi-monist*¹³ system of the placement of international law in its domestic legal system, Article 8 suggests that once a treaty is ratified by the national parliament, it becomes part of the Slovenian legal order where its provisions have direct legal effects, and it is positioned above the statutes and other national regulations while remaining below the constitution. This “international-law model” would be a rather weak manner of the EU law’s implementation into the Slovene legal order. According to such a model, the EU law would be given precedence over Slovene legislation (as it is the case now) but a potential problem would be its relation with the Constitution. If an international treaty being ratified is deemed unconstitutional (on the proposal of the President of the Republic, Government, or a third of the Deputies), the Constitutional Court is empowered to issue an opinion on that and the parliament is bound by it.¹⁴ The idea for the international law model of EU law fitting within the hierarchy of Slovenian legal acts did not bear fruit, for the following reasons among others: (i) EU law is not international law; (ii) the Constitutional Court would be left with (very) broad powers to find EU treaties unconstitutional; and (iii) there would be no legal basis in the Slovenian Constitution for the application of the principles of primacy and direct effect of EU secondary legislation (regulations and directives).

The idea presented above was an example of early thinking about the place of EU law in the hierarchy of national legal rules in Slovenia. It may sound naïve, but it can be considered a necessary path to walk before embracing the idea of the plurality of legal systems, which was created several years later. The second option, which prevailed, was the decision to amend the Constitution by adding the European Article.¹⁵ Paragraph 1 of this article provides for the possibility of trans-

11 ‘Laws and other regulations must comply with generally accepted principles of international law and treaties binding on Slovenia. Ratified and published treaties shall be applied directly.’

12 That idea was supported by France Bučar, who had been a political dissident in communist times. However, at the time of political change, he was one of the leaders of the democratic opposition. After the first democratic elections, he became the first president of the National Assembly. He considered erstwhile European Communities an international organization, which was an older view espoused by other theorists, as well.

13 For treaties to apply within the domestic legal system, a special statute needs to be adopted. The mere signature of a treaty does not suffice. It needs to go through the process of ratification in the national parliament.

14 Art. 160.2 of the RS Constitution.

15 The constitutional amendment took effect on 7 March 2003. It was added by the Constitutional Act Amending Chapter I and Arts. 47 and 68 of the Constitution of the Republic of Slovenia, 27 February 2003 (Official Gazette of the Republic of Slovenia No. 24/03). It reads as follows:

‘Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international

ferring a part of Slovenian sovereign rights on international organisations aligned with the values of human rights, democracy, and the rule of law, and entering into a defence alliance with countries that protect the values mentioned. This article was necessary for Slovenia to enter the EU and NATO, in 2004. Paragraph 2 requires a referendum before joining the EU and NATO. Paragraph 3 stipulates that legal acts adopted by the EU and NATO need to be applied in accordance with their legal regulation, and not according to national legal rules. The principles of primacy, autonomy, and direct effect of EU Law have special importance. Finally, Paragraph 4 is about the necessary cooperation between the Government and National Assembly (Slovenian parliament) in EU affairs.¹⁶ Two parts of this article are especially important in understanding the continued Slovenian membership in the EU and the place of EU law in the Slovenian legal system, in the (constitutional) hierarchy of legal acts: (i) the part emphasising the transfer of partial sovereign rights on the condition of respecting the three mentioned constitutional values (here, the primacy of EU law over national law could apply); and (ii) the part underlining that EU law is to be applied in Slovenia according to its own rules (this concerns the autonomy of EU law and its direct effects).¹⁷

Article 3a of the Constitution is very important as it determines the position of the Republic of Slovenia, and its legal order vis-à-vis the EU. In theory and practice, there are three possible versions of understanding such a relationship:

organizations which are based on respect for human rights and 2 fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of voters who have cast valid votes vote in favour of the same. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations.

In procedures for the adoption of legal acts and decisions in international organizations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.¹⁷

16 Based on the constitutional provision, right after the accession, the Act on the Cooperation between the National Assembly and Government of the Republic Slovenia in the Area of EU Affairs was adopted, in which the government has several responsibilities to inform the parliament about its activities in the EU.

17 According to Avbelj, a Slovenian EU-law professor, the wording of this article is obsolete as it reflects older views, following which the EU was considered an international organisation. There was no obligation to have a special EU article in the constitution. Avbelj 2019, 71.

(a) internationalist;¹⁸ (b) supranationalist; and (c) pluralist.¹⁹ With respect to (a), EU is an international organisation. Thus, the relationship between national and EU laws is similar to that between national and international laws. Although the RS Constitution designates the EU as an international organisation to which the RS transferred the implementation of a part of its sovereign rights, by allocating that issue in Article 3a, distinct from Article 8 in which international law is addressed, it distinguished the position of EU law from that of international law.²⁰ Of the three (b) has had the strongest influence in Slovenia. According to this view, even if the Constitution mentions the transfer of the implementation of a part of sovereign rights alone, this entails the fact that Slovenia renounced its rights at the time of the transfer entirely and thus recognised the supremacy or primacy of the EU legal order.²¹ Therefore, where the sovereign rights have been transferred to the EU, sovereignty in its entirety – as legal power or the power to independently make legal decisions – has been transferred to the EU.²² Thus, the principle of primacy of EU law entails EU primacy over all rules concerning Slovenia's internal legal order. Although the RS Constitution conditions Slovenia's membership in the EU with respect for human rights, democracy, and the rule of law by the EU, these safeguards are not as intensive to offer grounds for Slovenian authorities to refuse the use of individual acts or provisions of primary or secondary EU law if they are found contrary to the Slovenian Constitution, as long as the EU in its entirety is based predominantly on the abovementioned values.²³ That seems to be a restrained approach from the perspective of a national legal order that takes EU law into account.

This position seems to be espoused by those who do not find a crucial element in distinguishing between the supremacy and primacy of EU law over members' national laws. Over a decade ago, Matej Accetto, a Slovenian EU scholar and now president of the Slovenian Constitutional Court, demonstrated in his articles that the use of the word "supremacy" was even more frequent than that of "primacy" in various professional legal texts dealing with EU law. However, he pointed to the position of the Spanish Constitutional Court while reviewing the Treaty establishing a Constitution for Europe, where primacy and supremacy were presented as different categories:

18 This version of the same relationship has been presented above. It was rejected by the framers of Art. 3a while making a distinction between international (Art. 9) and EU (Art. 3a) laws. See also Cerar, pp. 83–84.

19 Avbelj, 2012, p. 348. See also Avbelj, 2019, where the author comments on paras. 1–3 of this provision in the Commentary on the RS Constitution. On constitutional pluralism and heterarchy, see Walker, 2002; Walker 2016; Halberstam, 2012; Dunof and Trachtman, 2012; Kirsch 2012; Davis and Avbelj, 2018; Barber, 2006; Jakab and Kochenov, 2017.

20 Cerar, 2011, pp. 83–84.

21 *Ibid.*, 79.

22 *Ibid.*, 81.

23 *Ibid.*, 78.

the latter entailing a hierarchy based notion of a superior regulation that is a source of the validity of inferior regulations leading to the consequential invalidity of the second if contrary to the prescriptive provisions of the first; and primacy in which the relation is not necessarily hierarchical but the scope of application of different regulations is distinguished, all valid in principle, where one or several of such have the power to achieve a withdrawal of others by their priority or predominant application based on various reasons.²⁴

By not insisting on the difference between the concepts mentioned,²⁵ it seems that he would rather join the Slovenian EU law theorists belonging to group (b). The supranational approach has been criticised in Slovenia in the last year, particularly by Matej Avbelj, a Slovenian EU law professor and scholar, and proponent of the pluralist approach (c). According to this view, there are three levels of regulation within the EU: sovereign countries with their autonomous constitutional order, the EU at the supranational level with its own autonomous legal order, and both national and supranational ones connected through structural principles into a whole (union). The basic structural principle is the principle of primacy, not superiority, which establishes a heterarchical horizontal relationship between the legal orders in the EU whose efficacy depends on the fulfilment of two types of conditions – national and supranational. Therefore, the relationship between national and EU law is not hierarchical. National law is not subordinate to EU law, whose entry into and effect on the national territory are not unconditional. Slovenia remains sovereign in the classical sense of the term, while the EU obtained functional sovereignty in the framework of the powers transferred.²⁶

In Avbelj's opinion, the Weiss Case decided by the German Federal Constitutional Court in 2020, in which it held that a CJEU judgement was unintelligible and arbitrary, *ultra vires*, and not binding in Germany, only proved the theory of constitutional pluralism. According to that theory, the EU is a plural entity comprising the territorially sovereign constitutional orders of member states and the functionally sovereign autonomous legal order of the EU. The relationship between the state and supranational legal orders is regulated by structural principles, of which the principle of primacy has special importance. This shows that in the case of a conflict between EU and national laws, the former is applied.

Different than the principle of supremacy, the primacy principle following the doctrines of national constitutions and constitutional courts is effective if

24 Accetto, 2010a.

25 See also Accetto, 2010b.

26 Avbelj, 2011, p. 744.

the EU respects the principles of democracy, the rule of law and human rights and if it operates within the boundaries of transferred powers. If one of the said conditions is not fulfilled, the constitutional court, and only such a court, after a dialogue made with the CJEU, may exceptionally and by providing very good reasons decide that an EU law will not be applied in the member state. This law remains applicable since the national law cannot interfere with the autonomous EU law, however it may restrict its effect on the national territory.²⁷

In Avbelj's opinion, the German Court has been building the pluralist doctrine since the 1970s. There have been other highest national courts, such as the Czech Constitutional and Danish Supreme Courts, which in the Landtova (C-399/09) and Ajos (C-441/14) cases, respectively, decided not to follow the CJEU judgements. However, in Avbelj's view that did not open Pandora's box for selective disrespect for EU law, which was allegedly taken advantage of by the abducted Polish and Hungarian Constitutional Courts. He remains optimistic by arguing that the CJEU must not act *ultra vires* and that authoritarian states cannot refer to constitutional pluralism at the EU level while persistently oppressing the same pluralism internally.²⁸

3. Slovenian Highest Courts in light of EU Law and the CJEU

■ 3.1. The Constitutional Court

Unlike some (already mentioned) robust EU members' constitutional courts that questioned the constitutionality of certain EU measures from time to time, to fit the pluralist approach to the relationship between EU and national laws, the Slovenian Constitutional Court has remained rather restrained in relation to potential issues concerning the unconstitutionality of EU law. A similar approach was taken vis-à-vis the interpretation of Article 3a of the Constitution. In a series of decisions, it gradually built its doctrine on the position of EU law within the national legal order. However, in such issues, it has not gone that far to be labelled as a bold or even "nationalistic" constitutional court. The Court supported the application of the classical idea of state sovereignty to Slovenia, and left the question of whether such an approach is too excessively restricted by the new EU treaty on a case by case basis at the time of ratification.²⁹ However, when it came to specific issues, it indicated its restrained review vis-à-vis EU fiscal and monetary policies as follows: 'By entering into the monetary union and the introduction of the Euro, the RS and its economy are no longer the guarantee for the money but was substituted by the Eurozone member states and their economies.'³⁰

27 Avbelj, 2020a; Avbelj, 2020b.

28 Ibid.

29 Decision No. U-II-1/12, U-II-2/12, para. 41; Avbelj, 2019, p. 69.

30 Decision No. U-I-178/10, Para. 6; Avbelj, 2019, *ibid.*

The Court emphasised that Article 3a of the Constitution requires the application of EU law in conformity with its legal principles as developed by the ECJ.³¹ It emphasised the following: ‘Due to Article 3.3 of the Constitution, the fundamental principles that define the relationship between internal and EU laws are also internal constitutional principles that are binding with a constitutional effect.’³² It held that ‘it is the exclusive power of the ECJ to interpret EU law and review the validity of EU secondary law.’³³ However, the question of whether or not the principle of primacy entails the unconditional supremacy of EU law, or whether or not EU law must, in a certain example, be subordinated to the RS Constitution, remained unaddressed.³⁴ It stated that the principle of primacy requires the non-application of a national regulation that is in conflict with EU law.³⁵ The Constitutional Court emphasised other fundamental EU legal principles, such as loyal interpretation, direct application and effect of EU law, transfer of powers, subsidiarity, and proportionality in its case laws.³⁶ It expressed the view that it is not empowered to review the conformity of national regulations with EU secondary sources (regulations and directives). However, it noted that it is still empowered to review national regulations when they implement EU law or respect the legal effects of EU regulations.³⁷ From this, it follows that where the legislature implements a maximum directive (in a replicate style without adding implementing provisions) in a statute, the Constitutional Court would not review it. However, the same would not be the case when a minimum directive is implemented in a statute. In such cases, the Constitutional Court would consider itself empowered to make such a review.

When the matter concerns preliminary ruling references to the CJEU, I have already mentioned the four references from the Slovenian Constitutional Court, which demonstrates the fact that it actively began a dialogue with the European Court. It began doing so in 2014,³⁸ 10 years after Slovenia joined the EU.³⁹

■ 3.2. *The Supreme Court*

The Supreme Court of the Republic of Slovenia regularly cites CJEU cases in its judgements. The online Slovenian judicial case database presents around 500 hits

31 Decision No. Up-328/04, U-I-186/04, para. 10; Avbelj 2019, p. 70.

32 Decision No. U-I-146/12, para. 32; Avbelj, 2019, *ibid*.

33 Decision No. U-I-295/13, para. 68; Avbelj, 2019, *ibid*.

34 Decision No. U-II-1/12, U-II-2/12, para. 53; Avbelj, 2019, *ibid*.

35 Decision No. Up-328/04, para. 19; Avbelj, 2019, *ibid*.

36 Decision No. U-I-146/12, para. 33; Avbelj, 2019, *ibid*.

37 *Ibid*.

38 Case No. U-I-295/13.

39 It could be the case that the beginning of the dialogue was a consequence of the first reference for a preliminary ruling that the German Constitutional Court submitted to the European Court in the case of Gauweiler. That may have encouraged the judges of the Slovenian Constitutional Court to do the same.

when searched for CJEU case laws.⁴⁰ Of the Supreme Court's five departments (civil, criminal, business, labour and social, and administrative laws), the most "active" in terms of EU legal matters seems to be the administrative law department (and the least active is the criminal law department), with the labour and social law department in the second place,⁴¹ which is more or less expected given the areas regulated by EU law that they deal with as part of their jurisdiction.

The Supreme Court submitted 24 preliminary ruling references to the CJEU, out of 39 that came from Slovenia since 2004. The administrative department of the Supreme Court submitted the greatest number of references for a preliminary ruling (mainly from the area of value added tax and international protection), which was followed by the civil and labour and social law departments (predominantly concerning the working hours directive). The business and criminal law departments had never submitted references for a preliminary ruling to the CJEU at the time of writing. The Supreme Court and its departments had not (at the time of writing) developed a doctrine vis-à-vis EU or CJEU case law. Given that Slovenia subscribes to the European model of centralised constitutional review, it left the issue of setting potential boundaries between EU and Slovenian law to the Constitutional Court. However, it retained the power to deal with CJEU case law on a case by case basis.

It seems that the relationship between the CJEU and RS Supreme Court is considered so obvious that books or articles dealing with it cannot be found. Some articles comment on specific CJEU judgements – like that concerning our first preliminary ruling reference that was already mentioned (*Detiček Case*).⁴²

4. Conclusion

In contradistinction with some "rebellious" constitutional or supreme courts in the EU, the highest courts in Slovenia seem to have remained "poster children"⁴³ of the EU. Although with some delay, they did enter into the dialogue with the CJEU. However, that dialogue seems to be one-sided, where one asks and the other replies without the first asking further questions.⁴⁴ Perhaps such a restrained role is not too bad because there could be a problem with being an activist but not constructive one. I guess there is also nothing bad either with a tame national judicial

40 It is not necessarily true that cases in which EU law is applied are adjudicated correctly. Nevertheless, the European Commission will not react as long as there is no systemic problem.

41 *Sodna praksa* [Online]. Available at: [Iskalnik sodne prakse \(sodnapraksas.si\)](http://iskalnik.sodne.prakse(sodnapraksas.si)) (Accessed: 21 June 2023).

42 See, e.g. Hudej, 2014; Lubinič, 2021; Sever, 2011b; and Sever, 2015.

43 See Avbelj and Letnar Čeranič, 2020, p. 224.

44 There has not been a CJEU case so far (a reply to the reference for a preliminary ruling from Slovenia) that can upset either the Constitutional or Supreme Court. However, that does not ensure that a situation resembling those in Germany, the Czech Republic, or Denmark will not happen.

activism within the EU. However, if such activism becomes untamed or unbridled, that is another thing to the effect of jeopardising the uniformity of EU law.

Avbelj suggested that the Slovenian Constitutional Court, as the final defender of Slovenian constitutionality, should take a position of critical restraint vis-à-vis the EU and espouse a friendly attitude at the same time. Following the example of others, particularly the German and Spanish constitutional courts, it should call on regular courts and bind them to the correct and effective application of EU law. The Slovenian Constitutional Court should strive to align itself with other (more “courageous”) national constitutional courts and make itself an equal interlocutor of the CJEU.⁴⁵

In the case of Slovenia, the internal dialogue with regular courts on EU issues and CJEU case law has been taken up by the Supreme Court and, after some initial problems, has proceeded well. However, in relation to the RS Constitutional Court and its dialogue with the European Court, there is an impression that the Constitutional Court could be more self-confident without it causing any problem for autonomous EU law. Considering Slovenia’s legal culture,⁴⁶ where there is relatively high trust in the EU and its institutions, including the CJEU,⁴⁷ the restraint exercised by the highest courts vis-à-vis CJEU case law may not be surprising. However, it is a very different issue when it comes to trusting domestic courts, in which public trust is quite low.⁴⁸

Finally, Slovenia has predominantly been pro-EU. This applies to its internal legal culture, that is, lawyers support liberal democratic values such as the rule of law, human rights, and democracy. As long as the EU remains dedicated to these values, in such a(n) (legal) environment, it is not expected for the Slovenian highest courts to show a bolder attitude vis-à-vis following CJEU case law. Some cases (e.g. C-578/16 and C-144/23) demonstrate that the Supreme Court sought an intervention by the CJEU in its own interpretative “battle” with the Constitutional Court because the Supreme Court had not agreed with a certain case law of the Constitutional Court. Thus, it turned to the CJEU to get an appropriate interpretation of EU law.

As long as the EU and CJEU keep subscribing to the liberal idea of constitutional democracy while defending its values, the rule of law, and human rights, which also form the Slovenian conditions for the transfer of a part of its sovereign rights to the EU, and the Slovenian Constitutional Court continues to uphold this idea under the RS Constitution, some major collisions between the Slovenian Constitution and its identity vis-à-vis EU law and CJEU judgements are unlikely to occur.

45 Avbelj and Komarek, 2012, p. 351.

46 For more on the Slovenian legal culture, see Novak, 2023.

47 This could be analysed based on many domestic surveys and, for example, following the annual Eurobarometer.

48 See, for example, national surveys requested by the Supreme Court to be carried out every second year, and the annual EU Justice Scoreboard reports.

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