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The PSPP Judgment of the *Bundesverfassungsgericht* and the Slovenian Constitutional System

ABSTRACT: *The BVerfG's judgment on the PSPP marks another important part of the EU constitutional mosaic. It was the first time that the court declared an EU act ultra vires. Intense academic commentary ensued, mostly adopting a critical attitude towards the judgment. However, a summary rejection of the underlying idea of an exceptional national constitutional review of EU acts does not seem warranted. Unconditional primacy has been disputed by different national courts for some time now, and on two occasions, national apex courts already declared EU acts ultra vires. Considering its inherent diversity, the EU should be able to accommodate legitimate national constitutional concerns. A common frame of reference, possibly provided by Art. 4(2) TEU, could facilitate such accommodation if very high standards of violation were adopted by national courts, which would also respect the principle of loyal cooperation. In this regard, EU law also marks red lines when it comes to its fundamental principles, limiting the possibility of abuse. The Slovenian Constitution introduces EU law through Art. 3a, adopted for the purpose of accession to the EU. The Slovenian Constitutional Court's case law is generally very EU-friendly, and it could be marked by cooperative vagueness, echoing the doctrines of the CJEU. A clear answer regarding the relationship between national (constitutional) law and EU law is lacking in its jurisprudence. The court explicitly left the question of absolute primacy open. The substantive preconditions for the transfer of sovereign rights in Art. 3a, namely, respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law, have been interpreted in different ways in academia. However, considering the inalienable right to self-determination, in exceptional cases of serious encroachment on fundamental constitutional values, the SCC would probably adopt its version of the BVerfG's doctrines.*

KEYWORDS: German Federal Constitutional Court, Constitutional Court of Slovenia, Court of Justice of the European Union, PSPP, ultra vires review, constitutional identity.

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https://doi.org/10.47078/2021.1.93-118

1. Introduction[2]

It seems that Eric Stein's words about the CJEU being blessed with '*benign neglect from the powers that be*' in the fairyland Dutchy of Luxembourg[3] faded into the past in May 2020, if not before, due to the *BVerfG's* PSPP judgment. National (constitutional) courts are now more vigilant of any attempts at progressive interpretation of EU law, and are not particularly uneasy or hesitant even to dismiss them.

The impetus for this article was provided by this most recent judgment of the *BVerfG* related to European integration. The primary aim is to discuss the judgment briefly, analyse its underlying proposition, and consider the possibility of applying it to the Slovenian constitutional system. With this in mind, I first address the judgments of the CJEU and the *BVerfG* in the Weiss case. I mostly focus on the underlying idea of constitutional exceptionalism, which means that national constitutional standards may function as standards of review of EU law, materialised forcefully by the *BVerfG's* judgment. This provides the basis for the second part of the article, dealing with the elucidation of the case from the perspective of Slovenian constitutional law. In this section, I present the constitutional bedrock of EU law in the Slovenian Constitution, the relevant (relatively vague) case law of the Slovenian Constitutional Court on the subject, and conclude with theoretical discussions related to the issue.

2. The PSPP and the *ultra vires* problem

At the beginning of May, the *Bundesverfassungsgericht* (*BVerfG*) delivered a judgment on the public sector purchase programme (PSPP) of the European Central Bank (ECB).[4] It was delivered after the CJEU had issued its judgment regarding the PSPP in C-493/17 Weiss, responding to the *BVerfG's* preliminary reference.[5]

The PSPP is a programme enabling the ECB and the national central banks to buy (*inter alia*) government bonds on the secondary market. The scope of the programme extended to over 2 trillion EUR in August 2020.[6] The main legal issue brought up before the *BVerfG*[7] was that the Decisions[8] of the ECB, which formed the legal basis for the

2 The manuscript was closed on 14 December 2020, therefore it reflects the legal situation of that date.
3 Stein, 1981, p. 1.
4 For an overview of the programme, see: BVerfG Judgment 2 BvR 859/15 of 5 May 2020.
5 C-493/17 Weiss of 11 December 2018.
6 European Central Bank, 2020a.
7 Among the complainants was Peter Gauweiler, one of the applicants behind the BVerfG's first preliminary reference in BVerfG 2 BvR 2728/13 of 21 June 2016. Also see: C-62/14 Gauweiler and Others of 16 June 2015.
8 The ECB Governing Council's Decision (EU) 2015/774 OJ EU L 121, p. 20 and the subsequent Decisions (EU) 2015/2101 OJ EU L 303, p. 106, (EU) 2015/2464 OJ EU L 344, p. 1, (EU) 2016/702 OJ EU L 121, p. 24, and (EU) 2017/100 OJ EU L 16, p. 51. Hereinafter: the Decisions.

enactment of the Programme, amounted to *ultra vires* acts. The complainants argued that the ECB disregarded the distribution of competences between the Member States (MS) and the EU (in violation of the principle of conferral)[9] and acted outside Art. 119 TFEU,[10] exceeding its competences under Art. 127 TFEU and Arts. 17 to 24 of Protocol no. 4 on the Statute of the ECB.[11] They also claimed that it infringed the prohibition of monetary financing in Art. 123 TFEU as well as the principle of democracy, and that it undermined German constitutional identity by infringing the budgetary powers of the *Bundestag*[12] due to possible sharing of losses.[13]

In *Weiss*, the CJEU sustained the validity of the Decisions. It adopted the position that by implementing the PSPP, the European System of Central Banks (ESCB) did not exceed its mandate. The distinction between monetary and economic policy was one of the crucial points because if the Decisions corresponded to measures of economic policy, they would represent an overreach of the ESCB's competences.[14] The CJEU found that the main objective of the ESCB was tied to monetary policy,[15] that there is no absolute separation between monetary and economic policy in the Treaties,[16] and that indirect effects on economic policy do not make the PSPP an economic policy measure.[17] Considering the broad discretion afforded to the ESCB in the field, the Decisions were also held proportionate to the objectives pursued.[18] The CJEU further found that the purchasing of state-issued bonds on the secondary market did not amount to monetary financing contrary to Art. 123(1) TFEU.[19] The issue of a potential violation of Art. 4(2) TEU was dismissed as hypothetical, as no provisions laid down an obligatory sharing of losses.[20]

The response is already (in)famous[21] in European constitutional academia as another stepping-stone in the series of the *BVerfG's* expositions on the possibility of reviewing EU legal acts and its implicit limits to the European integration project.

9 Art. 5(1) Treaty on European Union, OJ C 326 (TEU).
10 Treaty on the Functioning of the European Union, OJ C 326 (TFEU).
11 OJ C 202, p. 230.
12 C-493/17 Weiss, para. 14.
13 *Ibid.*, para. 15. For an overview of the arguments, also see: BVerfG 2 BvR 859/15, para. 1.
14 The EU enjoys exclusive competence with regard to monetary policy (Art. 3(1)(c) TFEU), but only coordinating competences with respect to economic policy. On this issue, see: Watson and Downing-Ide, 2020.
The issue was addressed before by the CJEU in C-62/14 Gauweiler and C-370/12 Pringle of 27 November 2012.
15 C-493/17 Weiss, para. 57.
16 *Ibid.*, para. 60.
17 *Ibid.*, para. 61.
18 *Ibid.*, para. 73 *et. seq.*
19 *Ibid.*, para. 101 *et. seq.*
20 *Ibid.*, para. 159 *et. seq.*
21 Labelled as 'an unprecedented act of legal vandalism' in: Eleftheriadis, 2020.

Considering the vast amount of commentary and research already published,[22] a very short overlook of the judgment should suffice.

In its judgment, the *BVerfG* found the Decisions[23] as well as the judgment of the CJEU *ultra vires*.[24] Generally, the *BVerfG*, in line with its established jurisprudence, may find an act *ultra vires* when '*the European Union* [*has*] *exceeded the limits of* [*its*] *competences in a manner that specifically runs counter to the principle of conferral*'.[25] The overreach of competences has to be manifest, meaning that the exercise of such competence would require a Treaty amendment or an evolutionary clause, requiring the involvement of the legislator.[26]

In particular, the *BVerfG* first found that the CJEU manifestly failed in its consideration of whether the ECB exceeded its monetary policy mandate, not paying sufficient attention to the actual effects of the PSPP, effectively not applying the principle of proportionality in an acceptable manner, rendering the principle of conferral meaningless.[27] While recognising in principle the primary competence to interpret EU law to the CJEU in line with Art. 19(1) TEU,[28] it considered the judgment '*not comprehensible*' and '*objectively arbitrary*'.[29] Since it '[*could*] *not rely on the Weiss judgment of the CJEU*' concerning the validity of the Decisions,[30] it performed its own review. It found that the Decisions neither contained, nor were based on, the required balancing of economic policy effects, violating Arts. 5(1) and (4) TEU, namely the principle of proportionality.[31]

The consequence of finding an act *ultra vires* is that German constitutional organs *'may participate neither in the development nor in the implementation, execution, or operationalisation*' of these acts, making them inapplicable in Germany.[32] The *Bundesbank* was ordered not to participate in the PSPP subject for a transitional period of three months, during which the ECB would adopt a new Decision, implementing the court's expectations.[33] The *BVerfG* also charged the Federal Government and the *Bundestag* to take steps to ensure that the ECB conduct a suitable proportionality assessment in relation to the PSPP.[34]

22 See, for example, the German Law Journal Special Collection on European Constitutional Pluralism and the PSPP Judgment (Volume 21, Issue 5 of July 2020). Also see publications referenced in this article, esp. n. 34.
23 BVerfG 2 BvR 859/15, paras. 164–178.
24 *Ibid.*, para. 117 *et. seq.*
25 *Ibid.*, para. 110.
26 *Ibid.*, para. 110. Despite this clear reference to the exceptionality of such review, Eleftheriadis notes that this standard was in fact not reached in Weiss. Eleftheriadis, 2020.
27 BVerfG 2 BvR 859/15, para. 123 *et. seq.*
28 *Ibid.*, para. 111.
29 *Ibid.*, para. 118 *et. seq.*
30 *Ibid.*, para. 164.
31 *Ibid.*, para. 167 *et. seq.*
32 However, it should be noted that this is therefore not a ruling on the validity of the Decisions.
33 BVerfG 2 BvR 859/15, para. 235. For a follow-up during the following months, see: Utrilla, 2020.
34 BVerfG 2 BvR 859/15, para. 232.

3. Exceptional constitutional exceptionalism?

A distinction between two issues concerning the judgment should be made. The first is its persuasiveness. In the present case, this covers the issues related to the distinction between monetary and economic policy, the ECB's mandate, and the application of the principles of proportionality and conferral. The second issue is the viability of the underlying premise of the judgment, which is that national (constitutional) courts have the competence to perform a review of an EU act exceptionally – which I refer to as constitutional exceptionalism.

Regarding the first issue,[35] it is hard to add much to the very poignant analyses already provided elsewhere.[36] The response of the EU institutions, somewhat unconventionally, followed the German judgment as well.[37] Further discussion of these points would be a digression from the aim of this article.

The overwhelming criticism of the *BVerfG's* reasoning on proportionality meant that the second issue was also rejected more or less summarily by academia. The most open dismissal was the joint statement signed by more than thirty well-renowned academics in May 2020, also arguing against the idea of constitutional pluralism,[38] which supposedly brought about this type of reasoning, as inherently prone to such abuse.[39] While the overall circumstances surrounding the judgment, especially concerning possible ramifications for the Pandemic Emergency Purchase Programme,[40] beg for its refusal, I argue that a complete rejection of its underlying approach based solely on this *BVerfG* judgment is unwarranted.

The argument behind the *ultra vires* review is that the constitutional court should review EU acts in cases of manifest and structurally significant exceeding of competences.[41] As stated by the *BVerfG*:

'*[…] if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences*'.[42]

This means that the national authorities are bound by EU law; however, if the act exceeds the EU's competences, contradicting the national constitution, the national authorities (courts) may be authorised to depart from it.

35 Is the CJEU's judgment really 'not comprehensible'? The question was craftily reversed by: Marzal, 2020.

36 See, for example: Fabbrini, 2020; Galetta, 2020; Marzal, 2020; Meier-Beck, 2020; Nowag, 2020; Viterbo, 2020, p. 679 n. 45; Ziller, 2020.

37 Court of Justice of the European Union, 2020; European Central Bank, 2020b; European Commission, 2020.

38 Kelemen and Pech, 2018. For a response, see: Avbelj, 2020.

39 Kelemen *et al.*, 2020. For a response, see: Baranski, Brito Bastos, and van den Brink, 2020.

40 Maduro, 2020a; Viterbo, 2020.

41 BVerfG 2 BvR 859/15, para. 105, 110. See: Calliess, 2019, pp. 170–171. Also see below, n. 45.

42 BVerfG 2 BvR 859/15, para. 118.

The broader idea behind the national review of EU legal acts stems from the well-known line of *BVerfG* judgments dealing with European integration, referring to the *BVerfG's* residual competence to review EU acts.[43] The *BVerfG* developed human rights review (Solange I[44] and Solange II[45]),[46] *ultra vires* review (Maastricht[47]), and identity review (Lisbon[48]).[49] In these cases, albeit in a more EU-friendly manner, the *BVerfG* established the doctrines, which first came to life in Weiss. As any European constitutional law scholar is aware, the *BVerfG* is not alone in retaining competence for scrutiny of EU acts in exceptional circumstances.[50] From the very beginning of European integration, nods in the German direction emerged from Italy.[51] Similar doctrines were later developed for example, in Spain,[52] France,[53] Poland,[54] and the Czech Republic,[55] among others.[56]

Furthermore, despite the fact that the terminology utilised by the *BVerfG* in the PSPP case is unprecedented,[57] this is not the first time a decision like this has been made by a national court either. The first to declare an act of EU law *ultra vires* was the Czech Constitutional Court.[58] Recently, the Danish Supreme Court also refused to recognise

43 Tomuschat, 2013; de Abreu Duarte and Delgado, 2020; Nowag, 2020, p. 12.

44 BVerfG 37, 271 of 29 May 1974.

45 BVerfG 73, 339 of 22 October 1986.

46 Hassemer, 2004, pp. 35–37; Denham and Burke, 2009, pp. 114–115.

47 BVerfG 89, 155 of 12 October 1993. In this regard, see: Hassemer, 2004, pp. 37–40; MacCormick, 2010, pp. 259–260. In this regard, the Honeywell judgment BVerfG 2 BvR 2661/06 of 6 July 2010 is also relevant.

48 BVerfG 2 BvE, 2/08 of 30 June 2009. See, for example: Denham and Burke, 2009, pp. 120–125; Reestman, 2009; Zwingmann, 2012; López Bofill, 2013.

49 For an overview of the development and meaning of the doctrines, see: Calliess, 2019, p. 158 *et. seq.*

50 For an overview by a Slovenian author, see: Accetto, 2013, pp. 426–451. Also see: Hoffmeister, 2007; Dobbs, 2014, pp. 303–305. For an in-depth study on the national constitutional limitations to EU law and integration, see: Besselink *et al.*, 2014.

51 Frontini v. Ministero delle Finanze, Judgment No. 183 of 18 December 1973; SpA Granital v. Amministrazione delle Finanze, Dec. 170 of 8 June 1984; SpA Fragd v Amministrazione delle finanze dello Stato, Dec. 232 of 21 April 1989. More recently, see: Judgment No. 115 of 10 April 2018.

52 DTC 1/2004 of 13 December 2004; DTC 26/2014 of 13 February 2014. See, for example: Torres Pérez, 2012, pp. 119–121.

53 For example: 2004-496 DC of 10 June 2004; 2004-498 DC of 29 July 2004. See: Reestman, 2009, p. 386 *et. seq.*

54 Judgment K 18/04 of 11 May 2005.

55 Judgment Pl. ÚS 50/04 (re Sugar Quota Case II) of 8 March 2008; Judgment Pl. ÚS 19/08 (Lisbon I) of 26 November 2008; Judgment Pl. ÚS 29/09 (Lisbon II) of 3 November 2009; Judgment Pl. ÚS 5/12 of 31 January 2012. For an overview of the Czech judgments regarding the Treaty of Lisbon, see: Denham and Burke, 2009, pp. 126–129. For an overview of early jurisprudence of new member states from the 2004 and 2007 enlargements, see: Łazowski, 2010, esp. Albi, 2010. Also: Rideau, 2013.

56 Joined by Hungary as well in Decision 22/2016. (XII. 5.) AB. of 30 November 2016. See: Halmai, 2018.

57 Maduro, 2020b.

58 In relation to C-399/09 Marie Landtová of 22 June 2011. Judgment Pl. ÚS 5/12 of 31 January 2012. See: Komárek, 2012.

the horizontal application of the prohibition of discrimination as a general principle of EU law in the Ajos case.[59] A similar incident was narrowly avoided in the Taricco saga[60] by the Italian Constitutional Court.[61] This brief overview should suffice to show that absolute primacy is only one side of the coin – dissenting voices endure on the MS side.[62] Unconditional supremacy proclaimed by the CJEU in Costa[63] has been disputed from the outset,[64] and after the failed attempt of the Treaty in establishing a Constitution for Europe,[65] which included the primacy clause in Art. I-6, it has not been included in the text of the ensuing Treaty of Lisbon.[66]

Two key problems are usually put forward as arguments against such constitutional exceptionalism: (1) it runs counter to the principle of *effet utile* of EU law[67] and (2) the danger of its abuse (uncovered in the present political situation in the EU).[68]

Regarding the first point, it should be noted that constitutional exceptionalism is not exceptional in the EU's constitutional structure. A whole field of research dealing with the different types of differentiation, including judicial,[69] is devoted to differentiation in the EU.[70] Differentiation is considered a systemic feature[71] of the EU, and important adaptations are granted to MS at all levels of EU law. Catastrophic projections are, in my view, overstated, and some negative effects on uniformity do not necessitate (or even facilitate) disintegration.[72] We should also keep in mind that this debate, however consequential it may seem to European constitutional law scholars, is taking place at the margins of EU law. This is demonstrated by the fact that the ECB and German authorities are moving on with the PSPP more or less unaffected. Similarly, no Armageddon followed the Czech and Danish judgments.[73]

59 Danish Supreme Court, judgment no. 15/2014 of 6 December 2016. See: Krunke and Klinge, 2018.
60 For an overview of the case, see: Kos, 2019, pp. 51–53.
61 Weiler and Sarmiento, 2020.
62 For an overview of the main arguments in the debate between supremacy of state constitutions and EU law, as well as the pluralist account, see, for example: Torres Pérez, 2009, p. 41 ff.
63 C-6/64 Flamino Costa v E.N.E.L. of 15 July 1964. Recently most problematically applied in C-399/11 Melloni of 26 February 2013. On primacy in general, see, for example: Denham and Burke, 2009, pp. 109–113.
64 Baranski, Brito Bastos, and van den Brink, 2020. For a historic overview, see, for example: De Witte, 2011.
65 OJ C 310, p. 1–474.
66 It was relegated to a declaration, namely, 17. Declaration Concerning Primacy. See: von Bogdandy and Schill, 2011, p. 1417 nos. 2 and 3 and references therein.
67 C-314/85 Foto-Frost of 22 October 1987, para. 15. Ironically, this was acknowledged in the *BVerfG's* judgment: BVerfG 2 BvR 859/15, para. 111. Also see: Weiler and Sarmiento, 2020.
68 Maduro, 2020b, 2020a; Ziller, 2020.
69 Avbelj, 2013, pp. 192–193.
70 See, for example: de Witte, 2018. For one of the most comprehensive accounts, see: Tuytschaever, 1999.
71 Schimmelfennig, Leuffen, and Rittberger, 2015, p. 765.
72 In that sense, see: Baranski, Brito Bastos, and van den Brink, 2020.
73 Arguments to the point that these courts are minor players, to me, seem somewhat condescending.

On the other hand, important arguments can be made in favour of this form of exceptionalism.[74] The argument from national law is certainly endowed with legitimacy because one cannot expect national constitutional courts to act in violation of what they perceive to be national constitutional law.[75]

Indeed, therein lies the '*structural dilemma of a jurisdictional conflict*'.[76] However, it could be addressed by mutual accommodation that leaves margin for dissent, respecting some common set of principles.[77] If a common frame of reference (rules of engagement) were established, these types of disputes would be much less likely. In my view, Art. 4(2) TEU[78] could function as a hub for these types of disputes.[79] While this approach would offer an opportunity to express national constitutional concerns, it would also maintain the possibility of uniform applicability of EU law.[80] Exceptionally, if a certain (part) act of EU law infringed national constitutional identity, that (part) act would be (if possible)[81] inapplicable in the present case,[82] while retaining its full application in all other cases. This would only be accepted if, in line with the CJEU's practice, there existed a genuine and sufficiently serious threat to the fundamental interest of society.[83] Both parties' decisions would be based on valid EU law. Both courts should also proceed with respect for the principle of loyal cooperation in mind. For this approach to work, very high levels of violation of the principle of conferral or national constitutional identity would be necessary to validate a departure by a national constitutional court.[84] This approach could be possible under Art. 4(2) TEU, even considering the existing, albeit scarce, case law.[85] This option would even be possible regarding the *BVerfG's* judgment in Weiss, since *ultra vires* review is, as its subcategory,[86] inherently tied to identity

74 On this issue, see: Jakab and Sonnevend, 2020.
75 Kos, 2019, p. 49.
76 Weiler and Sarmiento, 2020.
77 Maduro, 2020a.
78 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [...]'. It should be noted that the reference to fundamental constitutional structures makes the identity clause a constitutional, rather than a cultural concept. See: Besselink, 2010, pp. 44, 47; von Bogdandy and Schill, 2011, pp. 1427–1429.
79 Lately, similar proposals have been made by: Garner, 2020; Jóźwicki, 2020. For the substantive and functional aspect of Art. 4(2) TEU, important for its operationalisation, see: Kos, 2019, pp. 44–51. It is noteworthy in the context of the Weiss case that Article 4(2) TEU was initially intended to prevent overreach of competences. See: Guastaferro, 2012, pp. 271–284.
80 Garner, 2020.
81 As concisely explained by *Jóźwicki*, if that was not possible, the act could be overturned by the CEJU, or upheld despite the constitutional conflict. In the latter case, political solutions (as put forward by the Polish Constitutional Court in its jurisprudence) would apply: amending EU law, amending the national constitution, or the MS leaving the EU. Jóźwicki, 2020.
82 Jóźwicki, 2020.
83 C-438/14 Bogendorff von Wolffersdorff of 2 June 2016, para. 67 and C-208/09 Sayn-Wittgenstein of 22 December 2010, para. 86.
84 Eleftheriadis speaks of '*important constitutional transformations*'. Eleftheriadis, 2020.
85 Kos, 2019, pp. 48–51.
86 Calliess, 2019, pp. 174–175.

review and the corresponding concept of German constitutional identity, which fits well with Art. 4(2) TEU.[87]

It must be stressed that, by now, the almost paradigmatic loyal and sincere cooperation must permeate judicial dialogue at the highest level for the approach to be viable. The highest national courts must reserve such a contestation for only the most problematic encroachments on national constitutional values, simultaneously informing the CJEU of their concerns via the preliminary reference procedure. They also have to adopt a deferential approach to the CJEU's approach to the problem. The latter has to take strong consideration of national constitutional concerns, voiced in a coherent and legitimate matter, and engage in dialogue.[88] Only in exceptional cases, where these would not be possible to accommodate within EU law, may the CJEU reject them. Only judicial dialogue, by and of itself inherent to Art. 4(2) TEU, performed in this spirit may enhance the legitimacy of the EU and preserve the trust vested in it.

The problem with the present *BVerfG* judgment is that it was mostly considered an example of how constitutional problem-solving among EU courts should not be conducted.[89] I would nevertheless argue that this approach does not entail an inherent possibility of abuse – at least no more than any other approach.[90]

Under this proposal, national identity could, in line with Art. 4(2) TEU, be used to express national constitutional concerns pertaining to core national constitutional values. In this way, it is essentially an argument for disapplication of a deviation from EU law, which supposedly encroaches on core national constitutional values. There are different possible operationalisations with respect to the type of EU act deemed problematic.[91] However, in all of these, it has to be kept in mind that the endeavour occurs within the realm of EU law: since this argument essentially pertains to the interpretation, validity, or application of EU law, it can only be accepted if accommodation of national constitutional concerns is legally possible within EU law. The invoked national constitutional value must be compatible with EU law to be deemed legitimate.[92] In that sense, it must be noted that EU law itself marks red lines in this regard: the departure

87 For a different view on the relationship between *ultra vires* and identity review, see: Jóźwicki, 2020.

88 See, for example: von Bogdandy and Schill, 2011, pp. 1449–1451; Torres Pérez, 2013, pp. 155–156.

89 As noted by Strumia, it marks a betrayal of the long-upheld spirit of cooperation among courts. See: Strumia, 2020.

90 Even if we accept the idea of a supranational body, as proposed by Sarmiento and Weiler, national courts could still declare the decisions of this body in violation of national constitutional law – if the latter was not changed accordingly. Weiler and Sarmiento, 2020. Similarly (regarding possible abuse), see: Baranski, Brito Bastos, and van den Brink, 2020.

91 Due to space constraints, these cannot be fully addressed here. See, however: von Bogdandy and Schill, 2011, p. 1442 ff; Kos, 2019, pp. 48–49.

92 Kos, 2019, p. 50. For a practical application of this requirement, related to Art. 4(2) TEU, see: C-438/14 Bogendorff von Wolffersdorff, para. 71 and C-208/09 Sayn-Wittgenstein, para. 89.

from fundamental values in Art. 2 TEU[93] and (at the very least)[94] human rights as they result from constitutional traditions common to the MS (Art. 6(3) TEU).

If an MS wanted to use the identity argument to the detriment of a certain EU law provision, when such a deviation also meant going against (or even endorsing the violation of) the core principles of integration, this could not be accepted.[95] National constitutional arguments for a deviation from EU law, which would, if accepted, lead to lower standards of fundamental rights protection following from Art. 6(3) TEU,[96] or infringe the fundamental EU values in Art. 2 TEU,[97] cannot be justifiably accommodated under EU law, since such acceptance would constitute a violation of EU law. In this sense, Arts. 2 and 6(3) TEU function as safeguards regarding which national constitutional arguments can be validly invoked under Art. 4(2) TEU. Flexibility under EU law can only be accommodated within these parameters. If a case arose where accommodation of national constitutional concerns was not possible, the proposed method would not offer a solution; such a solution would have to be found within the realm of politics.[98]

Despite there being different approaches to national constitutional exceptionalism, it would generally be apposite to argue that when invoking the respect of national constitutional essentials under the identity clause, it must be kept in mind that the goal of this endeavour should be to maintain and develop legal safeguards, protecting the individual from disproportionate exercise or abuse of public authority[99] – or, at the very least, such arguments may not deteriorate those safeguards. If anything, the

93 Esp. the values of respect for human dignity, freedom, democracy, equality, the rule of law, and human rights. Also see: Hillion, 2016, p. 63.

94 Despite the fact that the EU Charter is reaching beyond that, it is (also) an emanation of the core constitutional principle of the EU: respect for fundamental rights as stemming from common constitutional traditions of MS (see Art. 52(4) EU Charter). Therefore, it could also be argued that any arguments of national identity should respect the standards of fundamental rights protection developed in the EU Charter, especially since all MS agreed to adopt these common standards. It should also be noted here that the application of the EU Charter in such cases should generally not be questioned under Art. 51 EU Charter. If an MS wishes to invoke national identity against the application of an act of EU law, since it is also acting within the field of application of EU law, the EU Charter applies. Charter of Fundamental Rights of the European Union, OJ C 326, p. 391–407.

95 Kos, 2019, pp. 44, 50, 56. Similarly, see: Avbelj, 2020, pp. 1029–1031.

96 See above, n. 92.

97 It should be noted that this also raises the question of whether a conflict of EU and MS fundamental values is even possible, since EU values were derived from national values. While addressing this issue would go beyond the scope of this paper, I would argue that such a conflict is indeed possible. In practical terms, this has already been happening in some instances, while theoretically, fundamental EU values from Art. 2 TEU can be seen to have decoupled, meaning that they have gained an independent normative foundation. Namely, it should be understood that the values enshrined in Art. 2 TEU are not merely the sum of its parts, gathered from MS, but also contain separate and collective normative foundation. A change in the understanding of the fundamental values in an MS does not therefore also mean a change in its understanding at the EU level. For a more extensive argument, see: Zagorc and Kos (forthcoming).

98 The possible solutions are: (1) changing EU law, (2) changing national constitutional law, or (3) the MS leaving the EU due to an insurmountable incompatibility in fundamental values.

99 Bardutzky, 2007, p. 23.

protection of the individual from (ab)use of state power can be considered a constitutional principle common to all EU MS.[100] Attempts to (ab)use the method described above to erode the rule of law, democracy, or human rights standards in the EU cannot be validly acknowledged.

4. EU law in the Slovenian constitutional system

■ ***4.1. What is the place provided for EU law in the Slovenian Constitution?***

To consider the possibility of adopting similar doctrines in the Slovenian constitutional system, EU law's place within the system must first be established.

Constitutional foundations for accession to the EU were mostly created in 2004.[101] The main provision is Art. 3a of the Slovenian Constitution (SC), the so-called 'Europe Clause'. Art. 3a, para. 1 provides that *'Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law'.* Further, para. 3 states that *'*[*L*]*egal acts and decisions adopted within international organisations* [*from para. 1*] *shall be applied in Slovenia in accordance with the legal regulation of these organisations*'.[102]

A constitutional amendment was considered necessary as the transfer of sovereign rights would otherwise be unconstitutional, and collision rules had to be established as well due to the symbolic and constitutive value of sovereignty.[103] The insertion of a new article into the SC is a testament to the refusal to treat the EU as a regular international organisation, international law being governed by Art. 8 of the SC.[104] During the discussions, the key issue was whether to adopt an abstract or a casuistic approach.[105] The final version adopted the former, which was considered more suitable given the changing nature of the EU, the existing tradition of relatively general and abstract constitutional regulation, and the uncertainty of accession due to a pre-accession referendum and the possible eventual rejection by the EU.[106] Although the text does not mention the EU, it was drafted precisely for the purpose of accession (partly also for accession to NATO). In theory, the article is marked as out-dated, as most EU MS since the '70s include an explicit EU-related constitutional provision.[107]

100 One example of this was the Melloni case, where the concern of the Spanish Constitutional Court (which did not however form part of the state's constitutional identity) was the level of protection of the individual's right to a fair trial, the Spanish standard being higher than the EU standard.

101 See: Bardutzky, 2019, pp. 690–692. In Slovene, see: Avbelj, 2012a, pp. 344–346.

102 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13, and 75/16.

103 Cerar, 2003a, pp. 6–7, 2011, pp. 83–84. Also see: Bardutzky, 2019, pp. 692, 697–699.

104 Cerar, 2011, pp. 83–84. For a general overview on the role of international law in the SC, see: Bardutzky, 2019, pp. 730–732.

105 Cerar, 2003b, p. 1463 *et. seq.*

106 Cerar, 2011, pp. 76–77; Bardutzky, 2019, p. 692.

107 Avbelj, 2012a, p. 350, referencing Claes, 2005.

■ *4.2. What is the stance of the Slovenian Constitutional Court on its competence to review acts of the EU?*

The Slovenian Constitutional Court (SCC) has so far failed to provide a clear answer regarding the interpretation of Art. 3a, paras. 1 and 3 of the SC, which means that the constitutional relationship with the EU is not yet completely apparent. An estimate of restraint in the formulation of a clear understanding of the relationship between EU law and national law[108] seems to be still accurate. Additionally, initial post-accession observations, that the case law shows no substantial deviations from the jurisprudence of the CJEU,[109] still hold true today.

In general, the SCC seems to be taking an 'EU-friendly' approach.[110] The SCC interpreted Art. 3a, para. 3 as binding all state institutions, including the national courts, to act in line with EU law when exercising their jurisdiction.[111] This position is exemplified by the view that '*all state authorities, including the Constitutional Court, must apply EU law in accordance with the legal order of this [international] organisation*'.[112]

Regarding its powers to review EU acts, the SCC also seems to be clear and equally in line with the general doctrines of the CJEU. It considers that (1) it is not competent to review the compatibility of national legislation with secondary EU law,[113] (2) it is competent to review the compatibility of national legislation with EU primary law,[114] (3) it does not have the power to review EU acts from the point of view of national (constitutional) law, (4) while retaining the power to review the compatibility of the national implementing measures,[115] (5) and the competence to interpret and review the legality of secondary law is the exclusive competence of the CJEU.[116]

The SCC also considers itself competent to initiate a preliminary ruling procedure. It was first put on the spot in U-I-113/04,[117] where it avoided posing a preliminary

108 Avbelj, 2012a, p. 346.

109 Zagorc and Bardutzky, 2010, p. 421 *et. seq.*

110 Similarly: Zagorc and Bardutzky, 2010, p. 421 *et. seq.* Avbelj, 2012a, p. 348.

111 Up-105/13-17 of 23 January 2014, para. 8.

112 U-I-146/12 of 14 November 2013, para. 32.

113 This position was criticised as formalistic in: Accetto, 2013, pp. 454–461. Nerad proposed that such a review could be possible with the upper premise being Art. 3a of the SC. See: Nerad, 2012, p. 389.
The SCC's jurisprudence concerning directives: U-I-32/04 of 9 February 2006, para. 19; U-I-116/07 of 25 May 2007, para. 6; U-I-44/05 of 11 September 2007, para. 6; U-I-17/11 of 18 October 2012, para. 6; U-I-146/12, para. 31. For regulations, see: U-I-186/04, Up-328/04 of 8 July 2004, para. 10.

114 U-I-17/11-7, paras. 7–9.

115 U-I-113/04-33 of 7 February 2007, para. 12. Also see: U-I-411/06 of 19 June 2008, esp. para. 12; U-I-37/10 of 18 April 2013, esp. para. 11; U-I-146/12, paras. 30–31; U-I-65/13-16 of 26 September 2013, para. 7; U-I-295/13-260 of 19 October 2016, para. 76.

116 U-I-113/04-33, para. 12; U-I-280/05 of 18 January 2007, para. 14; Up-1056/11 of 21 November 2013, para. 6; U-I-155/11 of 18 December 2013, para. 18; U-I-65/13-16, para. 8; Also see: U-I-295/13-260, para. 68. The SCC also understands issues regarding the interpretation and validity of EU law as a question of division of competence between national courts and the CJEU. See: Up-1056/11, para. 11; Up-561/15 of 16 November 2017, para. 10.

117 For an overview of the facts of the case, see: Ribičič, 2005, pp. 11–14.

question[118] because the procedures were already in motion before the CJEU.[119] The SCC stayed the procedure and waited for the CJEU's judgment.[120] Similarly, in U-I-65/13, the SCC waited for the CJEU's judgment in the already pending cases.[121] This approach can be considered a reflection of the internalisation of the principle of loyal interpretation.[122] The SCC first used the preliminary reference procedure in U-I-295/13, in which the issue was the validity of the Commission's banking communication.[123] Only recently, the SCC decided to issue a second preliminary reference in U-I-152/17, related to the validity of Directive (EU) 2016/681,[124] despite the fact that preliminary references with the same substance are already pending before the CJEU.[125] In all cases so far, including in Kotnik, where the standards of the Slovenian rule of law appear to be higher than those adopted by the CJEU,[126] the SCC fully complied with the CJEU's judgments.

In this context, a recent peculiar case[127] should be noted, in which the ECB and the Bank of Slovenia (BS) brought a constitutional complaint as well as challenged the Criminal Procedure Act concerning the search of premises, electronic devices, and seizure of documents performed on the premises of the BS connected to a suspected criminal offence of abuse of office or official authority. They argued that the orders of the District Court, *inter alia*, violated Protocols No. 7[128] and No. 4, concerning the inviolability of archives, proposing a reference for a preliminary ruling as well. The SCC rejected the complaints based on the lack of standing of public law entities when acting *ex iure imperii*, without engaging with substantive submissions. The epilogue

118 Accetto, 2013, pp. 453–454.
119 C-453/03 ABNA and Others of 6 December 2003.
120 For a summary of the case, see: Zagorc and Bardutzky, 2010, pp. 426–428.
121 C-293/12 Digital Rights Ireland of 8 April 2014.
122 Zagorc and Fajdiga, 2018, p. 417.
123 C-526/14 Kotnik and Others of 30 September 2016. As a follow-up to the violations established by the SCC in U-I-295/13, the National Assembly adopted a statute (Act on Judicial Protection Procedure for Former Holders of Eligible Liabilities of Banks) establishing a compensation scheme for subordinate creditors. This statute produced further issues regarding the independence of the Bank of Slovenia under Art. 130 TFEU and the prohibition of monetary financing in Art. 123 TFEU, prompting another proposal for a preliminary reference. An interim measure was issued by the SCC without engaging with EU-related substantive arguments. The case is currently pending. See: U-I-4/20-19 of 5 March 2020 (not currently available in English).
124 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime, OJ L 119, pp. 132–149. The Ombudsman challenged the validity of the Police Tasks and Powers Act implementing the directive, specifically points 8 and 12 of Annex I of the directive on the ground that it violates the provision on the protection of personal data (Art. 38) of the SC and Arts. 7 and 8 of the EU Charter due to its indeterminate character. Case reference before the CJEU: C-486/20 (pending).
125 U-I-152/17-53 of 3 September 2020.
126 Bardutzky, 2007, p. 30.
127 U-I-157/16-12, Up-729/16-15, Up-55/17-20 of 19 April 2018.
128 Protocol (No. 7) on the privileges and immunities of the European Union, OJ C 326, p. 266–272.

will regardless ensue before the CJEU since the European Commission initiated an infringement procedure against Slovenia concerning the said matter.[129]

On the issue of the role of fundamental principles that govern the relationship between national and EU law, the SCC ruled, in line with Art. 3a, para. 3, that they are also national constitutional principles, binding with the same effect as the Constitution.[130] The principles of primacy,[131] consistent interpretation,[132] direct application, direct effect, transfer of competences, subsidiarity, and proportionality are, '*as national constitutional principles, […] also binding on the Constitutional Court when carrying out its competences in the framework of the legal relations concerning EU law*'.[133] The principle of the effectiveness of EU law is also categorised as a national constitutional principle.[134]

Regardless, the answer on absolute supremacy, a key point when comparing the SCC with the *BVerfG*, has explicitly been left open:

> '*[The decision of the court] is true regardless whether we interpret this provision of the Constitution and the law of the European Union […] to entail that due to the principle of the supremacy of the law of the European Union such law unconditionally also prevails over the provisions of the Constitution, […] or in a manner such that in certain exceptional cases the law of the European Union has to give way to the Constitution. In the case at issue, it is namely not necessary for the Constitutional Court to take a position on this […]*'.[135]

Considering the above, the case law of the SCC on EU matters can be marked by cooperative vagueness. The SCC echoes the positions of the CJEU; however, a final decision on the interpretation of Art. 3a, para. 1 has yet to be made. Furthermore, as quoted above, the issue of primacy over the constitution has explicitly been left open, showing that the option of constitutional exceptionalism is not off the table. Therefore, the question of the relationship between national constitutional law and EU law

129 C-316/19 Commission v Slovenia (pending).

130 U-I-155/11, para. 14; U-I-146/12, para. 32; U-I-295/13, para. 66.

131 Also labelled the most important fundamental principle. See: U-I-146/12, para. 33; U-I-295/13, para. 67.

132 The SC confirmed the principle of loyal interpretation very early on in U-I-321/02 of 27 May 2004, para. 23. When exercising a judicial review of national legislation, the SCC has to, when interpreting national law, consider EU law following form EU acts and the CJEU's decisions. U-I-146/12, paras. 32, 34; U-I-129/13-16, Up-429/13-18 and U-I-138/13-16, Up-456/13-17 of 4 June 2015, para. 12; U-I-194/17-21 of 15 November 2018, para. 16; U-I-189/14-13, Up-663/14 of 15 October 2015, para. 20; Up-951/15-27 of 18 May 2017, para. 15; U-I-59/17-27 of 18 September 2019, para. 23.
For a general overview of the principle of loyal cooperation in Slovenia, see: Zagorc and Fajdiga, 2018.

133 U-I-295/13, para. 67. Also see: U-I-155/11, para. 14; U-I-146/12, para. 34.

134 U-II-1/12, U-II-2/12 of 17 December 2012, para. 53. The SCC could therefore in the future declare itself competent to review national legislation from the perspective of these principles.

135 U-II-1/12, U-II-2/12, para. 53. References omitted.

remains open.[136] While the constitutional text may allow it, no clear answer regarding whether the *BVerfG's* models of review of EU acts can be adopted within the Slovenian constitutional context follows from the jurisprudence of the SCC.[137] Nevertheless, if a situation of direct and insurmountable conflict between the SC and EU law arises, it would be safe to assume that the SCC would first initiate a preliminary reference procedure.[138]

■ *4.3. Are there constitutional limits to EU law under the Slovenian Constitution?*

Considering the lack of clear guidance from the SCC on the subject, the exact meaning and consequences of Art. 3a of the SC are subject to debate in academia.

The third paragraph of Art. 3a provides that legal acts adopted within the EU shall be applied in Slovenia in accordance with the legal regulation of these organisations, taking into account that it is all but in explicit wording directed at the EU. This is very broad authorisation,[139] which provides, among other things, for a complete acceptance of all the doctrines, especially those of primacy[140] and direct effect,[141] developed by the CJEU with regard to the relationship between national (constitutional) and EU law.[142] It covers both the validity and legal effects of EU law in the internal legal order, and it directs towards primary and secondary EU law as well as the CJEU's case law.[143] As already accepted by the SCC, it also makes these fundamental principles domestic constitutional principles.[144] All of this significantly affects and supplements other constitutional provisions.[145] However, it has to be read in conjunction with the first paragraph of Article 3a.[146] This is the key part of Art. 3a of the SC for the purpose of this paper, as it entails substantive preconditions for the transfer of sovereign rights, namely respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law.[147] These are understood as the fundamental constitutional principles of the Slovenian constitutional system.[148] This provision was inspired by Art. 23, para. 1 of the

136 Avbelj and Trstenjak, 2019, p. 70; Bardutzky, 2019, p. 695.
137 Avbelj, 2019, p. 72.
138 Even before the first preliminary reference by the SCC, this was suggested by Nerad, who highlighted that in such a conflict, the SCC is primarily bound by the constitution. Nerad, 2012, pp. 386, 391–392. Also see: Zagorc and Fajdiga, 2018, p. 416.
139 Also marked as a '*crack in the constitution*'. Testen, 2003.
140 Trstenjak, 2012, p. 275.
141 Bardutzky, 2019, pp. 693, 725.
142 In Testen's view, the effects of EU law on national constitutional provisions (primacy and direct effect) were the main reason Art. 3a, para. 3 had to be adopted in the first place. Testen, 2011, p. 91.
143 Nerad, 2012, p. 382.
144 Nerad, 2012, p. 383.
145 Namely, Arts. 125, 120, and 153 of the Slovenian Constitution. See: Nerad, 2012, p. 383.
146 The two provisions were marked as being in a 'dialectic opposition'. See: Ribičič, 2006, p. 22 *et. seq*.
147 These reflect a general perception of what the essential constitutional principles of the Slovenian constitutional system are. Bardutzky, 2019, p. 694.
148 Cerar, 2011, p. 78.

German Basic Law.[149] The values listed in Art. 3a of the SC are considered substantive conditions, which have to be fulfilled for Art. 3a, para. 3 to take effect and for the legal acts and decisions adopted by the EU to be applied in Slovenia in accordance with the legal regulations of the EU, as described above.[150] In fact, this provision could function as a source of rights for individuals, even in relation to the EU.[151]

At the time of the constitutional amendment, at least in theory, it seems that the supranational view of EU law, according to which EU law may enjoy a supra-constitutional rank,[152] had been dominant in Slovenia.[153] In line with this view, echoing the Solange doctrine,[154] the substantive safeguards described above do not warrant the rejection of the EU acts in violation of the constitution, *as long as* the EU, in its fundamentals, continues to be governed by the values described therein.[155] Only then can the SCC reject the application of EU acts,[156] which could, as a last resort, lead to a withdrawal from the EU.[157] This approach seems to conform with the textual interpretation of the provision since it authorises the transfer of sovereign rights to international organisations, which are *based* on the values listed therein. In other words, under this interpretation, sporadic divergences from these standards would not be constitutionally relevant, as long as they do not amount to a fundamental change in the value base of the EU.[158]

Approaches that are more recent, advocated most notably by *Avbelj*,[159] promote pluralistic interpretation, which treats the primacy of EU law as a relational principle.[160] In this sense, the issue is not which legal acts enjoy a hierarchical advantage because there should be a harmonious coexistence of the systems, in which primacy would depend on the circumstances of the case.[161] Accordingly, the SCC should remain open to a possible review of EU acts from the perspective of fundamental rights, in

149 Cerar, 2003b, n. 9.
150 Avbelj and Trstenjak, 2019, p. 67.
151 Avbelj, 2019, p. 68.
152 Cerar, 2011, p. 74.
153 Avbelj, 2011, p. 755, 2012b, p. 6.
154 Ribičič, 2006, p. 22 *et. seq.*
155 Cerar, 2011, p. 78.
156 This view is supported by Novak, who argues that such exceptional cases would entail a major decline in the protection of the democratic setup or fundamental rights protection. See: Novak, 2004, pp. 100, 105.
157 Cerar, 2011, p. 78.
158 A similar position, which argues against the competence of the SCC to review EU acts unless a serious and continual breach of constitutional principles would occur, also follows from Zagorc and Bardutzky (2010), pp. 432-433. Similarly, as Zagorc and Fajdiga argue, only continuous violations of human rights could justify an intervention by the SCC. However, they do leave the door open in extreme situations, if fundamental values of the Slovenian legal order were at stake. See: Zagorc and Fajdiga, 2018, pp. 415–416.
159 Avbelj, 2012a, pp. 349–351.
160 Avbelj and Trstenjak, 2019, p. 68.
161 In that sense, Zalar argues that a constitutional provision establishing primacy over the constitution is not appropriate. Art. 3a of the SC, enabling such an understanding, is hence not optimal. See: Zalar, 2005, p. 14 *et. seq.*

line with the *BVerfG's* doctrine.[162] In the view of the commentators, the substantive limits defined above were intended to create a sort of emergency brake on the broad concession of Art. 3a, para. 3, and they could be understood as a possibility for the SCC to review EU acts,[163] especially in cases of violations of fundamental rights.[164] In this sense, *Avbelj* notes that Art. 3a could also be interpreted as an anchoring point for inalienable fundamental rights and constitutional identity, adopting the doctrines of the *BVerfG*, since the article is inspired by the German model,[165] as was the case with many other constitutional courts.[166] *Jambrek* takes a similar view, arguing that despite differences in the constitutional text,[167] the SCC could adopt both human rights reviews as well as the identity review developed in the *BVerfG's* Lisbon judgment. He bases his argument not only on Art. 3a, but also on the right to self-determination[168] in Art. 3 of the SC, suggesting that the said article could be used to substantiate the adoption of the German doctrines within the Slovenian constitutional system.[169] Starting from the understanding that national constitutional courts, as guardians of the constitution and fundamental rights, should not be underestimated and degraded,[170] *Ribičič* argued that in line with Art. 3a, the SCC has three possible approaches to the review of an EU (or national implementing) act: (1) negative or passive – the SCC strictly follows the CJEU and EU law, (2) neutral – the SCC decides on the (in)compatibility of implementing the act with the SC, without solving the conflict, and (3) positive or active – where the SCC reviews the constitutionality of an EU act.[171] The latter would be exceptional and, in his view, could be based on Art. 3a of the SC.[172] As noted above, the negative approach was followed in nearly all cases.[173]

We can see that by going beyond the textual interpretation of Art. 3a of the SC and acknowledging historical and systemic considerations, arguments can be proposed in favour of granting substantive limits more power than initially advocated by some

162 Zalar, 2010, p. 183.
163 Testen, 2011, pp. 91, 92.
164 Ribičič, 2006, p. 22 *et. seq.*
165 Testen, 2011, pp. 91, 93. Testen explicitly states that with regard to human rights, Art. 3a, para. 3 interpretations should take into consideration the judgments of the BVerfG on the issue.
166 Avbelj, 2019, pp. 71–72.
167 The main doubt was whether identity review could be adopted, since based on the text, there are no unamendable provisions (no 'eternity clause') in the SC. Jambrek, 2011, p. 55.
168 He asserts that the right to self-determination entails the republican form of government (Art. 1 of the SC), democratic legitimacy of state power (Arts. 1 and 3 of the SC), principles of rule of law and social state (Art. 1 of the SC), the protection of fundamental rights and freedoms (Art. 5 of the SC), and local self-government (Art. 9 of the SC). These would form an inalienable constitutional identity of the Slovenian nation. Jambrek, 2011, pp. 56–57.
The right to self-determination is closely related to the principle of sovereignty. For the most comprehensive elaboration on the principle of sovereignty by the SCC, see: Rm-1/02 of 19 November 2003, esp. paras. 22–25.
169 Jambrek, 2011, pp. 52–57.
170 Ribičič, 2006, p. 22 *et. seq.*
171 Ribičič, 2005, p. 14.
172 Ribičič, 2005, pp. 5–6.
173 Zagorc and Fajdiga, 2018, p. 416.

commentators. Although the constitution does not empower the SCC to reject the application of individual EU acts that would be incompatible with the SC,[174] in cases of serious encroachment on fundamental constitutional values, this could be possible.

Without too much speculation, although here too, the SCC lacks a clear stance, critical areas that prompt the SCC to be more inclined to resort to constitutional exceptionalism can preliminarily be determined. Regarding the substance of the constitutional core of the SC, *Avbelj* argues that the SCC has already joined other constitutional courts in establishing the irreducible epistemic core of the SC, identified mainly in the Basic Constitutional Charter,[175] although it has not used it in relation to the EU.[176] The case was, however, singular, as it dealt with the determination of the border with Croatia. *Jambrek* more broadly argues that human dignity,[177] freedom and equality, the right to self-determination, independent statehood, and the guarantee of human rights and fundamental freedoms, as well as the principles of democracy, rule of law, and social state can be considered the core of Slovenian constitutional identity. Both historical legitimacy and the current constitutional setup grant these values the status of permanence and inviolability. In that sense, the SC shares many parallels with other states born of totalitarian regimes, based on the 'never again' principle.[178] Similarly, *Novak* argues that Art. 3a has to be read in conjunction with Art. 3, para. 1, according to which any transfer of sovereignty cannot entail an infringement upon the permanent and inviolable right to self-determination.[179] A partial transfer of sovereignty should also not legalise a (substantial) diminishing in the standards of fundamental rights protection.[180] The latter in particular might find some indirect support in the SCC's case law because in U-I-113/04, the court rejected the review of an EU act, among others, because the standard of human rights under the SC was identical to that of the EU.[181] With regard to human rights review, the SC in general would preclude any decrease in the existing standards of human rights protection. In cases of contradictions between national constitutional law and EU law, the SCC would probably maintain a higher standard, or at least attach a Solange-type condition to the EU act's validity within the national legal system.[182]

174 Cerar, 2003b; Bardutzky, 2019, p. 694.

175 Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia Nos. 1/91-I and 19/91 – corr. He builds on the Opinion of the Constitutional court on the Arbitration Agreement between Slovenia and Croatia in Rm-1/09 of 18 March 2010. See: Avbelj, 2010, pp. 141–142.

176 Also see: Zagorc and Fajdiga, 2018, p. 418.

177 In a famous case, the SCC already held that human dignity is at the centre of the Slovenian constitutional order, directly following from Art. 1 of the SC, which provides that Slovenia is a democratic republic. See: U-I-109/10 of 26 September 2011, paras. 7, 10.

178 Jambrek, 2012, p. 32. Also see above, n. 166.

179 See the SC, Art. 3, para 1: 'Slovenia is a state of all its citizens and is founded on the permanent and inalienable right of the Slovene nation to self-determination'. See: Novak, 2004, p. 96.

180 Novak, 2004, p. 105.

181 U-I-113/04, para. 17.

182 Bardutzky, 2019, pp. 722–723 and references included therein.

In line with all of the above, we see that some rudimentary elements, which could be taken up to introduce the German doctrines discussed above, especially those of human rights and identity review, into the Slovenian constitutional system are already scattered throughout the SCC's jurisprudence and are discussed in the academia, including in connection with EU law. It is very likely that the SCC would take up all of the abovementioned constitutional values, which, looking at the text of the SC, especially considering the above-discussed Art. 3a, para. 1, can definitely be seen as enjoying special protection, into its understanding of Slovenian constitutional identity, should such a case arise.

Asking more concretely what the decision of the SCC would be with regard to the PSPP, should the case be submitted to it, would amount to pure speculation, considering the inconclusive stance of the SCC. Parallels to the interpretations of the right to vote (entailing the 'right to democracy'),[183] budgetary powers of the Parliament,[184] and corresponding duties of constitutional organs,[185] which form the base of the *BVerfG's* judgment, could hardly be traced in the SCC's case law. Nevertheless, a thorough comparison would require a separate paper devoted to each of these issues. The only general rule that is directly relevant to the PSPP judgment which can be inferred from the SCC's case law for certain is that it will adopt a deferential attitude when reviewing monetary and economic measures (including in connection with the EU), meaning that a wide margin of appreciation will be accorded.[186] In addition, only a general outline, which has been provided above, can be established.

In conclusion, it can be argued that should a case that raises doubts regarding EU law's compatibility with the fundamental constitutional values of the SC identified above come before the SCC, the constitutional text (esp. Art. 3, para. 1 and Art. 3a, para. 1) and its current case law enable it to adopt doctrines similar to those of human rights, *ultra vires,* and identity review. In line with what has already been said, the SCC would probably follow the German approach, adapted to the text of the SC. In doing so, it should be stressed that this could only be an *ultima ratio* measure. Only clear violations of the core constitutional values could trigger such a review, and the SCC should, considering its EU-friendly attitude, which is discernible from its case law, act in line with the principle of loyal cooperation. This means that it would first have to initiate a preliminary ruling procedure, and then, considering the provided interpretation of EU law by the CJEU, recognise the latter's interpretation of EU law. Only if the CJEU failed to address the SCC's concerns could the national court reserve for itself the option of giving precedence to the SC, as the *BVerfG* did in Weiss. Considering all the safeguards – if respected by the parties involved – this is more or less a hypothetical possibility.

183 BVerfG 2 BvR 859/15, para. 99. See: Calliess, 2019, pp. 172–173.
184 *Ibid.*, para. 104.
185 *Ibid.*, para 106.
186 U-II-1/12, U-II-2/12, para. 47. Also see: U-I-178/10 of 3 February 2011, para. 9; U-I-129/19 of 1 July 2020, paras. 64–65, 83.

5. Conclusion

The *BVerfG's* PSPP judgment spurred intensive debates regarding possible constitutional repercussions for the EU. Admittedly, there is the possibility that the court's uncooperativeness might sprout illiberal mimicry from some of the constitutional courts in the continent. However, as far as national constitutional courts are concerned, exceptional constitutional exceptionalism has never been completely off the table, and, without catastrophic consequences, has already materialised before the *BVerfG's* judgment in May. I believe that national constitutional exceptionalism in the context of EU law should not be disregarded as categorically unacceptable, as inevitably damaging European integration, and as being inherently prone to abuse. National restraints stemming from genuine concern about maintaining and developing legal safeguards against disproportionate exercise or abuse of public authority are certainly endowed with legitimacy. However, when arguing for exceptions under EU law due to national constitutional concerns in line with Art. 4(2) TEU, these can only be accommodated if possible within the general framework of EU law. Red lines should always be drawn when attempts at breaking down the fundamental values in Art. 2 TEU and the standards of fundamental rights as stipulated in Art. 6(3) TEU emerge before the CJEU in the guise of genuine national constitutional concerns. Regardless, in a system of such prevalent diversity, the EU should be able to accommodate inherent fundamental differences if it wishes to integrate sustainably. *Ab initio* rejecting national constitutional concerns would be counterproductive.

Although the SCC has not yet expressed a clear view on the issue, some limits to EU integration already follow from the text of the constitution. The SCC's approach can be marked by cooperative vagueness, echoing the doctrines of the CJEU. However, the answer to absolute primacy has explicitly been left open by the court. Considering its existing case law as well as its doctrinal affinity to German constitutional law, I would argue that when a clear case arises, the SCC would probably frame the rules of engagement in similar terms as the *BVerfG*. Viewed from the perspective of its general EU-friendly attitude, it would be safe to assume that any departure from established EU law doctrines would only be undertaken in exceptional cases of encroachment on core constitutional values and it would be exercised in the spirit of loyal cooperation with the CJEU.

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