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CONSTITUTIONAL COURTS AND THE IMPLEMENTATION OF EU DIRECTIVES: A COMPARATIVE ANALYSIS

Abstract:

This article concerns constitutional problems related to the implementation of EU directives seen from both the legal and comparative perspectives. The directives are a source of law which share a number of characteristic features that significantly affect and determine the specificity of Member States' constitutional review of the directives as well as the legal acts that implement them. The review of the constitutionality of EU directives is carried out in accordance with the provisions of national implementing acts. Member States' constitutional courts adopt two basic positions in this respect. The first position (adopted by, inter alia, the French Constitutional Council and German Federal Constitutional Court) is based on the assumption of a partial "constitutional immunity" of the act implementing the directive, which results in only a partial control of the constitutionality of the implementing acts, i.e. the acts of national law implementing such directives. The second position, (adopted, explicitly or implicitly by, inter alia, the Austrian Federal Constitutional Court, Czech Constitutional Court, Polish Constitutional Court, Romanian Constitutional Court and Slovak Constitutional Court) concerns the admissibility of a full review of the implementing acts. This leads to the admissibility of an indirect review of the content of the directive if the Court examines the provision as identical in terms of content with an act of EU law. Another issue is related to the application of the EU directives as indirect yardsticks of review. The French Constitutional Council case-law on review of the proper implementation of EU directives represents the canon in this regard. Nonetheless, interesting case studies of further uses of EU directives as indirect yardsticks of review can be found in the case law of other constitutional courts, such as the Belgian Constitutional Court or Spanish Constitutional Court. The research presented in this paper is based on the comparative method. The scope of the analysis covers case law of the constitutional courts of both old and new Member States. It also includes a presentation of recent jurisprudential developments, focusing on the constitutional case-law regarding the Data Retention Directive and the Directive on Combating Terrorism.

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1. IMPLEMENTATION OF EU DIRECTIVES: CONSTITUTIONAL PROBLEMS

EU directives are a source of EU law having a few characteristic features that significantly affect the issues involving review of the constitutionality of the directives themselves and, by extension, the legal acts that implement them. EU directives are addressed to the Member States and, as a general rule, they cannot be treated as a source of the rights and obligations of an individual. The Member States – either all of them or those precisely defined in the provisions – are bound by EU directives in respect of the result that is to be achieved, while the applicable provisions leave it to the discretion of the Member States to select the means and measures of implementation. Directives are therefore an instrument for the harmonization of the laws of the Member States. Directives are implemented into the national legal order by means of national legislation, which is usually done by acts. It is clear from the case-law of the Court of Justice of the European Union (CJEU¹) that if a directive is not implemented in the national order, or is implemented improperly, an individual may rely on the provisions of this directive against the public authorities of the state, provided that the provisions are “unconditional and clear enough.” Moreover, national courts are obliged to give full effect to EU law and to interpret all national legislation in the light of all relevant EU law, regardless of whether a particular provision is of direct effect. EU law does not have to be directly effective in order for it to benefit from the general doctrine of supremacy.²

The CJEU has developed ample case-law concerning the constitutional review of EU law (European Constitutional Supremacy: ECS).³ Ever since the 1960s (*Van Gend en Loos*⁴ and *Costa v. ENEL*⁵) this view has not changed a single iota.⁶ Two of the strongest CJEU statements in this regards were in the *Foto-Frost* judgment of 22 October 1987, where it explicitly held that the national courts have no jurisdiction themselves to declare that measures taken by EU (then the Community) institutions are invalid;⁷ and the *UPA* judgment of 25 July 2002, where the CJEU emphasized that the EU Treaties have established a complete system of legal remedies and procedures designed to ensure

¹ This abbreviation will be applied consistently throughout the text, irrespective of whether the decision was issued before or after the entry into force of the Treaty of Lisbon.

² Case C-14/83 *Von Colson and Kamann v. Land Nordrhein – Westfalen*, ECLI:EU:C:1984:153.

³ Cf. M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11(3) *European Law Journal* 262 (2005), pp. 262-263.

⁴ Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

⁵ Case C-6/64 *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

⁶ Case C-42/17 *Criminal proceedings against M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936. This case is considered, at least for now, as the exception that proves the rule.

⁷ Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

judicial review of the legality of acts of the institutions, and have entrusted such review to the EU courts.⁸ Nevertheless some national constitutional courts have not accepted this perspective, or at least accepted it only under certain conditions, which give them the right of the last word (*Kompetenz-Kompetenz*)⁹ and does not overturn the National Constitutional Supremacy (NCS).¹⁰ On the other hand, constitutional courts have been becoming more and more aware of their role as European courts. In effect, they have abandoned the strategy of “splendid isolation” and incorporate EU law as yardsticks for constitutional review.¹¹ Therefore the current way of application of EU law by national constitutional courts can be most accurately described in conceptual frames as (an imperfect phase of) legal pluralism. Both (to some extent inconsistent) factors – lack of acceptance of the CJEU’s monopoly to review EU law and an increasing awareness of the constitutional courts’ role as European courts – affect two basic constitutional issues regarding EU directives and their implementation. The first is the national constitutional review of EU directives via the review of implementing acts; and the second one is application of the EU directives as indirect yardsticks of review, *inter alia*, while reviewing of the correctness of their implementation.

In relation to the issue of constitutional review, the preliminary hypothesis is that the characteristic features of EU directives result in them being reviewed via a review of the implementing acts, and in this respect constitutional courts can choose one of two basic positions.

The first position is based on the assumption of a partial “constitutional immunity”¹² of the implementing act, which results in only a partial constitutional review of implementing acts (i.e. national legislation implementing EU directives).¹³ The consti-

⁸ Case C-50/00 *P Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462, para. 40.

⁹ Cf. M. Kumm and R.F. Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3(2-3) *International Journal of Constitutional Law* 473 (2005).

¹⁰ Kumm, *supra* note 3, pp. 262-263.

¹¹ D. Paris, *Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review*, 24(6) *Maastricht Journal of European and Comparative Law* 2017.

¹² Cf. M. Claes, *The National Courts’ Mandate in the European Constitution*, Hart Publishing, Oxford and Portland: 2006, p. 628.

¹³ The specificity of the implementation process of EU law in some Member States should be taken into account. For instance in Italy the implementation process is regulated by separate acts, and the implementation of specific directives can be carried out by decree-laws directly, or by means of regulations and other administrative acts, or by means of transitional regulations with the force of law and other acts adopted in accordance with the urgency procedure, as well as by means of legislative acts of the Italian regions and autonomous provinces. Cf. K. Doktor-Bindas, *Wpływ prawa Unii Europejskiej na system prawa Republiki Włoskiej* [The Impact of European Union Law on the Law System of the Italian Republic], Wydawnictwo Sejmowe, Warszawa: 2013, pp. 185 et seq. On the other hand, in practice only 10 per cent of EU directives are implemented by means of laws of parliament in France. The implementation of the remaining 90 per cent of directives is carried out with the use of acts within the jurisdiction of the government, i.e. decrees and ordinances. In case of the implementation of the directive by means of an act of the executive powers, the competent body to conduct a review of the legality of such an act is the Council of State, not the Constitutional Council of the French Republic. Cf. K. Wójtowicz, *The Constitutional Courts and European Union Law*, E-Wydawnictwo, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław: 2014, p. 86.

tutional courts that adopt this thesis in their case-law acknowledge the fact that they are only authorized to review those provisions of the implementation act which are of an executive nature and refer not to the directive's objectives, but to the manner of its implementation. These courts could only exceptionally allow for a review of those provisions of an implementing act which are identical in terms of content with the provisions of the directive. This position means that, as a rule, constitutional courts avoid reviewing (indirectly) EU directives.

The second position involves, whether explicitly or implicitly, the admissibility of a full review of the implementing acts. It is then possible to declare the admissibility of an indirect review of the content of the directive, provided the Court examines a provision which is identical in terms of content with the act of EU law.

The preliminary hypothesis related to second aforementioned constitutional problem (constitutional review of the proper implementation of EU directives) is that the EU directive itself serves as an indirect yardstick of review, and the constitutional court is to decide whether the legislator has failed to implement the directive properly and thus violated its provisions. However, such a ruling may be issued by the constitutional court only if it assumes that a proper implementation of the directive is a constitutional obligation. Therefore, the constitutional provisions are always the direct yardsticks for the constitutional review.

The research presented in this paper is based on the comparative method, and the theoretical conceptualization of the constitutional courts' case-law is purposefully limited. The scope of the analysis covers case law of the constitutional courts of both old and new Member States. It also includes presentation of recent jurisprudential developments, e.g. the constitutional case-law regarding the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC¹⁴ (the Data Retention Directive); and the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA¹⁵ (the Directive on Combating Terrorism).

2. NEGATION OF CONSTITUTIONAL REVIEW OF EU DIRECTIVES: A PARTIAL “CONSTITUTIONAL IMMUNITY” OF THE IMPLEMENTING ACTS

The Constitutional Council of the French Republic represents a perfect illustration of a constitutional court which has accepted the partial “constitutional immunity” of implementing acts. and as result refuses to review (indirectly) EU directives. This thesis

¹⁴ Document 32006L0024.

¹⁵ Document 32017L0541.

on the “constitutional immunity” of implementing legislation was formulated in its Decision of 10 June 2004.¹⁶ The Council resolved a case brought before the National Assembly by a group of senators and deputies who had questioned the constitutionality of the French Act on trust in the digital economy. This act was one implementing the Community Directive 2000/31/EC concerning certain legal aspects of information society services, electronic commerce in particular, in the internal market (hereinafter the Directive on e-Commerce).

The Constitutional Council of the French Republic stated that the examined provisions of the French Act, which excluded civil and criminal liability in certain situations, were to lay down only the necessary consequences of the unconditional and precise provision of Art. 14 of the Directive on e-Commerce. At the same time, the Constitutional Council decided that due to the content of Art. 88(1) of the French Constitution, the transposition into national law of an EU directive is a constitutional obligation that may be waived only by an explicit provision of the Constitution. If there is no such provision, only the EU judiciary, through the preliminary ruling procedure, could examine the alignment of a particular directive with the treaty provisions determining the competences of the Community, as well as the alignment of the directive with the fundamental rights guaranteed by Art. 6 TEU. Considering the aforementioned thesis in relation to the contested Act, the Constitutional Council stated that it was not in a position to comment on its constitutionality. In the operative part of its decision, the Constitutional Council stated that the contested statutory regulation was not inconsistent with the Constitution.¹⁷

The adoption of the thesis on the constitutional and legal nature of the obligation to implement a EU directive leads to the conclusion that acts which are identical in terms of content with the provisions of EU directives should not be subject to constitutional review.¹⁸ However, in its judgment the Constitutional Council of the French Republic included a reservation that allows the Council, in exceptional circumstances, to carry out indirect reviews of the directive itself. The Constitutional Council stipulated that the fulfilment of the constitutional requirement of Community transposition may be waived by an “explicit provision of the Constitution.”¹⁹ In such a case, a finding by the

¹⁶ Decision no. 2004-496 DC. Cf. J. Bell, *French Constitutional Council and European Law*, 54(3) *International & Comparative Law Quarterly* 735 (2005), pp. 735-744. F.-X. Millet, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, 51(1) *Common Market Law Review* 195 (2014), p. 204; F.-X. Millet, *The French Constitutional Council and the CJEU: between splendid isolation, communication, and forced dialogue in Constitutional Conversations in Europe. Actors, Topics and Procedures*, in: M. Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Intersentia, Cambridge: 2012, pp. 254 et seq.

¹⁷ It is also worth emphasizing that in the discussed ruling of the Constitutional Council Art. 88(1) of the Constitution served as a constitutional standard for the first time. Previously, it was considered too general to have specific legal effects.

¹⁸ Cf. D. Piqani, *The role of National Constitutional Courts in Issues of Compliance*, in: M. Cremona (ed.), *Compliance and Enforcement of EU law*, Oxford University Press, Oxford: 2012, p. 146.

¹⁹ Cf. Millet (*The French Constitutional Council*), *ibidem*, pp. 62 et seq.

Constitutional Council of the unconstitutionality of a provision of an implementing act with identical content to the provisions of the directive would result in an indirect review the directive itself.²⁰ The logical consequence of finding a contradiction between a directive provision and a clear provision of the French Constitution would be to declare the transposing law unconstitutional. In the case of preventive supervision of the legality of the transposing law, this would mean hindering the promulgation of the act and preventing its coming into force. In the case of an *a posteriori* constitutional review, as introduced in 2008 (*Question prioritaire de constitutionnalité*: a priority preliminary ruling on constitutionality), the outcome would depend on the decision of the Constitutional Council, but would nevertheless result in the fact that the implementing act was no longer in force. The ultimate goal of the implementation of the directive could be achieved only after making an appropriate amendment to the Constitution if such were possible, i.e. if it did not mean an interference with the constitutional identity of the Fifth Republic of France. Nevertheless, it should be emphasized that in its decision of 10 June 2004 the Constitutional Council limited its competence to declare an EU directive unconstitutional only to those cases when its implementation (and the Directive itself) conflicted with an “explicit” provision of the Constitution.²¹ Otherwise, it would be up to the national (“ordinary”) judge to refer the matter to the CJEU via the preliminary reference procedure.²² Therefore, the decision should be considered as a finding of a limited scope of constitutional review of EU Directives.

The Constitutional Council confirmed this position in its Decision of 1 July 2004²³ regarding the constitutionality of the Act on electronic communication and audiovisual communication services. This Act transposed the Community Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive).²⁴ As in the earlier case of 10 June 2004, the Constitutional Council decided that the contested statutory regulation concerned only the laying down of the necessary consequences resulting from an unconditional and clear provision of the Directive, hence the Constitutional Council stated that it was not in a position to comment on its constitutionality.

In its subsequent case-law the Constitutional Council developed the initial concept of an exception in the event of an “explicit” provision of the Constitution.²⁵ While initially it used the phrase “explicit and specific”, in its Decision of 27 July 2006 the Constitutional Council held that the transposition of a directive must not “run counter” to “the constitutional identity of France.”²⁶

²⁰ *Ibidem*, pp. 54 et seq.

²¹ Cf. M. Granger, *France Is Already Back in Europe: The Europeanization of French Courts and the Influence of France in the EU*, 14(3) European Public Law 333 (2008).

²² Cf. M. Neves, *Transconstitutionalism*, Hart Publishing, Oxford: 2013, p. 103.

²³ Decision no 2004-497 DC.

²⁴ Document 32002L0019.

²⁵ Cf. Granger, *supra* note 21, p. 354.

²⁶ Cf. Neves, *supra* note 22, p. 103.

In conclusion, it should be recognized that the Constitutional Council, as a rule, delimits its review of implementing acts only to those provisions that remain within the scope of the discretionary power of the Member States, and at the same time are not identical in terms of content with the provisions of a directive itself. An exception to this principle, which allows for the creation of only a 'partial constitutional immunity' of implementing acts, concerns a situation in which the provision of an Act identical in terms of content with the provisions of a directive infringes the rules or provisions established for the identification of the constitutional identity of France. In such a case, the Constitutional Council is required to declare the unconstitutionality of the contested regulation. The effects of the application of this concept in practice would require a determination whether a certain unconstitutional norm violates a principle protected within the framework of the EU legal order. If that legal order contained an equivalent protection for a particular rule, the decision of the Constitutional Council could give rise to proceedings before the CJEU and result in or lead to the annulment of the directive itself. In the absence of an equivalent protection in the EU legal order of a value which constitutes an element of the constitutional identity of France, the effect of such a ruling would be to affirm the protection offered by the French Constitution. Such a situation would certainly affect the development of the doctrine that constitutional identity may be an acceptable exception to the principle of priority.

The Federal Constitutional Court of Germany takes a similar position to that taken by the Constitutional Council of the French Republic. The German Court permits a review of the constitutionality of the acts implementing directives, but only to a very limited extent. The Federal Constitutional Court recognizes that it is constitutionally entitled to examine implementing acts only to the extent that the legislator had a margin of flexibility regarding the transposition of a directive. This means that only the manner of achieving the objectives adopted in the directive may be subject to a constitutional review, not the objectives of the directive itself.

For the first time, this view was explicitly expressed by the Federal Constitutional Court in its decision of 13 March 2007²⁷ in a case regarding the constitutional review of Art. 12 of the Act on the National Allocation Plan for Greenhouse Gas Emission Allowances in the 2005-2007 allocation period. This case was initiated in the context of the abstract review procedure by the German State of Saxony-Anhalt. The Act was an implementation of Directive 2003/87/EC establishing a system for trading greenhouse gas emission allowances within the EU (the Greenhouse Emission Directive).²⁸ The German Federal Constitutional Court decided that the concept formulated in the *Solange II* case²⁹ applies to laws implementing EU directives as well. The Federal Constitutional Court pointed out that the consequence of this position should be recognition of the fact that (similarly to the operation of the Community regulation) the provision of the act that transposes the directive should not be (conditionally) subject to control

²⁷ No 1BvF 1/05, BVerfGE t. 118, pp. 79 et seq.

²⁸ Document 32003L0087.

²⁹ *Wünsche Handelsgesellschaft* decision of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339.

of its compliance with the fundamental rights guaranteed in the Basic Law in those situations when the Community law does not leave any margin of flexibility and issues only binding guidelines.

This position was reiterated by the Federal Constitutional Court in its judgment of 2 March 2010,³⁰ in which it clarified the question as to the constitutionality of the telecommunications law and criminal procedure regulations that regulated the preventive storage of telecommunications data by providers of publicly available telecommunications services for a period of six months, as well as the usage of such data. According to the applicants, the contested statutory provisions also infringed Community fundamental rights and Art. 95 of the Treaty establishing the European Community (Art. 95 TEC). The contested norms had been introduced into the German legal order by the law transposing the Data Retention Directive. The case dealt with by the German Federal Constitutional Court had been initiated by lodging tens of thousands of constitutional complaints. It should be noted that some of the complaints included demands for the Federal Constitutional Court to appeal to the CJEU for annulment of the Data Retention Directive, which was alleged to have been adopted *ultra vires*.³¹

The German Federal Constitutional Court decided that the Data Retention Directive allowed the Member States a wide margin of flexibility. The Court also stated that the provisions of the Directive were, as a rule, limited to describing data storage obligations, and did not regulate access to or the use of such data by Member State authorities. In particular, according to the Federal Constitutional Court the provisions of the Data Retention Directive did not harmonize the question of access to the data by the competent national criminal prosecution authorities, nor the use and exchange of such data between these authorities. On the basis of the minimum requirements of the Data Retention Directive, the Federal Constitutional Court stated that it was the responsibility of the Member States to put in place all the necessary security measures to ensure data security, transparency, and legal protection.

The adoption of the above assumptions allowed the Federal Constitutional Court to carry out an extensive review of the constitutionality of the national transposition of the Data Retention Directive. All the following provisions were considered inconsistent with Art. 10(1) of the Basic Law expressing freedom and guaranteeing the privacy of correspondence, posts, and telecommunications: the provisions of Art. 113a and 113b of the German telecommunications law (added under the Act implementing the Data Retention Directive) and Art. 100g of the German Code of Criminal Procedure, which allowed the collection of telecommunications data without the knowledge of the perpetrator and other persons participating in a criminal act.³²

³⁰ No 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.

³¹ See further K. de Vries et al., *The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)*, in: S. Gutwirth et al. (eds.), *Computers, Privacy and Data Protection: An Element of Choice*, Springer, Dordrecht: 2011, pp. 3–23.

³² For more on this ruling, see A.-B. Kaiser, *German Data Retention Provisions Unconstitutional in Their Present Form; Decision of 2 March 2010*, 6 *European Constitutional Law Review* 503 (2010).

Simultaneously, the Federal Constitutional Court ruled that the six-month, preventive and unjustified storage of telecommunications data by private service providers, as laid down in the Data Retention Directive, is not as such inconsistent with Art. 10 of the Basic Law.

The judgment of the Federal Constitutional Court of 2 March 2010 demonstrates that when adopting the second position of the two positions mentioned above, the real scope of constitutional courts' jurisdiction when dealing with transposing acts and directives depends largely on the interpretation of the national legislator's margin of flexibility in transposing the directive. As the commentators point out, the judgment of 2 March 2010 may be seen as a ruling in which the Federal Constitutional Court *de facto* reviewed the constitutionality of the Directive itself.³³

Comparing the decisions of the Federal Constitutional Court and the Constitutional Council, it should be noted that unlike the French Constitutional Council, the German Federal Constitutional Court did not expressly define any criterion that would allow it to go beyond the acceptable scope of a partial review of the implementing act. However, the decisions presented in this article indicate that in practice the precept of the limited jurisdiction of the constitutional court when dealing with the transposing acts is quite loosely interpreted, if not ignored completely. In addition, according to the German legal doctrine the generally-formulated prohibition on violating constitutional identity should be addressed when interpreting implementing acts.³⁴ This very liberal interpretation of the German Federal Constitutional Court's "limited competences" with respect to constitutional review of implementing acts should be analysed with full awareness of the strictly pragmatic grounds related to the preliminary reference procedure. The principle of supremacy results in the obligation on the part of national courts to lodge a request for a preliminary ruling to the CJEU on the validity of an EU act if the court has doubts about its legality. Until 2014 and the preliminary reference in the *Gauweiler* case,³⁵ the German Federal Constitutional Court consistently avoided direct dialogue with the CJEU. However, as the reference in *Gauweiler* was more a *threatening reference of appeal*³⁶ than an average request for a preliminary ruling, it is not very realistic to think that that the Federal Constitutional Court will change its established case-law.

³³ Ch. Möllers, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010*, 2 BvR 2661/06, *Honeywell*, 7 *European Constitutional Law Review* 161 (2011), pp. 161-167.

³⁴ D. König, *Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses – Anwendungsbereich und Schranken des Art. 23. des Grundgesetzes*, MohrSiebeck, Berlin: 2000, pp. 417-522 and the literature cited there.

³⁵ Cf. E.J. Lohse, *The German Constitutional Court and Preliminary References. Still a Match not Made in Heaven?* 16(6) *German Law Journal* 1491 (2015); F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) *German Law Journal* 1003 (2015); A. Pliakos, G. Anagnostaras, *Saving Face? The German Federal Constitutional Court Decides Gauweiler*, 18(1) *German Law Journal* 213 (2017).

³⁶ D. Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco*, 37 *Questions of International Law* 5 (2017), pp. 5-6.

Such a hypothesis seems to be confirmed by the pre-*Gauweiler* judgment of 24 April 2013³⁷ on the Counter-Terrorism Data Base Act, where the German Constitutional Court avoided in every possible way to acknowledge that the reviewed act was within the scope of the application of EU law and therefore, according to the CJEU's *Åkerberg Fransson* judgment,³⁸ required compliance with the Charter of Fundamental Rights of the European Union (hereinafter: the Charter).³⁹ Paradoxically, the more probable scenario is a shift in the French Constitutional Council's case-law (at least in the sphere of fundamental rights protection). The introduction of an *a posteriori* constitutional review in 2008⁴⁰ and the first preliminary reference submitted by the Constitutional Council in the case of *Jeremy F.*⁴¹ may affect its case-law regarding the "constitutional immunity" of national legislation implementing EU Directives. This potential change in existing case-law may be forced by the recent Directive on Combating Terrorism. This Directive, as well as other supranational instruments (such as UN Security Council Resolution 2178 of 24 September 2014 and the 2015 Council of Europe Convention on the Prevention of Terrorism – Additional Protocol (Riga Protocol), have received their fair share of criticism, for example because of "vague and over-broad definitions and resulting human rights risks such as arbitrary or discriminatory application of the law [and] the criminalisation of conduct without any direct link to specific terrorist offences."⁴² The Directive on Combating Terrorism also states that consulting terrorist websites can be a terrorist crime, and the French Constitutional Council held a similar provision to be unconstitutional on two occasions, most recently on 15 December 2017.⁴³

³⁷ Judgment of the First Senate of 24 April 2013, 1 BvR 1215/07.

³⁸ The Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Laender*.

³⁹ D. Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9(13) European Constitutional Law Review 391 (2013); F. Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson*, 9(2) European Constitutional Law Review 315 (2013).

⁴⁰ See F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9(10) German Law Journal 1297 (2008); O. Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional Law. A Comparative Perspective*, 6(2) European Constitutional Law Review 223 (2010).

⁴¹ N. Perlo, F.-X. Millet, *The first preliminary reference of the French Constitutional Court to the European Court of Justice: Révolution de Palais or Revolution in French Constitutional Law?*, 16(6) German Law Journal 1471 (2015).

⁴² Ch. Paulussen, *Courts and Counter-Terrorism: the Last Line of Defence?*, Verfassungsblog, 4 May 2018, available at: <https://verfassungsblog.de/courts-and-counter-terrorism-the-last-line-of-defense/> (accessed 30 May 2019).

⁴³ N. Houry, *French Legislators Rebuked for Seeking to Criminalize Online Browsing. Court Ruled Provision Was Too Restrictive of Freedoms*, available at: <https://www.hrw.org/news/2017/12/15/french-legislators-rebuked-seeking-criminalize-online-browsing>; A. Ollo, *Can we ensure EU terrorism policies respect human rights?*, available at: <https://edri.org/can-we-ensure-eu-terrorism-policies-respect-human-rights/> (both accessed 30 May 2019).

3. ACCEPTANCE OF THE CONSTITUTIONAL REVIEW OF EU DIRECTIVES VIA IMPLEMENTING ACTS

The group of constitutional courts who have taken the stance of allowing a full review of the constitutionality of laws transposing directives continues to grow. One of the factors which accelerated the development of such constitutional case-law was the introduction of the aforementioned controversial Data Retention Directive, which after many judgments by national courts⁴⁴ was finally declared invalid by the CJEU.⁴⁵ The Directive on Combating Terrorism may be another factor encouraging constitutional courts to take a more active role in questioning the compatibility of national laws implementing EU directives with constitutional and human rights obligations.

The Slovak Constitutional Court may serve as the first example of such a position. In its decision of 18 October 2005,⁴⁶ the Court examined the case initiated by the government in the abstract review procedure, in which it claimed that Art. 8(8) of the Anti-discrimination Act was inconsistent with the Slovakian Constitution. The Act transposed the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin.⁴⁷ The contested provision stipulated that “in order to ensure equal opportunities in practice and to observe the principle of equal treatment, specific measures may be adopted to compensate for the inconveniences related to racial or ethnic origin.: The wording of the provision of the Act was nearly identical to the content of Art. 5 of the Directive, which declared that: “[i]n order to ensure full equality in practice, the principle of equal treatment shall not stop the Member State from maintaining or adopting specific measures to prevent or compensate for inconveniences related to racial or ethnic origin.” At the hearing, a representative of the Slovak National Council applied for suspension of the proceedings and making a preliminary reference to the CJEU regarding the interpretation of Art. 5 of the Directive. The Constitutional Court of Slovakia shared the view of the National Council that the contested provision of the Act was broadly consistent with the wording of Art. 5 of the Directive, but the Court also pointed out that it is clear from the wording of this EU provision that every legislator of a Member State has a wide margin of flexibility to act in order to achieve the objective of the Directive referred to in Art. 1.⁴⁸

⁴⁴ Ch. Jones, *National legal challenges to the Data Retention Directive*, 8 April 2014, available at: <http://eulawanalysis.blogspot.com/2014/04/national-legal-challenges-to-data.html> (accessed 30 May 2019).

⁴⁵ O. Lynskey, *The Data Retention Directive is incompatible with the rights to privacy and data retention protection and is invalid in its entirety: Digital Rights Ireland*, 51(6) *Common Market Law Review* 1789 (2014), p. 1799.

⁴⁶ Pl. ÚS 8/04 202. Cf. B. Havelková, *Burden of proof and positive action in decisions of the Czech and the Slovak Constitutional Courts - milestones or mill-stones for implementation of EC equality law?* 32 *European Law Review* 686 (2007).

⁴⁷ Document 32000L0043.

⁴⁸ According to Art. 1 of the Directive, it “aims to provide a framework for combating discrimination based on racial or ethnic origin, and for implementing the principle of equal treatment in the Member States.”

The Polish Constitutional Tribunal expressed similar views in its jurisprudence, although they were not so clearly stated. In its judgment of 2 July 2007,⁴⁹ the Constitutional Tribunal, referring to the judgment of 27 April 2005 in the EAW case, stated that “the implementation of the secondary law of the European Communities is a requirement under Article 9 of the Constitution; however its implementation does not automatically and in every case ensure the substantive conformity of the provisions of this secondary law and the acts implementing them into national law. The basic systemic function of the Constitutional Tribunal is to examine the constitutionality of legislative acts, and this obligation also applies to the situation in which the allegation of unconstitutionality concerns a part of the act laying down provisions for the implementation of Community law (...).”⁵⁰ The Tribunal therefore found that the contested provisions of the Act⁵¹ were, irrespective of the character of their implementation, an admissible subject of its constitutional review.⁵²

This position was expressed once more in the Tribunal judgment of 3 December 2009.⁵³ The Tribunal noted that “the obligation to examine the constitutionality of legislative acts also applies to the situation when the plea alleges the unconstitutionality of that part of the act which regulates the implementation of Community law.”⁵⁴ In this judgment, the Constitutional Tribunal also stressed that implementing acts may be subject to a preventive review initiated by the President, pursuant to Art. 122(3) of the Constitution.⁵⁵

In its judgment of 30 July 2014,⁵⁶ in which the provisions implementing the Data Retention Directive were subject to a review, the Constitutional Tribunal emphasised the specificity of the acts implementing the Directive resulting from the fact that the content of such an act will be determined, to a greater or lesser extent, by legal regulations coming from outside the national legislation system. However, the Tribunal stated that this specificity of the implementing acts did not change the constitutional scope of the Tribunal’s tasks and competences, the restriction of which could not be presumed. Therefore, such an act was subject to a review of its constitutionality.⁵⁷ Moreover, it should be clearly stated that in the judgment under consideration the Constitutional Tribunal did not *de facto* carry out a more detailed analysis of the scope of the obligation provided for in the CJEU judgment of 8 April 2014 in case *Digital Rights Ireland Ltd*,⁵⁸ in which the Data Retention Directive had been annulled. In the opinion of the

⁴⁹ K 41/05.

⁵⁰ *Ibidem*, para. 3.2.

⁵¹ The Act of 16 November 2000 on counteracting the introduction into financial circulation of property values from illegal or undisclosed sources and on counteracting the financing of terrorism.

⁵² *Cf.* para. 3.3. of the judgment.

⁵³ Kp 8/09.

⁵⁴ *Ibidem*, para. 4.

⁵⁵ *Cf. ibidem*, para. 4.

⁵⁶ K 23/11.

⁵⁷ *Cf. ibidem*, para. 7.

⁵⁸ Joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

Constitutional Tribunal, the provisions examined in the judgment of K 23/11 did not implement the directive directly.⁵⁹

Analysis of the Polish Constitutional Tribunal case-law regarding the constitutional review of EU directives via implementing acts requires the presentation of one more case, in which the Constitutional Tribunal decided for the first time to refer a preliminary question to the CJEU.⁶⁰ Case 61/13, which served as the basis for the reference for a preliminary ruling, was heard by the Polish Constitutional Tribunal upon the application of the Polish Ombudsman (*Rzecznik Praw Obywatelskich*) for a declaration concerning several provisions of the Act of 11 March 2004 on the goods and services tax (VAT Act). The provisions challenged by the Ombudsman determined which goods are taxed at a reduced VAT rate. The reduced rates of 5% and 8% may be applied only to publications that are published in print or on carriers (disks, tapes, etc.) but not to electronic publications, which are subject to the VAT rate of 23%. The Ombudsman held that such a differentiation in the levying of a tax on publications with the same relevant characteristics, namely identical content, violated the principle of tax equality. The challenged provisions of the VAT Act were contained in an act implementing Directive 2006/112/EC,⁶¹ which require application of the base rate of VAT to deliveries of electronically provided books. Taking this into consideration, Polish Constitutional Tribunal in its decision of 7 July 2015 made a preliminary reference to the CJEU and posed two questions concerning the validity of EU law. The first one regarded the validity of point (6) of Annex III to the Directive, and the second one regarded the validity of the Directive itself, i.e. Art. 98(2) of Directive 2006/112/EC, read in conjunction with point (6) of Annex III. The CJEU, in its judgment of 7 March 2017 (case C-390/15 *RPO*) did not share the Ombudsman's reservations and decided that there was no factor of such a kind which would affect the validity of the Directive. Interestingly, in the meantime the arguments raised by the Ombudsman had already been recognized by the European Commission.⁶² Following the CJEU judgment the Ombudsman decided to withdraw the application. Consequently, the Polish Constitutional Tribunal, in its decision of 17 May 2017,⁶³ discontinued the proceedings. Despite the fact that the case was not adjudicated *ad meritum*, it demonstrates the lack of restrictions on the Tribunal's view concerning the constitutional review of EU directives. On the other hand, it also shows the Constitutional Tribunal's awareness of its role as a European court and willingness to engage in direct dialogue with the CJEU.

⁵⁹ Cf. *ibidem*, para. 3.2.3.

⁶⁰ Cf. A. Kustra, *Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure*, 16(6) German Law Journal 1543 (2015).

⁶¹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, document 32006L0112.

⁶² On 7 April 2016, the European Commission presented the Action Plan on Value Added Tax – Towards a Single EU VAT Area. Time for action (document COM (2016) 148 final), the aim of which is to resume discussion on the VAT regulation, and on 1 December 2016 announced a draft amendment providing for the equalization of VAT rates for books and magazines in electronic and paper form.

⁶³ 38/A/2017.

The position accepting the admissibility of extensive constitutional review of acts implementing EU directives seems also to be taken implicitly by those constitutional courts which, while monitoring the implementation process, have so far failed to establish in their case-law any objections regarding the scope of this kind of review. This category of constitutional courts includes the Austrian Federal Constitutional Court, the Romanian Constitutional Court, and the Czech Constitutional Court.

The Austrian Federal Constitutional Court, in its judgment of 20 June 1998,⁶⁴ had the opportunity to formulate its objections regarding the scope of the admissible constitutional review of the acts implementing Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;⁶⁵ and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.⁶⁶ However, in its decision the Austrian Federal Constitutional Court examined the constitutionality of the entire Federal Procurement Act, which was the implementation of the directives. On the basis of an interlocutory procedure for the review of its constitutionality, instigated only by the authority on its own motion when handling an individual complaint, the Federal Constitutional Court concluded that the Act under examination had violated the constitutional standard of the state of law because it did not guarantee that tenderers in public procurement procedures would get adequate judicial protection. The Federal Constitutional Court also claimed that the fact that the law which transposes the directives does not exclude the possibility of reviewing its constitutionality. In order to justify its decision, the Federal Constitutional Court stated that the national legislator was bound by both Community law and constitutional law. At the same time, the Court did not formulate any restrictions as to the scope of such a review. It stressed that the subject of the review was the constitutionality of the Act, and therefore it was not necessary to make a reference for a preliminary ruling to the CJEU. In this judgment, the Austrian Federal Constitutional Court adjudicated that the contested provision of the Act was inconsistent with the Austrian Constitution.⁶⁷

The judgments of the Romanian Constitutional Court of 8 December 2009⁶⁸ and the Czech Constitutional Court of 22 March 2011⁶⁹ should be interpreted in a similar way. Both concerned the acts implementing the Data Retention Directive. The Roma-

⁶⁴ Reference G 22/98.

⁶⁵ Document 31992L0050.

⁶⁶ Document 31992L0013.

⁶⁷ It should be emphasised that the judgment was delivered by a full court. However, five judges gave their dissenting opinions as to the entire content of the judgment, and one judge gave a dissenting opinion as to the reasoning of the judgment. The judges in the minority pointed, *inter alia*, to the fact that the provision of the Act declared unconstitutional was based on Art. 5 of the Directive which, according to the Act itself, was an annex to that very Act.

⁶⁸ No. 1258.

⁶⁹ Pl. ÚS 24/10.

nian Constitutional Court ruled unconstitutional the entire Act No. 298/2008 transposing this Directive into the Romanian legal system.⁷⁰ The Romanian Constitutional Court found that the implementing Act violated Romanian constitutional provisions protecting freedom of movement; the right to intimate, private and family life; secrecy of correspondence; and freedom of expression.⁷¹ The Court also issued delivered a few post-*Digital Rights Ireland Ltd.* decisions declaring the unconstitutionality of other national laws implementing the void Data Retention Directive. In its Decision of 8 July 2014 (no. 440) the Romanian Constitutional Court declared the unconstitutionality of Law No. 82/2012, which was established to transpose the same Data Retention Directive after the Constitutional Court adopted the aforementioned Decision of 8 October 2009, while in the meantime the Directive itself was declared null and void by the judgement of the CJEU of 8 April 2014.⁷² Two other decisions are of a similar character: the Decision of 16 September 2014 (no. 461) on the unconstitutionality of the provisions of the Law amending and supplementing the Government Emergency Ordinance No. 111/2011 on electronic communications; and the Decision of 21 January 2015 (no. 17) on the unconstitutionality of the provisions of the Law on the cyber security of Romania.⁷³

The Czech Constitutional Court ruled on the unconstitutionality of some provisions of an implementing Act and its implementing Regulation.⁷⁴ As regards the Court's opinion, however, it must be pointed out that in its judgment of 8 March 2006 on Sugar Quotas,⁷⁵ the Court had already expressed the view that in creating standards for implementing Community law the national legislator is bound by both EU law and the Czech Constitution.⁷⁶ This thesis, similar to the position of the Austrian Federal

⁷⁰ For more on this ruling, see C. Murphy, *Romanian Constitutional Court, Decision No. 1258 of 8 October 2009 regarding the unconstitutionality exception of the provisions of Law No. 298/2008 regarding the retention of the data generated or processed by the public electronic communication service providers or public network providers, as well as for the modification of Law No. 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area*, 47 *Common Market Law Review* 933 (2010). Murphy states that the Decision of the Constitutional Court of Romania was essentially a constitutional review of the entire Directive and that the Court, despite such an extensive review, did not decide to make a reference for a preliminary ruling as to the interpretation of the relevant provisions of the Directive (pp. 938 et seq).

⁷¹ Jones, *supra* note 44.

⁷² D. Călin, *The Constitutional Court of Romania and European Union Law*, 15(1) *International and Comparative Law Review* 59 (2015), p. 80.

⁷³ *Ibidem*, p. 81.

⁷⁴ More specifically: Art. 97(3,4) of the Act No. 127/2005 of 31 March 2005 on electronic communication and on the amendment of other acts; and the Regulation of 7 December 2005, No. 485/2005. For more on this judgment, see P. Molek, *The Czech Constitutional Court. Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10*, 8(2) *European Constitutional Law Review* 383 (2012). As pointed out Molek, the Constitutional Court of the Czech Republic also reviewed (and criticized) the provisions of the Directive itself (p. 351).

⁷⁵ Pl. ÚS 50/04.

⁷⁶ Quoted in Z. Kühn, *Raport krajowy – Czechy* [The National Report – the Czech Republic], in: J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej* [Protection of basic rights in the European Union], Beck, Warszawa: 2008, p. 360.

Constitutional Court, led the Czech Constitutional Court to conclude that the national act will be subject to a full constitutional review, even if the principle of the EU law is applied, regardless of whether the EU law grants any margin of flexibility to the national legislature.

4. EU DIRECTIVES AS AN INDIRECT YARDSTICK OF CONSTITUTIONAL REVIEW: JUDICIAL CONTROL OF PROPER DOMESTIC IMPLEMENTATION OF EU LAW AND BEYOND

The second problem analysed in this paper concerns the use of EU directives as an indirect yardstick of review. The central focus of this concept is usually on the conformity of a national law with an international (including EU) norm. However, in case of a conformity review with EU law, the use of EU law as a reference point results in a higher probability of a preliminary reference to the CJEU, mostly regarding the interpretation of the yardstick of review. Therefore, traditionally *Europhile* courts, such as the Belgian Constitutional Court, were among the first to review the conformity of a national act with EU law.⁷⁷ In Belgium, indirect reference may be had to all provisions of primary or secondary EU law, including EU directives.⁷⁸ This in turn is a consequence of its great openness towards international and EU law.⁷⁹

With regard to the use of EU Directives as the yardstick of a conformity review, the core of the concept is formed by the case-law of the French Constitutional Council, where the implementation of EU directives as has been recognized as a “constitutional obligation”.⁸⁰ However, the recent case-law of other constitutional courts shows an increasing openness towards applying the EU Directives as yardsticks of review.

The thesis on the constitutional nature of the obligation to implement EU directives has appeared in the jurisprudence of the Constitutional Council of the French Republic, along with the admission of the constitutional review of acts implementing Community directives. It was noted that the review of these acts may be, as was mentioned at the beginning of this article, of a dual nature. It could be either a “simple” review of the constitutionality of the implementing act, or a review of the implementing act in terms of its compliance with the constitutional obligation to properly implement EU directives. In both cases the direct model for the review is the very same Art. 88(1) of

⁷⁷ P. Gérard, W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse*. *Belgian Constitutional Court No. 62/2016*, 28 April 2016, 13(1) *European Constitutional Law Review* 182 (2017), pp. 190-191; T. Vandamme, *Prochain Arrêt: la Belgique! Explaining Recent preliminary References of the Belgian Constitutional Court*, 4 *European Constitutional Law Review* 127 (2008).

⁷⁸ The Constitutional Court decision no. 55/2011, 6 April 2011 on consumer law. Cf. D. Heirbaut, M.E. Storme, *Private Law Codification in Belgium*, in: J.C. Rivera (ed.) *The Scope and the Structure of Civil Codes*, Springer, Dordrecht: 2013, pp. 80-81.

⁷⁹ Cf. Vandamme, *supra* note 77, pp. 127-148.

⁸⁰ Cf. D. Piquani, *The role of National Constitutional Courts in Issues of Compliance*, in: M. Cremona (ed.), *Compliance and Enforcement of EU law*, Oxford University Press, Oxford: 2012, pp. 142-143.

the Constitution, which is the provision constituting the basis for the transfer of competences to the benefit of the EU. If the review concerns the alleged violation of the constitutional order by the directive itself, Art. 88(1) of the Constitution will be the regulation that delimits the constitutionally permissible integration of France into the EU.⁸¹ However, when a case considered by the Constitutional Council concerns the issue of the proper implementation of an EU directive by the French legislator, Art. 88(1) will be in this situation the legal basis of the constitutional commitment of the French Republic to ensure the effectiveness of EU law. Thus an improper implementation results in a violation of the constitutional norm.⁸² An example of a decision declaring the unconstitutionality of an act which improperly implemented a directive is the Decision of 30 November 2006.⁸³ The Constitutional Council declared in this judgment that the Act pertaining to the energy sector had obviously violated the objective of EU directives to open up the market to competition, and thus it had violated the constitutional obligation imposed by Art. 88(1) of the French Constitution.⁸⁴ It is worth mentioning here that in its justification of the decision, the Constitutional Council specified exactly how to proceed in case an implementing act infringed upon an objective of the Community directive. The Constitutional Council pointed out that if there was a clear breach it should establish, including on its own initiative, a violation of Art. 88(1) of the Constitution and issue a ruling. However, in the event that such a breach is not clear, the common and administrative courts were competent to take action and make a preliminary reference under Art. 267 TFEU.⁸⁵ It is worth emphasizing, however, that this thesis was formulated before the reform – including reform of the competences of the Constitutional Council – in 2008, which changed the position of the Constitutional Council as far as its status as a court was concerned, within the meaning of Art. 267(3) TFEU.⁸⁶ At present, it should be assumed that also in cases where there is no clear breach of the objective of a directive by the implementing law, the Constitutional Council may be the competent authority to take action, at least in the procedure of *Question prioritaire de constitutionnalité* (QPC). However, it would only be possible for the Constitutional Council to make a preliminary reference if there were no such references made by the court initiating proceedings in the QPC procedure.

The case-law of the aforementioned Belgian Constitutional Court – which is not afraid to show bold judicial activism – proves that constitutional courts can also make

⁸¹ Cf. *ibidem*; J.D. de la Rochère, *French Conseil constitutionnel: Recent Developments*, in: J.M. Beneyto, I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts: Lisbon and Beyond*, Nomos, Baden Baden: 2011, pp. 22-23.

⁸² Cf. Wójtowicz, *supra* note 13, p. 84.

⁸³ Reference 2006-543 DC.

⁸⁴ Cf. Wójtowicz, *supra* note 13, p. 86.

⁸⁵ Cf. J.F. Colares, *The Reality of EU-conformity Review in France*, 18 *Columbia Journal of European Law* 369 (2012), pp. 391 et seq; O. Pollicino, *The Conseil d'Etat and the Relationship between French internal law after Arcelor: Has something really changed?*, 45 *Common Market Law Review* 1519 (2008), pp. 1524 et seq.

⁸⁶ For more on this reform, see F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of a A Posteriori Constitutional Review of Legislation*, 9(10) *German Law Journal* 1297 (2008).

use of the EU Directives to extend their competences. An excellent illustration of such argumentation can be found in case No. 144/2012⁸⁷ on the constitutionality of the decree of the Walloon Parliament of 17 July 2008 which ‘ratified’ the building permits for various works relating to the Liège-Bierset airport, the Brussels South Charleroi airport, and the Brussels-Charleroi railway, i.e. authorized them in view of the “overriding reasons in the public interest.” The compatibility of the decree with EU law and the Aarhus Convention was the subject of the CJEU judgment on 18 October 2011 in the case *Boxus and Others*.⁸⁸ One of the effects of the decree was that controversial building permits could no longer be contested before the Council of State, but only before the Constitutional Court. However, the possibilities to challenge them before the Constitutional Court were less extensive than before the Council of State. The Constitutional Court had competence only to review the content of the decree, not the procedural aspects. Therefore, the Constitutional Court made reference to the EU Environmental Directive.⁸⁹ Next, the Constitutional Court made a preliminary reference to the CJEU and asked for an interpretation of the scope of application of the EU directive.⁹⁰ In its judgment of 16 February 2012,⁹¹ the CJEU held that a complete review is not obligatory for legislative decisions, provided that all relevant information was taken into account in an in-depth preparatory procedure. Despite the fact that in general review the parliamentary procedure falls outside the scope of the Constitutional Court’s competences, the Court interpreted the CJEU judgment in a way very advantageously for itself and indeed looked into procedural aspects of the legislative process, to determine whether the Directive was applicable to the decree.⁹² Based upon the preparatory documents and parliamentary discussions, the Constitutional Court noted that the Parliament had been prohibited from altering, or even investigating, the permits as drawn up by the executive. The Constitutional Court stated that this made the decree a simple ‘ratification’ of the executive decision and not a proper legislative act. Therefore, the Decree did not satisfy the conditions set out by the CJEU to be considered as a “specific legislative act” that can be exempted from full judicial review. The Belgian Constitu-

⁸⁷ CC No. 144/2012, 22 November 2012. A similar reasoning was followed in CC No. 29/2014, 13 February 2014. Cf. J. De Jaegere, J. Beyers, P. Popelier, *Exploring the deliberative performance of a constitutional court in a consociational political system. A theoretical and empirical analysis of the Belgian Constitutional Court*, available at: <https://ecpr.eu/Filestore/PaperProposal/1c16e505-e983-44c9-9935-8c573f521ab0.pdf> (accessed 30 May 2019), p. 17.

⁸⁸ Joined cases *Antoine Boxus and Willy Roua* (C-128/09), *Guido Durlet and Others* (C-129/09), *Paul Fastrez and Henriette Fastrez* (C-130/09), *Philippe Daras* (C-131/09), *Association des riverains et habitants des communes proches de l’aéroport BSCA (Brussels South Charleroi Airport) (ARACH)* (C-134/09 and C-135/09), *Bernard Page* (C-134/09) and *Léon L’Hoir and Nadine Dartois* (C-135/09) v. *Région wallonne*, ECLI:EU:C:2011:667.

⁸⁹ Council Directive 85/337/EEC of 27 June 1985 (now: Directive 2011/92/EU of the European parliament and of the Council of 13 December 2011) on the assessment of the effects of certain public and private projects on the environment.

⁹⁰ No. 30/2010, 30 March 2010.

⁹¹ Case C-182/10, *Marie-Noëlle Solvay and Others v. Région wallonne*, ECLI:EU:C:2012:82

⁹² Constitutional Court, no. 144/2012, 22 November 2012.

tional Court decided that in doing so the legislature had infringed upon Arts. 10, 11, and 23 of the Constitution, in combination with the aforementioned provisions of the Aarhus Convention and the EU Environment Directive. The result of the case was that all of the permits concerned could be subjected to full judicial review by the Council of State and that the Council could judge the pending cases.⁹³

The recent case-law of the Spanish Constitutional Court presents an interesting stance on the application of non-transposed EU directives as a yardstick of review. In its judgment of 10 March 2017,⁹⁴ the Spanish Constitutional Court adopted Art. 7 of the non-transposed Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings⁹⁵ as a yardstick of review, which enabled the Constitutional Court to find that the police and a lower court had violated the right to personal freedom of two detainees whose lawyer had not been given access to the arrest file, as provided by the aforementioned provision of the Directive.⁹⁶

The judgment of the Spanish Constitutional Court was based on the thesis that even though EU law is not itself part of the constitutional canon, “both international treaties and agreements, including European secondary legislation, may provide valuable interpretative criteria of the meaning and scope of the rights and freedoms that the Constitution recognizes,” taking into account the interpretive decisions rendered “by the bodies of guarantee established under those same international treaties and agreements.”⁹⁷ In order to justify the thesis on the direct effect of Art. 7 of the Directive, the Spanish Constitutional Court merely invoked the CJEU’s general case law on the direct effect of EU directives and concluded that it was binding given that it contains unconditional and sufficiently clear and precise provisions that could be immediately enforced.⁹⁸ Controversies concern, *inter alia*, the fact that the Constitutional Court did not refer the case to the CJEU and made no apparent attempt to decide whether it was obliged to submit a reference under Art. 267 TFEU or to apply the criteria established by the CJEU in the *Cilfit* case.⁹⁹

⁹³ Cf. L. Lavrysen, *EUFJE 2013 Vienna Conference – Report on Belgium*, available at: <https://www.eufje.org/images/docConf/vie2013/BE%20vie2013.pdf> (accessed 30 May 2019.), p. 3.

⁹⁴ Constitutional Court, no. 51/2017, 10 March 2017.

⁹⁵ Document 32012L0013.

⁹⁶ In that case, the detainees’ public defender had applied to see the materials of the case in order to challenge the arrests. The *Guardia Civil* denied the request and the lawyer filed a *habeas corpus* petition before a court, claiming that the arrests were illegal due to lack of information. The lower-court judge rejected the petition – first on the grounds that although Art. 7 of Directive 2012/13/EU provided for such a right of access, Spain had not yet transposed it into national law; and second on the grounds that in any case the file was not complete because the agents were still preparing the relevant documents. Cf. M. García, *Cautious Openness: The Spanish Constitutional Court’s Approach to EU Law in Recent National Case-Law*, available at: <http://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/> (accessed 30 May 2019).

⁹⁷ *Ibidem*.

⁹⁸ *Ibidem*.

⁹⁹ *Ibidem*.

5. FINAL REMARKS

The case-law regarding the first issue analysed in the paper, i.e. the constitutional review of EU directives, proves that the group of constitutional courts which have accepted the concept of a constitutional review of EU directives via their national implementation laws is still growing. One of the decisive factors in the development of this case law is the introduction of EU directives that controversially interfere with fundamental rights and freedoms, such as the Data Retention Directive and the Directive on Combating Terrorism. The ruling of the German Federal Constitutional Court regarding the Data Retention Directive also shows that even courts that do not wish to formally forswear the thesis of the constitutional immunity of laws transposing directives, may in practice circumvent this prohibition. They do so through a very narrow interpretation of the concept of provisions that are identical to the provisions of the EU directives. The adoption of such an interpretation makes it possible to control the constitutionality of almost the entire implementing act, and in practice also means a declaration by the national constitutional court regarding the constitutionality of the directive itself.

The comparative analysis of the second problem presented in this paper, namely the application of EU directives as an indirect yardstick of constitutional review, leads to the conclusion that in recent years there have been significant developments enhancing constitutional jurisdiction in this area. This problem was traditionally analysed only in the context of the French Constitutional Council's thesis regarding the constitutional obligation to transpose directives. Therefore, the use by the French Constitutional Council of an EU directive as an indirect yardstick of review was most often equated with the problem of the correctness of implementation. Nevertheless, the case-law of other constitutional courts regarding the problem is much richer. The example of the Belgian Constitutional Court shows that EU directives can be used by a constitutional court to realistically extend its competences in a specific case. In turn, the recent ruling of the Spanish Constitutional Court has gone so far as to even adopt the provisions of a non-transposed directive as a standard of control.

Many of the cases presented in this paper evoke numerous questions and doubts, both from the perspective of EU law and of national constitutional law. Nevertheless, this review of the case-law demonstrates that constitutional courts are trying to find their place in the changing architecture of European constitutionalism.¹⁰⁰

¹⁰⁰ Cf. J. Komárek, *The Place of Constitutional Courts in the EU*, 9(3) *European Constitutional Law Review* 420 (2013).