PROTECTION OF EU LAW IN CASE OF LEGISLATIVE OMISSIONS: HOW CONSTITUTIONAL COURTS REACT

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Abstract:

When a Constitutional Court declares a gap in legislation to be unconstitutional because certain categories are not included, immediately the question rises how redress can be offered to the excluded party. A mere annulment of the contested norm will often be insufficient. Therefore, Constitutional Courts developed different types of adjudication in order to eliminate a legislative lacuna, sometimes by even instructing ordinary judges to expand the contested norm's field of application.

A similar reasoning applies to legislative omissions that violate EU law. The principles of supremacy and direct effect that oblige national judges to set aside national legislation when it is contrary to EU law and the possibility of harmonious interpretation will often not suffice; a simple annulment of the contested norm does not lead to an expansion of its field of application. The principle of loyal cooperation (Article 4 (3) TEU) together with the principles of equivalence and effectiveness compel Constitutional Courts to employ the same types of adjudication they use within a national context to offer redress when EU law is violated. This research will show that the Italian and Belgian Constitutional Courts follow the practice they developed within a mere national setting, thereby often instructing ordinary courts to expand the contested norm's field of application in accordance with EU law. By contrast, the German and French Constitutional Courts do not even review national legislation to its conformity with EU law, let alone they use the developed techniques to fill a legislative gap that violates EU law. In this way, the latter deny to offer the necessary redress to the excluded party.

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1. Setting the scene

In 2008, the XIVth Congress of the Conference of European Constitutional Courts was devoted to the problems of legislative omissions in constitutional jurisprudence[1]. From the national reports it became clear that all Constitutional Courts are often implicitly or explicitly confronted with cases regarding legislative omissions[2]. In these cases a Constitutional Court will review the existence of a complete absence of legislative performance (absolute omissions) or it will review legislation that has been enacted in a partial, incomplete or defective way (relative omissions)[3]. Although only few Constitutional Courts were explicitly attributed the competence to review legislative omissions[4], judicial review of relative omissions has been extensively developed in the past decades in all democratic countries when it concerns the existence of poor, deficient or inadequate regulation, thereby in most cases infringing upon the principles of equality and non-discrimination[5]. Merely annulling or declaring unconstitutional the insufficient legislative norm however, does not provide the necessary redress. Consequently, Constitutional Courts developed different types of adjudication in order to eliminate a legislative lacuna, sometimes by even instructing ordinary judges to expand the contested norm's field of application.

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[1] www.confeuconstco.org, accessed May 8, 2018.

[2] T. Birmontienė, E. Jarašiūnas, E. Spruogis, *General Report,* in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 203-204.

[3] A.R. Brewer-Carias, *Constitutional Courts as positive legislators in comparative Law,* in A.R. Brewer-Carias (ed.), *Constitutional Courts as positive legislators. A comparative law study* (2011), 125-126.

[4] See e.g. Art. 283(2) Portuguese Constitution; Section 46(2) Act CLI of 2011 on the Constitutional Court Hungary; Art. 103, § 2, Brazilian Constitution 1988.

[5] T. Birmontienė, E. Jarašiūnas, E. Spruogis, *General Report,* cit. at 2, 204; A.R. Brewer-Carias, *Constitutional Courts as positive legislators in comparative Law,* cit. at 3, 148.

Legislative omissions may also be present within the context of the European Union. In that case and for this contribution, a legislative omission arises when the national legislator failed to provide a sufficient legal norm that implements European legislation and/or ensures the full protection of EU law. The principle of loyal cooperation between the Union and the member states obliges all authorities of the member states, including the courts, to take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties and acts of the institutions of the European Union. Referring to the principles of equivalence and effectiveness, one would assume that the same types of adjudication in case of a legislative lacuna in a mere national context are evenly applied to ensure compatibility with EU law. After all, the well-known principles of supremacy and direct effect that oblige national judges to set aside national legislation when it is contrary to EU law and the possibility of harmonious interpretation will often not suffice. Reference can be made to the situation where a national norm violates EU law because a certain category of persons is excluded without reasonable justification. In this case, a simple annulment of the contested norm will not lead to the desired effect, namely an elaboration of the contested norm's field of application so that it includes all persons.

In order to test this reasoning, I examined the case law of the French, German, Italian and Belgian Constitutional Court and the types of adjudication they use when dealing with legislative omissions in a mere national context (II) and consequently in a European context (III). These countries were chosen because their attitude towards EU law ranges from very rigid to very Europe friendly, which impacts the review process. Despite the principles of effectiveness and equivalence, not all Constitutional Courts apply the same types of adjudication to ensure compatibility with EU law. The French *Conseil Constitutionnel* refrains from reviewing national legislation in accordance with EU law and the decision of the German *Bundesverfassungsgericht* in the EAW case resulted in a total non-application of the relevant Framework Decision. By contrast, the Italian *Corte Costituzionale* has ruled on several occasions on how a violation of EU law in the form of a legislative lacuna should be eliminated and the Belgian Constitutional Court regularly and very explicitly instructs judges on how to fill a legislative gap violating EU law. With this active approach, a high

degree of clarity, legal certainty and uniformity is established and the Constitutional Court lives up to the standard of loyal cooperation and its duty to take all appropriate measures to ensure fulfilment of the obligations arising from EU law (Article 4 (3) TEU) (III). Moreover, recent case law of the European Court of Human Rights demonstrated that the right to an effective remedy, as enshrined in Article 47 of the charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European convention of Human Rights (ECHR), could be violated when courts do not fill a legislative gap (IV).

2. Adjudication within a national context

The Belgian Constitution, nor the Belgian Special Act on the Constitutional Court (SACC) provide an explicit basis for the Belgian Constitutional Court to review legislative omissions. What is more, Article 142 of the Belgian Constitution states that the Court may rule on violations of the constitution *by* a statute, decree or ordinance[6]. Likewise, since 2008 the French Constitution provides the possibility to bring proceedings in progress before the *Conseil constitutionnel* if it is claimed that *a legislative provision infringes* the rights and freedoms guaranteed by the Constitution[7]. The Italian Constitution equally refrains from mentioning the possibility of an infringement of the Constitution by a legislative omission; the Constitutional Court shall pass judgement on controversies on the constitutional legitimacy of laws and acts having force of law issued by the State and Regions[8]. By contrast, the German Act on the Federal Constitutional Court (BverfGG) explicitly states that the violation of a constitutional right by an act *or omission* can be subject of a constitutional complaint brought before the Court[9].

The fact that the possibility for some Constitutional Courts to review (relative) legislative omissions was not taken into account by the (constitutional) legislator, becomes apparent when looking

[6] See respectively Articles 1 and 26 of the Special Act 6 January 1989 on the Constitutional Court, *Belgian Official Gazette* 7 January 1989.
[7] Art. 61-1 French Constitution.
[8] Art. 134 Italian Constitution.
[9] § 92 BVerfGG.; see e.g. also Art. 283 (2) Portuguese Constitution; Section 46 (2) Act CLI of 2011 on the Constitutional Court Hungary; Art. 103, §2, Brazilian Constitution 1988.

at the possible decisions the Court may take when it finds such an unconstitutional legislative omission present. What is more, even within the German legal order where the review of legislative omissions was explicitly mentioned, the German *Bundesverfassungsgericht* developed the technique of *Unvereinbarkeitserklärung* to declare a provision unconstitutional, but not void when it encompasses a legislative omission[10]. After all, annulling the contested norm rarely provides the desired redress: parties wish to expand the confined field of application, rather than annulling the norm in its entirety (2.1). Consequently, Constitutional Courts resort to creative interpretations of the legal norm (2.2) and use the possibility to modulate the temporal effects of their decisions (2.3). In some cases Constitutional Courts pronounce injunctions to the legislator and sometimes they even instruct the ordinary courts on how the legislative gap should be filled (2.4). It will become clear that similar techniques are being used within the different legal orders to avoid the harsh consequences of a strict (retroactive) annulment.

2.1. Setting aside or annulling the contested norm

By annulling or declaring a legislative norm unconstitutional, a Constitutional Court prevents further application of the contested norm. However, when a Court annuls an explicitly determined exception to a rule, the Court automatically expands the field of application and offers immediate redress for the litigants. In this way e.g. the French *Conseil constitutionnel* eliminated an unconstitutional omission in legislation regarding data retention. Considering that the legislator did not include proper guarantees to ensure an equal balance between the right to respect of private life and the prevention of attacks on public order, the Council simply annulled the explicit competence for the investigators to obtain communication data[11]. A well-known case within the Belgian legal order, is case No. 157/2004 where the Constitutional Court ruled on the federal

[10] W. Heun, *The Constitution of Germany* (2011), 178.

[11] *Conseil constitutionnel* 21 July 2017, QPC No. 2017-646/647; see recently *Conseil constitutionnel* 24 January 2017, QPC No. 2016-608; *Conseil constitutionnel* 9 March 2017, QPC No. 2017-16-617; see also *Conseil constitutionnel* 20 January 2012, QPC No. 2011-212; *Conseil constitutionnel* 2 March 2016, QPC No. 2015-523; Italian *Corte Costituzionale* 26 May 2010, No. 187/2010.

legislation for combating discrimination[12]. The law explicitly provided a limited list of protected categories on the basis of which discrimination was prohibited, but forgot to mention (among others) language and political affiliation. The annulment of the limited list by the Court immediately ensured a general prohibition of discrimination.

In the majority of its judgments regarding legislative omissions, the Belgian Constitutional Court resorts to a very specific modulation of its dicta. The Court decided in numerous cases that the contested norm violates the principles of equality and non-discrimination *to the extent that* it excludes certain persons or *to the extent that it does not provide* for a certain form of protection, benefit, etc. It must be emphasized that this line of reasoning does not provide the necessary redress because the Court only declares the legislative lacuna as such unconstitutional; the contested norm remains unaltered. In decision No. 96 of 2015 the Italian Constitutional Court ruled in a similar manner: it found the rules on medically assisted procreation unconstitutional to the extent that they did not allow fertile couples who are carriers of genetic diseases to have access to methods of medically assisted procreation[13].

2.2. Constitution-conform interpretation

De Visser determined that the technique of constitution-conform interpretation is ubiquitous in the case law of European Constitutional Courts[14]. When more than one valid construction of the contested norm is possible, the presumption of constitutionality requires that judges should opt for the interpretation that guarantees conformity with the constitution[15]. For example, the French *Conseil constitutionnel* established a well-known tradition of *réserves d'interprétation* since the beginning of its case law in 1959[16].

[12] Belgian Constitutional Court 6 October 2004, No. 157/2004.
[13] Italian *Corte Costituzionale* 14 May 2015, No. 96/2015; see also e.g. Italian *Corte Costituzionale* 16 January 2013, No. 7/2013.
[14] M. De Visser, *Constitutional Review in Europe* (2014), 291.
[15] Ibid., 292.
[16] Within the *a priori* review procedure, reference can be made to so called *semi-réserves* or *interpretations directives* entailing guidelines to the legislator on how to eliminate the legislative omissions. *Rapport du Conseil constitutionnel de la République française,* in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 511.

Likewise, the Belgian Court of Cassation stated already in 1950 that if possible, legislation should be interpreted in conformity with the Constitution[17]. The Belgian Constitutional Court also regularly resorts to this technique. Although it is obliged to examine the contested legislation in the interpretation given by the referring judge, this does not prevent the Court from adding an alternative interpretation that is in conformity with the Belgian Constitution[18].

We must be aware however, and this is not only the case when legislative omissions are in play, that this technique can lead to considerable activism by the Court[19]. For example, in decision No. 2017-632 the French *Conseil constitutionnel* declared the contested legislation to be constitutional under the interpretation of "reading in" what was missing, namely a possibility of recourse against a physician's decision to halt or not implement treatments that it deems useless, disproportional or without any other effect than artificially sustaining life, when the patient is no longer in a condition to express his/her wishes[20].

2.3. Modulation of the temporal effects

Decisions of Constitutional Courts have a certain temporal effect that determines to which facts and (pending) cases the finding of unconstitutionality will be applicable. When a decision attaches legal consequences to facts that occurred prior to the judgment, this decision has an effect *ex tunc* or a retroactive effect. This is the case for decisions of the Belgian Constitutional Court and the German *Bundesverfassungsgericht.* If legal consequences are only attached to legal facts that occur after the pronouncement or publication of the decision, an effect *ex nunc* is attributed, which is the case for decisions of the French *Conseil constitutionnel*. Research

[17] Belgian Court of Cassation 20 April 1950, *Arresten van het Hof van Cassatie* (1950), 517.

[18] P. Popelier, *Procederen voor het Grondwettelijk Hof* (2008), 266-268; e.g. Belgian Constitutional Court 29 January 2004, No. 17/2004; Belgian Constitutional Court 6 July 2005, No. 119/2005; Belgian Constitutional Court 22 December 2011, No. 197/2011.

[19] See on the difference between interpretation and correction or amendment V. Ferreres Comella, *Constitutional Courts & Democratic Values* (2009), 112 et seq.

[20] *Conseil constitutionnel* 2 June 2017, QPC No.2017-632; M. De Visser, *Constitutional Review in Europe,* cit. at 14, 293; see also Belgian Constitutional Court 29 January 2004, No. 17/2004; Belgian Constitutional Court 6 July 2005, No. 119/2005; Belgian Constitutional Court 22 December 2011, No. 97/2011.

has shown that the initial attribution of a certain temporal effect to decisions of the highest courts is not decisive, but the possibility to deviate from them is[21]. In particular the possibility to assign an effect *pro futuro*, thereby imposing a continued application of the unconstitutional norm for a certain period of time, proves to be of great importance[22]. This becomes clear when we look at the case law of the Italian *Corte Costituzionale.* Seeing that this Court does not formally have the competence to control the temporal effects of its decisions, the Court developed the practice of the so called "warning decisions". In these decisions, the Court refrains from declaring legislative norms unconstitutional, but sends a message to the legislator to overcome a situation which might be justified only temporarily or in order to avoid a dangerous *horror vacui* subsequent to a decision of unconstitutionality[23].

As said before, in cases where legislative omissions are present, parties usually strive for an expansion of the field of application instead of an annulment or declaration of unconstitutionality of the existing, but incomplete norm. Moreover, such an annulment or declaration of unconstitutionality is often more detrimental than upholding the unconstitutional norm, because this would prevent other citizens to benefit from it[24]. Consequently, Constitutional Courts often find recourse in the possibility to impose an effect *pro futuro,* thereby granting the legislator time to fill the unconstitutional legislative gap[25]. After all, the decision to modulate the temporal effect of the Court's decision does not expand the contested norm's field of application.

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[21] S. Verstraelen, *Rechterlijk overgangsrecht* (2015), 446 et seq.

[22] P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe, *The Effect of Judicial Decisions in Time: Comparative Notes,* in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 3, 8-10.

[23] G. Martinico, *The Temporal Effects of the Italian Constitutional Court and the Mechanism of Warning Decisions*, in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 139.

[24] V. Ferreres Comella, *Constitutional Courts & Democratic Values,* cit. at 19, 25.

[25] *Conseil constitutionnel* 21 July 2017, QPC No. 2017-646/647; see recently also *Conseil constitutionnel* 9 June 2017, QPC No. 2017-635; *Conseil constitutionnel* 27 October 2017, QPC No. 2017-670; German *Bundesverfassungsgericht* 6 December 2016, 1 BvR 2821/11 - 1 BvR 321/12 – 1 BvR 1456/12; Belgian Constitutional Court 21 December 2004, No. 202/2004.

2.4. Filling the unconstitutional gap

2.4.1. Boundaries of constitutional adjudication

In 2005 the German *Bundesverfassungsgericht* filled a legislative gap situated in Article 79, §2 of the Act on the Federal Constitutional Court (AFCC) that prohibited the execution of non-appealable decisions based on a legal provision that was declared void. The Court decided to extend this prohibition of execution to decisions based on the interpretation of a legal provision which the Court declared to be incompatible with the Basic Law[26]. In her dissenting opinion, judge Haas rejected this analogous application and considered that with this, the Court took a political stance on what it thinks to be the ideal legal solution[27].

The foregoing example demonstrates the difficulty Constitutional Courts face when they wish to remedy an unconstitutional gap; they are constantly testing the boundaries between constitutional adjudication and judicial lawmaking. What is more, when a legislative omission violates the principles of equality and non-discrimination, there are two possibilities to restore the equality: either via a level down-approach, where the existing norm is removed so no one may benefit from it anymore, or via a level up-approach, where the field of application of the norm is expanded so that all parties concerned may benefit from it. Especially in cases where Constitutional Courts impose services, mostly benefits, for excluded categories of persons, this can entail grave financial consequences[28]. Only when an hierarchical higher norm obliges the legislator to provide for a certain right, the level down-approach cannot be followed. This is the case when EU law obliges the Member States to provide for and implement certain measures. Consequently, seeing that levelling downwards is not permitted, Constitutional Courts can give full effect to EU law by expanding the field of application. We will see this later.

2.4.2. Instructions to the legislator

The instructions a Constitutional Court provides for the legislator on how the unconstitutional omission can be remedied is

[26] Similar to the wording of art. 79, §1 AFCC, German *Bundesverfassungsgericht* 6 December 2005, 1 BvR 1905/02, § 38.
[27] Ibid., § 58.
[28] X, *Report of the Constitutional Court of the Italian Republic*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 564 et seq.

a perfect example of the ongoing constitutional dialogue between these two actors. Especially when the Court informs the legislator on possible constitutional legislative reforms without the obligation for the legislator to act accordingly, the Court respects the discretionary powers of the latter. However, it must be emphasized that when a Court only provides instructions to the legislator, again it fails to provide the necessary redress in that specific case and in the intermediary period leading up to the legislative reform.

When various options are at the legislator's disposal to amend the unconstitutional legislation, the German *Bundesverfassungsgericht* often resorts to an *Unvereinbarkeitserklärung,* providing the legislator explicit suggestions on how the unconstitutional gap can be filled, sometimes even on the (im)possible retroactive effect this new legislation should have[29]. In case No. 179 of 2017, the Italian Constitutional Court in its turn expressed its urgent wishes that the legislator proceeded rapidly to satisfy the principle of necessary proportionality of punishments[30]. Since 1996, the Belgian Constitutional Court developed case law in which it declares the contested norm to be constitutional, but the mere absence of a similar provision for the excluded category to be discriminatory. Referring to the legislator's prerogatives, the Court often states that only the legislator is able to fill the legislative gap[31]. Similarly, albeit less explicitly, the Italian *Corte Costituzionale* ruled on the

[29] German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 – 2 BvR 980/91; German *Bundesverfassungsgericht* 11 November 1998, 2 BvL 10/95; German *Bundesverfassungsgericht* 6 March 2002, 2 BvL 17/99; German *Bundesverfassungsgericht* 18 July 2006, 1 BvL 1/04 – 1 BvL 12/04; German *Bundesverfassungsgericht* 28 March 2006, 1 BvL 10/01; German *Bundesverfassungsgericht* 11 July 2006, 1 BvR 293/05; German *Bundesverfassungsgericht* 12 February 2014, 1 BvL 11/10; German *Bundesverfassungsgericht* 23 June 2015, 1 BvL 13/11 - 1 BvL 14/11; German *Bundesverfassungsgericht* 6 December 2016, 1 BvR 2821/11 - 1 BvR 321/12 – 1 BvR 1456/12; W. Schroeder, *Temporal Effects of Decisions of the German Federal Constitutional Court* in P. Popelier, S. Verstraelen, D. Vanheule, B. Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (2014), 24-25.

[30] Ibid. Italian *Corte Costituzionale* Judgment No. 179/2017, https://www.cortecostituzionale.it/actionJudgment.do

[31] E.g. Belgian Constitutional Court 15 May 1996, No. 31/96; S. Verstraelen, *Constitutionele dialoog als een lens: onderzoek naar het wetgevend optreden na de vaststelling van een ongrondwettige lacune door het Grondwettelijk Hof*, *Tijdschrift voor Wetgeving* (2016), 20-21.

impossibility for homosexual couples to marry[32]. The Court did not declare the provisions of the Civil Code discriminatory considering that homosexual unions could not be regarded as homogeneous with marriage. The Court however, underlined that for the purposes of Article 2 of the Italian Constitution, it was for Parliament to determine, exercising its full discretion, the forms of guarantee and recognition for homosexual unions[33]. Again it must be emphasized that in this way, the Court merely opens a dialogue with the legislator by inciting the latter to react, but it does not eliminate the existing legislative lacuna, nor does it oblige the legislator to fill the legislative gap. This became clear in the aftermath of the Italian legislative omission regarding homosexual unions which was brought before the European Court of Human Rights (ECtHR). The ECtHR found the failure of the Italian legislature to provide a specific legal framework for homosexual unions to be in violation of Article 8 ECHR[34]. It even stressed that "the repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account"[35].

2.4.3. Instructions to judicial and administrative authorities

When the Constitutional Court provides clear instructions to the ordinary courts and administrative authorities on how the unconstitutionality needs to be remedied, the Court offers immediate redress and provides certainty and equality regarding the further application of the contested norm.

The imposed deadline for legislative reaction by the German *Bundesverfassungsgericht* is often accompanied with further details for ordinary courts on how to act. First, the German Court can instruct the ordinary courts on how to they should adjudicate cases when no legislative reaction has yet taken place. In this way the

[32] Italian *Corte Costituzionale* 15 April 2010, No. 138/2010.
[33] Ibid.
[34] ECtHR 21 July 2015, *Oliari a.o. v. Italy;* ECtHR 14 December 2017, *Orlandi a.o. v. Italy*.
[35] ECtHR 21 July 2015, *Oliari a.o. v. Italië,* § 184.

Court avoids insecurities in the transitional phase[36]. On several occasions the Court emphasized the further application of the unconstitutional norm, which of course does not lead to the desired effect of expansion of the field of application[37]. In a decision of 2006 regarding the possibility of transsexuals to change their first name, the Court even argued that imposing a provisional arrangement would infringe upon the competences of the legislator to decide upon the question[38]. The Court can also instruct judges to apply another legal norm or can instruct judges to postpone their rulings until the entering into force of new legislation. The latter was the case in the recent notorious decision of the German *Bundesverfassungsgericht* on the '*dritte option'*. The German Court found the absence of a third option, namely the possibility for intersex people to indicate that they are neither male, nor female, incompatible with the respect for human dignity, the right to free development of citizens personality and the principle of equality[39]. The legislator is obliged to amend the unconstitutionality prior to 31 December 2018 and proceedings pending before the *Oberlandesgericht* will be continued after this legislative reaction.

Secondly, the German Court often provides information on how the unconstitutionality should be addressed if the legislator does not meet the imposed deadline[40]. In this way, the Court already clarified what would become the new legal ground for certain tax exemptions if the legislator would not react in time[41]. In a 2017 case, the German Court explicitly stated that if the legislator fails to act in time, the disputed regulation will become void with retroactive effect to the date of its entering into force[42]. In the latter

[36] M. Gerhardt, *Report of the Constitutional Court of the Federal Republic of Germany*, in E. Jarašiūnas (ed.), *Problems of legislative omission in constitutional jurisprudence* (2009), 229.

[37] German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 – 2 BvR 980/91; German *Bundesverfassungsgericht* 23 June 2015, 1 BvL 13/11 - 1 BvL 14/11.

[38] German *Bundesverfassungsgericht* 18 July 2006, 1 BvL 1/04 – 1 BvL 12/04.

[39] German *Bundesverfassungsgericht* 10 October 2017, 2 BvR 2019/16.

[40] German *Bundesverfassungsgericht* 28 March 2006, 1 BvL 10/01; German *Bundesverfassungsgericht* 11 July 2006, 1 BvR 293/05.

[41] German *Bundesverfassungsgericht* 10 November 1998, 2 BvR 1057/91 - 2 BvR 1226/91 – 2 BvR 980/91; see also German *Bundesverfassungsgericht* 26 July 2016, 1 BvL 8/15.

[42] German *Bundesverfassungsgericht* 29 March 2017, 2 BvL 6/11.

example, the similarity with the so called 'warning decisions' of the Italian *Corte Costituzionale* becomes apparent.

I mentioned before the practice of the Belgian and Italian Constitutional Court to annul or declare unconstitutional legislation *to the extent that it does not provide* for a certain benefit, level of protection, etc. By annulling the legislative omission, one could say that nothing changes: The Court merely annuls a rule that is not even present within the legal order. Since decision No. 111/2008, the Belgian Constitutional Court resolved this issue by explicitly granting the ordinary courts the possibility to fill the legislative gap "when the finding of unconstitutionality is put in sufficiently precise and complete terms"[43]. Within the case law of the German Constitutional Court, instructions to the ordinary judges usually accompany the instruction for the legislator to react, thus accentuating a perception of primacy of the legislative power and the legislator's duty to react. Instead, the Belgian Constitutional Court often only refers to the competences of ordinary courts to fill the legislative gap. What is more, within the Italian legal order, such an explicit indication for the ordinary courts is not even required. Within the case law of the Italian Constitutional Court, "substitutive" and "additive" judgments can be discerned. In the first, the Court declares a provision unconstitutional "in the part in which" a certain thing "instead" of another is provided for. In the case of additive judgments, the Court declares unconstitutional the provision "in the part in which it does not" foresee something. These decisions immediately add a fragment to the norm that was the subject of the judgment, i.e. immediately fill the legislative gap without explicit instructions towards ordinary courts[44]. The Italian Constitutional Court has emphasized that an additive decision is only permitted when it leads to a logical extension which is necessary and often implicit in the interpretive potentiality of the normative context in which the contested norm was inserted. This is not the case when a plurality of solutions is present, deriving from various possible assessments and the chosen solution by the Court would be the result of a discretionary assessment[45]. This line of reasoning corresponds to the formulation the Belgian

[43] Belgian Constitutional Court 31 July 2008, No. 111/2008.
[44] X, *Report of the Constitutional Court of the Italian Republic*, cit. at 28, 554-55.
[45] Italian *Corte Costituzionale* 109/1986, 22 April 1986, translation by M. De Visser, *Constitutional Review in Europe,* cit. at 14, 315.

Constitutional Court uses: ordinary courts can only fill the legislative gap when the finding of unconstitutionality is put in sufficiently precise and complete terms by the Court, meaning that no further discretionary assessment by the ordinary judge is required.

As mentioned before, also the French *Conseil constitutionnel* instructs the ordinary courts on how to fill a legislative gap, albeit in a less explicit way. The Council uses the technique of *reserves d'interprétation* to declare a norm constitutional, but under the condition of an extended interpretation of the defective norm, thereby "reading in" the excluded category of persons. The Council expects an active performance by the competent jurisdictions by filling the gap and providing for a timely recourse[46].

3. Adjudication within a European context

Seeing that the treaties do not provide explicit rules or mechanisms based on which EU law can be invoked by individuals and when it should be applied by national courts, the European Court of Justice (ECJ) developed crucial case law to define the tasks and competences of national judges[47]. Three main types of decisions or techniques can be distinguished to ensure the full effect of EU law: setting aside national legislation, the technique of harmonious interpretation and the overarching obligation to take "all appropriate measures". The resemblance with the aforementioned types of adjudication used by Constitutional Courts to rule upon legislative omissions already becomes apparent.

First and foremost, in 1963 the ECJ formulated the principle of direct effect in the *Van Gend & Loos* case[48] meaning that an EU law provision can be directly invoked in the national legal order by individuals[49]. Approximately one year later, the ECJ acknowledged in the *Costa v E.N.E.L.* case the principle of supremacy of EU law:

[46] *Conseil constitutionnel* 2 June 2017, QPC No.2017-632, §17.
[47] U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System* (2014), 62.
[48] CJEU C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* 5 February 1963.
[49] T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges* (2011), 27.

when national law conflicts with EU law, the latter must take precedence[50]. Only in this way it will be possible for EU law to be effective and to be applied in a uniform and equal manner across the whole Union[51]. Consequently, national provisions must be set aside when they conflict with EU law[52].

The question then rises what this 'setting aside' actually means. In the *IN.CO.GE* case, the ECJ clarified that the incompatibility with a European provision does not have the effect of rendering that rule of national law non-existent[53]. Given the absence of a European provision that describes the remedies or procedures that need to be followed, the principle of national procedural autonomy comes into play, encompassing the requirements of effectiveness and equivalence[54]. The latter entails that procedural conditions that govern the actions at law intended to ensure the protection of European Union rights cannot be less favourable than those relating to similar actions of a domestic nature[55]. Consequently, when we look at the national competences of a Constitutional Court, the principle of equivalence requires that when a national court has the competence to annul a national law for non-compliance with a higher norm, in our case with the Constitution, then it is under the obligation to apply the same national remedy when a national provision does not conform to EU law[56].

Besides the instrument of direct effect, national courts may give effect to EU law via the principle of harmonious

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[50] Ibid., 26; CJEU C-6/64, *Flaminio Costa v. E.N.E.L.,* 15 July 1964.

[51] CJEU C-106/77, *Amministrazione delle finanze v Simmenthal SpA,* 9 March 1978, §14; D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, in M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (2012), 134.

[52] CJEU C-106/77, *Amministrazione delle finanze v Simmenthal SpA,* 9 March 1978, §21; U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System,* cit. at 47, 64.

[53] CJEU C-10/97 to C-22/97, *Ministero delle Finanze v IN.CO.GE.'90,* 22 October 1998, §21.

[54] U. Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System,* cit. at 47, 82.

[55] CJEU C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* 16 December 1976, § 5; CJEU C-45/76, *Comet BV tegen Produktschap voor Siergewassen*, 16 December 1976, §13.

[56] D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 135.

interpretation[57]. In the aforementioned *von Colson* case, the ECJ emphasized that "i*t is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law*"[58]. *Moreover, the ECJ considers t*he requirement for national law to be interpreted in conformity with EU law as inherent in the system of the Treaty, because it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it[59]. *Seeing that this obligation applies to all national laws, irrespective of the source of EU law and even in horizontal cases, this principle of 'indirect' effect is of great importance to ensure a uniform application of EU law*[60].

Finally, Article 4 (3) TEU states that "the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union". The possibility to set aside national legislation which is contrary to EU law, or to interpret national legislation in conformity with EU law, does not always suffice for a national court to give full effect to EU law. Via the principle of national procedural autonomy, other suitable measures are used to ensure the protection of EU law and the ECJ also incites national courts to adopt these measures, thereby surpassing the technique of harmonious interpretation. In the *Martin Martin* case for example, a Spanish Court questioned the ECJ for a preliminary ruling regarding the interpretation of Article 4 of Directive 85/577/EEC to protect the consumer in respect of

[57] T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges,* cit. at 49, 29; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials* (2008), 287.

[58] CJEU C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen,* 10 April 1984, § 28.

[59] CJEU C-397/01 to C-403/01, *Bernhard Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV,* 5 Oktober 2004, §114.

[60] CJEU 157/86, *Mary Murphy and others v An Bord Telecom Eireann*, 4 February 1988; CJEU C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA,* 13 November 1990; P. Craig, G. De Búrca, *EU Law. Text, Cases and Material,* cit. at 57, 288-89; T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges,* cit. at 49, 29; U. Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System,* cit. at 47, 78-79.

contracts negotiated away from business premises[61]. This Article enshrines the duty for Member States to ensure that their national legislation lays down appropriate consumer protection measures in cases where consumers were not in writing noticed of their right of cancellation. The Court recalls the principle of harmonious interpretation and emphasizes that the concept of "appropriate consumer protection measures" affords to the national authorities a discretion in determining consequences which should follow a failure to give notice, provided that that discretion is exercised in conformity with the Directive's aim of safeguarding consumer protection. Declaring the contract in the dispute void, can be categorised as "appropriate" and Article 4 of the Directive does not preclude the national judge from pronouncing this measure of its own motion. The Court further points out that this finding does not rule out the possibility that other measures might also ensure that level of protection, for example by resetting the relevant time-limits relating to the cancellation of the contract[62]. Consequently, the ECJ considered these creative solutions by ordinary courts as appropriate measures in the light of Article 4 (3) TEU.

3.1. The deliberate decision to refrain

The French Constitution states that treaties and international agreements that are duly ratified or approved shall take precedence over Acts of Parliament (Article 55). The German Basic Law in its turn articulates that with a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law (Article 23, §1). The Constitutional Courts of both countries however, are reluctant to review national legislation to its conformity with European Union law.

Since 1975, the French Council adhered to a strict interpretation of the constitutional provisions regarding its functions to monitor the conformity of French national law to the

[61] CJEU C-227/08, *Eva Martin Martin EDP Editores, SL,* 17 December 2009.
[62] CJEU C-227/08, *Eva Martin Martin EDP Editores, SL,* 17 December 2009, § 32-68.

Constitution[63]. The Council stresses the difference "between the review of statutes for the purpose of verifying their conformity with the Constitution, which is incumbent upon the *Conseil constitutionnel,* and the review of their compatibility with the international and European commitments of France, which is incumbent upon the Courts of law and Administrative courts"[64]. The Council even emphasized that the ordinary judges, when asked to rule in litigation in which the argument of incompatibility with European Union law is raised, can *do all and everything necessary* to prevent the application of statutory provisions impeding the full effectiveness of the norms and standards of the European Union[65]. By contrast, the Council does not appropriate itself this broad competence. Consequently, the Council articulated that an argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot be deemed to constitute an argument as to unconstitutionality[66]. What is more, the *Conseil Constitutionnel* maintained its perspective when deciding preliminary rulings (*Questions Prioritaires de Constitutionnalité).* The French Council emphasized similarly that "a challenge alleging the incompatibility of a legislative provision with the commitments of France under international and European law cannot be deemed to be a challenge to their constitutionality; that accordingly it is not for the Constitutional Council, when seized pursuant to Article 61-1 of the Constitution, to examine the compatibility of the contested provisions with the treaties or with European Union law; that the examination of such a challenge falls under the jurisdiction of the ordinary and administrative courts"[67].

Obviously, the *Conseil constitutionnel* adopts a very reluctant attitude in deciding on questions of supremacy of EU law over national legislation. As a result, the *Conseil constitutionnel* has not yet decided that a field of application of French law needed to be expanded to comply with EU law, which contrasts heavily with the

[63] M. Fartunova, *Report on France,* in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010), 210-211.
[64] *Conseil constitutionnel* 12 May 2010, DC No. 2010-605, § 11.
[65] *Conseil constitutionnel* 12 May 2010, DC No. 2010-605, § 14.
[66] Ibid.; M. Fartunova, *Report on France,* cit. at 63, 211.
[67] *Conseil constitutionnel* 3 February 2012, QPC No. 2011-217, § 3.

active approach regarding legislative lacuna the French Council uses within a mere national context, as seen before.

Considering that the Council clearly distinguishes the constitutional review from the compatibility with EU law, its first preliminary reference to the ECJ in 2013 could be seen as an important first attempt at harmonization between both types of review[68]. The question concerned the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter FD EAW). More precisely, the French implementing statute explicitly excluded the right to appeal the decision to execute an EAW, thus constituting a legislative lacuna. The *Conseil constitutionnel* wished to ascertain whether Articles 27 and 28 FD EAW opposed an appeal mechanism that would suspend the execution of an EAW[69]. The ECJ decided that the fact that the FD EAW did not provide for a right of appeal with suspensive effect against decisions relating to EAWs, does not prevent the Member States from providing for such a right[70]. Consequently, the ECJ found the absence of an appeal mechanism not in violation with the FD, but granted Member States the possibility to organize one. The *Conseil constitutionnel* in its turn, reviewed the compatibility of this legislative lacuna with the rights and freedoms guaranteed under the Constitution and found that the absence of the right to appeal imposed an unjustified restriction on the right to obtain effective judicial relief[71]. The French Council declared the wording "by a ruling not subject to appeal" to be unconstitutional, thereby immediately eliminating the legislative omission. The Council further indicated that this declaration would have effect upon publication of the decision, but will be applicable to all appeals pending before the Court of Cassation on that date.

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[68] *Conseil constitutionnel* 4 April 2013, QPC No. 2013-314; see *Conseil constitutionnel* 23 January 2015, QPC No. 2014-439 where the Council decided not to refer a preliminary question to the ECJ; see also J. Komárek, *The Place of Constitutional Courts in the EU*, 9 EuConst 3 (2013), 434.

[69] A. Torres Pérez, *A predicament for domestic courts: caught between the European Arrest Warrant and fundamental rights,* in B. de Witte, J. A. Mayoral, U. Jaremba, M. Wind, K. Podstawa (eds.), *National Courts and EU Law* (2016), 200.

[70] CJEU C-168/13, *PPU Jeremy F v. Premier minister*, 30 May 2013, § 51.

[71] *Conseil constitutionnel* 14 June 2013, QPC No. 2013-314 (English text available on http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314-qpc/version-en-anglais.140224.html, accessed May 8, 2018)

Thus, the Council dealt with the legislative lacuna, not within a European context (no violation of EU law was discerned by the Council, nor the ECJ), but within a mere national context. What is more, it seems that the French Council returned to its strict division between constitutional review and review of European Union law; in decision QPC No. 2015-512, the Council ruled that it was not necessary to refer a preliminary question to the ECJ regarding the validity of Framework Decision 2008-913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, because the validity of that Framework Decision could not impact the review of conformity with the French Constitution[72].

The absence of a possibility for judicial review for EAWs that grant extraditions also played a pivotal role in the case law of the German *Bundesverfassungsgericht.* It needs to be highlighted that the standard of review before the German *Bundesverfassungsgericht* is limited to norms of domestic constitutional law in the strict sense[73]. Similar to his French counterpart, and despite the call for participation in Article 23, §1, Basic Law, the German Court has on various occasions distinguished between constitutional review, for which the Court and only the Court is fully competent, and review of compatibility with EU law[74]. In its famous *Milkpowder* case of 9 July 1971, the *Bundesverfassungsgericht* clearly stated that the Court is not competent to decide on the question whether a national norm is compatible with directly applicable EU law, but that ordinary courts are competent to decide upon this possible conflict of norms[75]. Furthermore, the Court determined that when no margin of appreciation was left to the Member States, the *Bundesverfassungsgericht* will not review the constitutionality of national legislation implementing EU law, so long as the European

[72] *Conseil constitutionnel* 8 January 2016, QPC No. 2015-512, §4.
[73] P. Cede, *Reports on Austria and Germany* in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010), 65.
[74] D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 136.
[75] German *Bundesverfassungsgericht* 9 July 1971, 2 BvR 255/69, BVerGE 31, 145, § 97.

Union, particularly the ECJ, provides effective protection of fundamental rights[76].

Keeping the foregoing division between constitutional and European review of national legislation in mind, we will assess the decision of the *Bundesverfassungsgericht* in the German EAW-case. The latter declared the German European Arrest Warrant Act, which implemented the FD EAW in the German legal order, void[77]. The German Court discerned two important reasons for this judgment, both relating to legislative omissions. First, the Court blamed the legislator for not using the latitude that the FD EAW left Member States to incorporate it in national law, leading to a violation of Article 16.2. of the German Basic Law that prevents extradition of German citizens to foreign countries[78]. Secondly, and similar to the French reasoning, the Court found a gap in legal protection by excluding recourse to a court against a grant of extradition to a Member State of the European Union[79]. In other words, the German *Bundesverfassungsgericht* accused the German legislator for being too pro-European, thereby neglecting his duties emanating from the German Basic Law. What is more, by declaring the German EAW act void in its entirety, the FD EAW could no longer be applied so no German citizen could be extradited to a Member State. The German Court even emphasized that because the legislator had to decide again, in normative freedom and taking into account the constitutional standards, an interpretation in conformity with the constitution or a ruling that establishes the Act's partial voidness, are excluded[80]. This kind of ruling is extraordinary, especially when we look at the types of adjudication

[76] I primarily focus on the review of national legislation and its compatibility with EU law and not on the compatibitlily of EU law with the German Constitution; German *Bundesverfassungsgericht* 13 May 2007, 1 BvF 1/05, §§68-69; German *Bundesverfassungsgericht* 31 May 2007, 1 BvR 1316/04, §47; German *Bundesverfassungsgericht* 22 November 2007, 1 BvR 2628/04, §30; German *Bundesverfassungsgericht* 29 April 2010, 2 BvR 871/04 – 2 BvR 414/08, §28; German *Bundesverfassungsgericht* 18 May 2016, 1 BvR 895/16, §29.

[77] German *Bundesverfassungsgericht* 18 July 2005, 2 BvR 2236/04 (English text available on http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/07/rs20050718_2bvr223604en.html, accessed May 8, 2018)

[78] Ibid., § 64 et seq.

[79] Ibid., § 103 et seq.

[80] Ibid., § 118 et seq.

the Court deploys on a national level. The Court could have opted for the possibility of an *Unvereinbarkeitserklärung,* which it often uses when the consequences of declaring an act void are too harsh. What is more, the Court could have imposed a deadline for the legislator to react and instruct the ordinary courts how they needed to act, possibly even obliging them to allow recourse against a grant of extradition, until such legislative reform took place. The Court had ample possibilities at its disposal, which it uses on a national level, to reconcile between the state (and legislative) sovereignty and supremacy of EU law, but chose the one option rendering the effectiveness of EU law impossible. Judge Gerhard did not agree with the ruling by the Court and explicitly stated that "the declaration of nullity of the EAW Act was not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible. […] Both objectives of protection are achieved by interpreting and applying the European Arrest Warrant Act in conformity with the constitution with account being taken of European Union law. The same applies *mutatis mutandis* to compliance with the guarantee of legal protection"[81]. Furthermore, he regrets that the Constitutional Court refused to make a positive contribution to European solutions and argues that instead of emphasizing the national perspective, it should achieve a balance between the bonds of national law and that of European law[82].

3.2. The deliberate decision to take (extreme) actions

For a long time, the Italian *Corte Costituzionale* adhered to the same division of powers as seen in the French and German constitutional case law: the guarantee of primacy of EU Law was entrusted to national ordinary judges. Thus, no question of constitutionality to the Constitutional Court was required, seeing that ordinary judges needed to apply the provisions of EU law and 'not apply' national rules contrasting with directly applicable EU law[83]. In cases of direct review by the Italian Constitutional Court

[81] Ibid., §§ 186-187.
[82] Ibid., § 191.
[83] G. Martinico, O. Pollicino, *Report on Italy,* in G. Martinico, O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective* (2010),273-274; D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 137.

however, ordinary judges do not participate and therefore cannot offer any protection of EU law. Consequently, in order to avoid a gap in the protection of rights, the Italian Court uses EU norms as "interposed norms" for review of national legislation; when the Court finds that a national norm is incompatible with EU law, it will declare the latter unconstitutional, seeing that Article 117 of the Italian Constitution clearly states that the legislative power belongs to the State and Regions in accordance with the constitution and within the limits set by European Union law and international obligations[84].

The Italian Court however, did not restrict this type of adjudication to direct proceedings. In 2010, the implementation of the FD EAW caused a stir (also) in the Italian legal system, albeit with different consequences than in the other two aforementioned countries[85]. The national transposing law stated that in specific situations, the Court of Appeal could refuse to execute the arrest warrant and order that the sentence or security measure be enforced in Italy *if the person sought is an Italian national.* The ordinary courts could not remedy this strict field of application through interpretation. Referring to the case law of the ECJ concerning the interpretation of the Framework Decision, the Italian Court concluded that by using the exclusive criterion of citizenship and excluding any check as to the existence of an actual and stable link with the executing Member State, the contested provisions ultimately violated not only the wording, but also and above all, the rationale of the provision of European Union law which it should have correctly implemented. The Italian Court thus explicitly reviewed a national provision to its conformity with EU law and from the violation thereof, deduced a finding of unconstitutionality[86]. What is more, the Court instructed the legislator and ordinary courts to fill the legislative gap. The Court

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[84] Ibid.; see e.g. Italian *Corte Costituzionale* 13 February 2008, No. 102/2008; Italian *Corte Costituzionale* 2 April 2012, No. 86/2012.

[85] Italian *Corte Costituzionale* 21 June 2010, No. 227/2010.

[86] In decision No. 187/2016 the Italian Constitutional Court applied a similar reasoning within an incidenter proceeding after a reference for a preliminary ruling to the ECJ was made, but not in a case relating to legislative omissions. Italian *Corte Costituzionale* 15 June 2016, No. 187/2016; CJEU C-22/13, C-61/13-C-63/13 and C-418/13, *Raffaella Mascolo et al. v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli,* 26 November 2014.

highlighted Parliament's prerogatives and emphasized that it is for Parliament to assess whether it is appropriate to specify the conditions governing the applicability of a refusal to surrender to non-nationals for the purposes of the enforcement of the sentence in Italy, in accordance with the relevant originating provisions of EU law, as interpreted by the ECJ. Besides demarcating the legislator's prerogatives, the Court explicitly instructed the ordinary courts to react in accordance with EU law: it is for the courts to ascertain whether the requirement of lawful and effective residence or staying is met, following an overall evaluation of the defining features of the individual's situation such as, *inter alia,* the length, nature and conditions of his presence in Italy as well as the family and economic ties that he has in our country, in accordance with the interpretation provided by ECJ[87]. Consequently, the Court gave (detailed) guidelines to the ordinary courts on how to fill the legislative gap prior to the legislative response.

Within the Belgian legal order, parliament denied the Constitutional Court the competence to review national legislation against international law, considering that it was well-established case law that ordinary courts possessed this power[88]. Consequently, according to Article 142 of the Belgian Constitution, the Belgian Constitutional Court is only competent to review national legislation[89] for compliance with stipulations that allocate powers between the federal State, the communities and the regions, and for compliance with fundamental rights and liberties[90]. Nevertheless, and unlike its French and German colleagues, the Constitutional Court adopted two indirect ways to review national legislation against international law. The first way is an indirect review through Articles 10 and 11 of the Constitution, which encompass

[87] Italian *Corte Costituzionale* 21 June 2010, No. 227/2010, §9.

[88] Advice Council of State, *Parliamentary proceedings Senate* 1979-80, No. 435/1, 5-7; A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht, Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2014), 620; P. Popelier, K. Lemmens, *The Constitution of Belgium* (2015), 213.

[89] This encompasses legislative acts from the federal parliament and from the parliaments of the Regions and Communities.

[90] As further elaborated in Articles 1 and 26 of the Special Act 6 January 1989 on the Constitutional Court, *Belgian Official Gazette* 7 January 1989.

the right to equal treatment and non-discrimination[91]. The Belgian Constitutional Court decided that the protection provided for by these two constitutional rights, also encompasses the rights and freedoms that ensue from international treaty stipulations[92]. The same reasoning is used with regards to secondary EU law[93]. In this way, the Belgian Court referred to the "rationale" behind a Directive to deduce the intention of the European legislator and to consequently annul the contested stipulation to the extent that it did not provide for the same exception in case of family reunification with EU-citizens[94].

Secondly, in case No. 136/2004, the Belgian Constitutional Court stipulated that when a treaty obligation has a similar (*analogous*) scope as a fundamental right enshrined in the Belgian Constitution, this treaty obligation becomes inseparable from the protection offered by the constitutional stipulations[95]. This line of reasoning offers the Belgian Constitutional Court the opportunity to update the content of its own constitutional catalogue of fundamental rights, but is by no means as important as the possibility for indirect review via Articles 10 and 11 of the Constitution[96].

Because of its Europe-friendly attitude, the Belgian Constitutional Court utilizes all types of adjudication exhibited in a mere national context (Cf. supra 2.1-2.4) when cases arise in which a legislative omission is found to be in violation with EU law. First, in cases Nos. 55/2011, 192/2011 and 99/2013, the annulment of the exclusion of practitioners of liberal professions from the legislation

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[91] Court of Cassation 27 May 1971, *Pasicrisie* 1971, I, 886; A. Alen, J. Spreutels, E. Peremans, W.Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht,* cit. at 88, 620-621; P. Popelier, K. Lemmens, *The Constitution of Belgium,* cit. at 88, 213-214.

[92] Belgian Constitutional Court 23 May 1990, No. 18/90, § B.11.3; Belgian Constitutional Court 15 July 1993, No. 62/93, B.3.2.; Belgian Constitutional Court 19 May 2005, No. 92/2004, B.5. (regarding ECHR).

[93] See explicitly for EU Directives Belgian Constitutional Court 25 October 2000, No. 105/2000, B.51.; Belgian Constitutional Court 22 July 2003, No. 106/2003, B.42.; A. Alen, J. Spreutels, E. Peremans, W. Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht,* cit. at 88, 621-622.

[94] Belgian Constitutional Court 26 September 2013, No. 121/2013.

[95] Belgian Constitutional Court 22 July 2004, No. 136/2004, § B.5.3.

[96] A. Alen, J. Spreutels, E. Peremans, W.Verrijdt, *Het Grondwettelijk Hof en het internationaal en Europees recht,* cit. at 88, 623-624.

on commercial practices immediately led to the expansion of the field of application and to compliance with Directive 2005/29/EG, i.e. the Unfair Commercial Practices Directive[97].

Secondly, in cases where the Belgian Constitutional Court interprets legislation to be in violation with EU law *to the extent that* it is not applicable on certain categories of persons, the Belgian Constitutional Court will almost always modulate the annulment or declaration of unconstitutionality. After all, in those cases a simple annulment or declaration of unconstitutionality will lead to a situation that is even less desirable and to a graver extent in violation with EU law. For example, in case No. 11/2009, the Court stated that a Flemish rule regarding health care violated (now) Articles 45 and 49 TFEU because EU-citizens who worked in the Flemish linguistic region, but lived in the French or German linguistic regions, could not benefit from the health care system[98]. Seeing that the annulment would lead to an even bigger exclusion of EU-citizens from this benefit, the Court annulled the norm, but maintained the effects of the provision. The Flemish legislator was attributed one year to amend the legislation accordingly[99].

Finally, instructing lower courts on how the legislative lacuna should be eliminated is a clear example of 'appropriate measures' to which Article 4 TEU refers. Within the case law of the Belgian Constitutional Court, two decisions are of great importance. In the first it became clear that the Belgian Court is willing to go as far as granting (financial) benefits on the basis of EU law to excluded categories of persons. In the second case the Court demonstrated a very active approach in indicating how the compliance with EU law should be ensured.

In the first case (No. 42/2012) the requirements to be eligible for guaranteed family benefits were discussed. In order to benefit from this legislation, a person should have resided for at least five years within Belgium. For certain categories of persons, an

[97] Belgian Constitutional Court 6 April 2011, No. 55/2011; Belgian Constitutional Court 15 December 2011, No. 192/2011; Belgian Constitutional Court 9 July 2013, No. 99/2013.

[98] Belgian Constitutional Court 21 January 2009, No. 11/2009, B.10.1.

[99] See also Belgian Constitutional Court 14 January 2004, No. 5/2004; Belgian Constitutional Court 15 March 2012, No. 46/2012; See similarly Belgian Constitutional Court 2 March 2011, No. 33/2011; Belgian Constitutional Court 14 June 2012, No. 76/2012.

exception to this requirement of residence was possible. To the extent that persons who were granted a subsidiary protection status still needed to meet the five-year residence requirement, the Belgian Constitutional Court found the national norm in violation of Articles 10, 11 and 191 of the Constitution, in conjunction with Article 28, paragraph 2, Directive 2004/83/EC[100]. The Court added that the referring court, in this case the labor court in Brussels, needed to eliminate this unconstitutionality. Consequently, the labor court had the possibility to award family benefits to persons who were granted a subsidiary protection status even if they had not yet lived in Belgium for more than five years as the national law in force at that time required.

In the second case, which was an appeal for annulment, the Belgian Constitutional Court instructed the ordinary courts even more explicitly on how they should fill the legislative gap. This case related to the possibility for collective redress when an undertaking violates its contractual obligations or when it violates European legislation[101]. The Belgian legislation stipulated that a group could only be represented by one group representative, which could be a consumer association, an organization of which the main objective is in direct connection with the collective damage or an autonomous public service. Of these three possible representatives, the law required that the first two needed to be accredited by the Minister. The Court ruled that the performance as a group representative also constituted a service in the light of the EU's Services Directive (2006/123/EC). Consequently, the requirement that the respective associations and organizations needed to be accredited infringed upon Article 16 of that Directive that states that the freedom of providing services may not be restricted by obliging the provider to obtain an authorization or registration. The Court annulled the Belgian provision t*o the extent that it did not allow* for entities from other EU and EEA Member States that meet the standards provided in point 4 of Recommendation 2013/396/EU, to act as group representative. The latter Recommendation relates to the common principles for injunctive and compensatory collective redress

[100] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. L 304/12.

[101] Belgian Constitutional Court 17 March 2016, No. 41/2016.

mechanisms in the Member States concerning violations of rights granted under European Union Law. Point 4 elucidates who has standing to bring a representative action; a non-profit character and a direct relationship between the main objectives of the entity and the alleged violated EU rights is required, as well as sufficient capacity in terms of financial resources, human resources and legal expertise. The Belgian Constitutional Court considers that, in anticipation of a legislative response, ordinary judges may take into account the criteria mentioned in point 4 of the Recommendation to eliminate the established violation of EU Law. What is more, the Court adds that ordinary courts may not declare an action for collective redress inadmissible when it is brought by an entity as defined in Article 4 (3) Directive 2009/22/EC. The Court however, did not previously refer to this Directive.

In this way, the Court provided a lot of instructions to the courts on how to fill this legislative gap. By doing so, the Belgian Constitutional Court used a very active approach: it does not (merely) allow an expansion of the contested norm's field of application, but replaces the contested norm with a stipulation from a European Recommendation. The approach by the Court however, may not be surprising: if it would have annulled the stipulation regarding who could be group representative, even more uncertainty would have arisen. The solution by the Court obviously constitutes an 'appropriate measure' as laid down in Article 4 (3) TEU. The Court does much more than eliminating a national norm that violates European Union law; it plays a crucial role in ensuring full application of EU Law by imposing the criteria as formulated in the Recommendation on to the ordinary courts and thereby filling the legislative gap.

It goes without saying that this type of adjudication provides the desired outcome; in both cases the legislative omission is eliminated in order to comply with EU law. However, this does not detract from the fact that for reasons of legal certainty and clarity, a legislative response is still desirable. Reference can be made to a procedure initiated by the Commission against Belgium for a failure to fulfil its obligations[102]. The subject of the procedure concerned the federal legislation on commercial practices and consumer protection, as was already declared to be

[102] CJEU C-421/12, *Commission v Belgium,* 10 July 2014.

unconstitutional and in violation of EU law by the Belgian Constitutional Court in the aforementioned cases[103]. In the first two preliminary rulings the Court declared the exclusion of practitioners of liberal professions unconstitutional, which automatically lead to the expansion of the field of application and to compliance with the Unfair Commercial Practices Directive. Advocate General Cruz Villalón decided that it is not always necessarily the case that a formal finding of unconstitutionality, as is the case in Belgian preliminary rulings, is in itself basis enough to rule out the possibility of the provision in question being applied[104]. The ECJ reiterated that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations under rules of EU law[105]. Moreover, the ECJ held that even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty, particularly in the field of consumer protection[106]. Given this case law, we can confirm that when the Belgian Constitutional Court instructs lower courts on how to fill the legislative gap, it complies with Article 4 (3) TEU, but this does not detract from the responsibility of the legislator to amend the contested legislation. The case law of the German Constitutional Court within a national context can be brought to mind: The Court usually first incites the legislator, who has the primary responsibility to adopt proper legislation, to react and subsequently instructs ordinary courts on how to act in the intermediate period.

4. Principles of effectiveness and equivalence

Given the requirements of effectiveness and equivalence, as briefly mentioned before, the case law of the Italian and Belgian

[103] Belgian Constitutional Court 6 April 2011, No. 55/2011; Belgian Constitutional Court 15 December 2011, No. 192/2011; Belgian Constitutional Court 9 July 2013, No. 99/2013.
[104] Opinion Adv.Gen. Cruz Villalón, with CJEU C-421/12, *Commission v Belgium,* 26 November 2013, §§ 45-52.
[105] CJEU C-421/12, *Commission v Belgium,* 10 July 2014, § 43.
[106] CJEU C-421/12, *Commission v Belgium,* 10 July 2014, § 46.

Constitutional Courts may not come as a surprise. The position of the French Constitutional Council and German Constitutional Court, on the other hand, is all the more remarkable.

The principle of equivalence or non-discrimination entails that remedies available to ensure the compliance of national law, must be made available in the same way to ensure the compliance of Union law[107]. The research has shown that this analogous reasoning is out of the question for the French Constitutional Council and the German Constitutional Court. By contrast, the Italian Constitutional Court and in particular the Belgian Constitutional Court, are far more willing to transpose the instruments they use in a mere national context, to cases where violations of EU law are present.

Besides, the willingness of the Belgian Constitutional Court cannot come as a surprise. The Court was established only in 1985, i.e. several years after the introduction of the principles of supremacy and direct effect. Therefore, the Court never operated under the impression of exclusivity of review of domestic legislation[108]. Consequently, if the Belgian Constitutional Court finds itself competent to impose on ordinary courts the power to fill a legislative gap that violates the Constitutional requirements, the Court should apply the same remedy when the legislative gap violates EU law. The fact that this type of remedy has no textual basis in the Constitution or in any other legal act does not alter this consideration.

With this, one important remark must be made. The power for ordinary courts to take appropriate measures to fill a legislative omission that violates EU law, is not determined by or dependent on decisions of the Constitutional Court. Ordinary courts can resort to this type of redress based on the obligation to ensure full effect of EU law as enshrined in Article 4 (3) TEU. However, when a Constitutional Court explicitly grants ordinary courts the power to fill the legislative lacuna, a uniform application of EU law will be reached within the national legal order, thereby providing clarity and legal certainty for citizens and ordinary courts.

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[107] CJEU C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* 16 December 1976, § 5; CJEU C-45/76, *Comet BV tegen Produktschap voor Siergewassen*, 16 December 1976, §13; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials,* cit. at 57, 307.

[108] J. Komárek, *The Place of Constitutional Courts in the EU*, cit. at 68, 428.

The principle of effectiveness implies that a national rule cannot be applied if it makes it impossible or excessively difficult to exercise rights conferred by EU law[109]. Consequently, a national procedural rule may not jeopardise the *effet utile* of EU Law. The application of this principle, and the relation with the requirement of equivalence, changes considerably when the principle of effective judicial protection, recognised as a fundamental principle of EU law[110], is added. This principle is enshrined in Article 19 (1) TEU that explicitly states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. After all, the principles of equivalence and effectiveness merely require the same (procedural) treatment of cases, regardless whether EU or national law is at stake, and where necessary, shall the court set aside a restricting national procedural rule. This line of reasoning does no longer suffice and national courts will sometimes need to apply 'additional' national rules in accordance with EU law or invent new legal remedies when they want to assure effective legal protection[111]. The case law of Constitutional Courts where violations of EU law are eliminated by granting ordinary judges the power to fill the legislative gap, is consistent with the foregoing considerations.

The importance of this right to an effective remedy is also enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and Articles 6 and 13 of the European Convention on Human Rights (ECHR). In this regard, reference needs to be made to a recent decision of the European Court of Human Rights (ECtHR). In the case *P.F. v. Belgium*, the plaintiff failed the entrance

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[109] CJEU C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten,* 14 December 1995, § 17.

[110] CJEU C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, 3 October 2013, §98; T. Tridimas, *The General Principles of EU law* (2006), 418 et seq; L. M. Ravo, *The Role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions*, in *Sources of Law and Legal Protection* (2012), 102-106.

[111] CJEU C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, 3 October 2013, 103-104; P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials,* cit. at 57, 313-325; T. Nowak, F. Amtenbrink, M. Hertogh, M. Wissink, *National Judges as European Union Judges,* cit. at 49, 31; M. Dougan, *The vicissitudes of life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts,* in P. Craig, G. De Búrca (eds.), *The Evolution of EU law* (2011), 412-421.

exam for the judicial internship and contested that he did not have any recourse to a court to challenge this result, being an administrative act of the High Council of Justice[112]. In 2011 already, the Belgian Constitutional Court examined Article 14 of the coordinated laws on the Council of State that provides an exhaustive list of administrative acts against which an appeal for annulment can be brought before the Council of State. The Constitutional Court determined that, seeing that candidates for other civil services had the possibility to challenge the results of their exams via an appeal for annulment, the absence of a similar judicial guarantee for candidates that did not succeed the entrance exam for the judicial internship, violated the principles of equality and non-discrimination. The Court declared the contested norm, i.e. Article 14, to be constitutional and found only the absence of such a similar recourse unconstitutional. Considering the need to secure the independence of the High Council of Justice, the Court emphasized that only the legislator could fill the unconstitutional legal gap, possibly by providing special guarantees which were not implemented in the coordinated laws on the Council of State[113].

In the aftermath of this preliminary ruling, the Council of State dismissed the appeal of the plaintiff as inadmissible. After all, given the exhaustive list in Article 14 of the coordinated laws, the Council was not competent to treat the appeal[114]. Invoking Article 6 § 1 ECHR, the plaintiff complained about the absence of any recourse against a decision of the High Council of Justice regarding the result of an entrance exam for the judicial internship and the Belgian Government acknowledged the violation of Article 6 § 1 ECHR. This infringement of Article 6 ECHR could have been avoided if the Belgian Constitutional Court would have enlarged the field of application of Article 14 of the coordinated laws. In this way, the appeal before the Council of State should have been allowed.

[112] Decision ECtHR No. 70759/12, *P.F. v. Belgium,* 23 August 2016.
[113] Belgian Constitutional Court 20 October 2011, No. 161/2011.
[114] Council of State 8 May 2012, No. 219.268 and No. 219.267, www.raadvanstate.be, accessed May 8, 2018.

5. Concluding remarks

National Courts, including Constitutional Courts, play a pivotal role in securing a uniform application of EU Law. Consequently, it is questionable whether Constitutional Courts adhere to the spirit of the *Simmenthal* mandate and therefore contribute to the immediate application of EU law by not reviewing the (in)compatibility between national law and EU law when constitutional questions arise[115]. Within the *Simmenthal* case, the ECJ explicitly circumscribed the mandate of *national* courts, and therefore not exclusively *ordinary* courts, to set aside national legislation violating EU law[116]. Especially in direct proceedings, where no ordinary court can guarantee the protection of EU law, this strict division of competences can be questioned. What is more, when legislative omissions violate EU law, the principles of equivalence and effectiveness dictate that Constitutional Courts should similarly apply the techniques they use on a national level to fill an unconstitutional gap on cases where a legislative gap violates EU law. It has been shown that on a national level, Constitutional Courts often provide an effective remedy by instructing lower judges on how to fill the unconstitutional gap. Such an active performance by the Courts can definitely be considered as an appropriate measure when applied within a European context, thereby eliminating a violation of EU law. In this way, Constitutional Courts ensure a uniform application of EU law within the national legal order and provide clarity and legal certainty for citizens and ordinary courts while awaiting a legislative reaction[117].

[115] D. Piqani, *The Role of National Constitutional Courts in Issues of Compliance*, cit. at 51, 137-138.
[116] CJEU C-106/77, *Amm. finanze v Simmenthal SpA*, 9 March 1978, §21.
[117] V. Ferreres Comella, *Constitutional Courts & Democratic Values,* cit. at 19, 20-26, 136-137.