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## ARTICLES

### **France is 'Already' Back in Europe: The Europeanization of French Courts and the Influence of France in the EU**

**Marie-Pierre Granger\***

This article analyzes the recent 'pro-European' case law of the French *Conseil d'État* and *Conseil Constitutionnel* in the light of its wider legal and political context, in order to identify the reasons behind this jurisprudential evolution. It concludes that, paradoxically, this jurisprudence is not motivated by pro-European considerations, but by the desire to restore French influence in Europe, protect French fundamental values and interests, and increase the scope of judicial control over the French Legislator and Administration.

Cet article analyse la récente jurisprudence 'pro-européenne' du *Conseil d'État* et du *Conseil Constitutionnel* à la lumière de son environnement légal et politique, afin d'identifier les raisons de cette évolution jurisprudentielle. Il conclut que, de façon assez paradoxale, cette jurisprudence n'est pas motivée par des considérations en faveur de l'intégration européenne, mais par un désir de restaurer l'influence française en Europe, de protéger les valeurs et intérêts fondamentaux de la France, et d'accroître la portée du contrôle juridictionnel sur le législateur et l'administration française.

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‘*La seule solution d’une certaine grandeur française, c’est de faire l’Europe.*’<sup>1</sup>

## 1. A European Wind has blown over the *Palais Royal*:<sup>2</sup> Preliminary Reflections on Possible Causes

‘[T]onight, France is back in Europe’, declared new French President Nicolas Sarkozy, on the eve of his electoral victory. French judges, however, did not wait for him to bring France back in Europe. For a few years already, they have engaged into a more sustained and constructive dialogue with their colleagues of the European Court of Justice (ECJ) in Luxembourg. They have referred more cases to the ECJ under Article 234 EC preliminary ruling procedures<sup>3</sup> and have taken a number of decisions, which furthered legal integration in Europe. In particular, the *Conseil Constitutionnel*<sup>4</sup> adopted a series of decisions which granted an important degree of constitutional immunity to national legislation directly implementing European Community (EC) Directives, whilst increasing the control of the compatibility of national parliamentary statutes with European Union (EU) law. As for the *Conseil d’État*, it delivered three important rulings,<sup>5</sup> which improved the compliance pull in favour of EU law as well as judicial control over national implementing acts.

These apparently very ‘pro-European’ judicial decisions strongly contrast with the long-standing distrust displayed by French constitutional and administrative judges towards EU law and its courts.<sup>6</sup> The emotion at this departure from earlier

<sup>1</sup> ‘The only way of maintaining France’s greatness, is to make Europe’ (Fernand Braudel, *La dynamique de l’Occident*, 1976, cited in *Conseil d’État, ‘Rapport Public 2007 Jurisprudence et avis 2007: L’administration française et l’Union européenne: quelles influences? quelles stratégies? La Documentation Française, Études & Documents* No. 58, Paris 2007, available at <[www.conseil-etat.fr/ce/rapport/rapport2007/rap07.pdf](http://www.conseil-etat.fr/ce/rapport/rapport2007/rap07.pdf)>, p. 34).

<sup>2</sup> Building which hosts both the *Conseil d’État* and the *Conseil Constitutionnel* (the latter in the Montpensier street side).

<sup>3</sup> See the *ECJ Annual Report 2006, Statistics of judicial activity at the Court of Justice*, available at <[www.curia.europa.eu/en/instit/presentationfr/rapport/stat/06\\_cour\\_stat.pdf](http://www.curia.europa.eu/en/instit/presentationfr/rapport/stat/06_cour_stat.pdf)>.

<sup>4</sup> Decision 2004-497 DC on the Act relating to electronic communications and services of audiovisual communication of 1 July 2004; Decision 2004-499 DC on the Act relating to the protection of physical persons regarding the treatment of personal data of 29 July 2004; Decision 2004-498 DC on the Act on bioethics of 29 July 2004; Decision 2006-540 DC on the Act relating to copyright and related rights in the information society of 27 July 2006; Decision 2006-543 DC on the Act relating to the energy sector of 30 November 2006, and Decision 2006-535 DC on the Equal Opportunity Act of 30 March 2006. All are available at <[www.conseil-constitutionnel.fr](http://www.conseil-constitutionnel.fr)>.

<sup>5</sup> Decisions CE, Ass., No. 234560, *Société De Groot en Slot Allium BV*, 11 December 2006; CE, Ass., No. 287110, *Société Arcelor Atlantique et Lorraine et autres* and CE, Ass., No. 279522, *M. Gardedieu*, 8 February 2007, all available at <[www.conseil-etat.fr/ce/jurisp/index\\_ju.shtml](http://www.conseil-etat.fr/ce/jurisp/index_ju.shtml)>.

<sup>6</sup> See K. Alter, *Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe* (Oxford-New York: Oxford University Press, 2001), 129.

resistance was such that some journalists went as far as to announce that French judges had surrendered to Europe. Indeed, a reader of the respectable daily newspaper *Le Monde* on 9 February 2007 would have learned that global warming had 'an unexpected consequence: a new transfer of French sovereignty to the European level' and that 'the *Conseil d'État* [had] disappear[ed] behind European justice'.<sup>7</sup>

These press commentaries were exaggerated, and most academic analyses of the constitutional and administrative decisions concluded on more qualified opinions as to the actual scope of the 'surrender' to Europe, if surrender there was at all.<sup>8</sup> Yet, whilst commentaries on the substance and scope of the recent case law are plenty, very few authors investigate the reasons behind the recent judicial moves.<sup>9</sup> A number of commentators seem to think that peer-pressure<sup>10</sup> and judicial

<sup>7</sup> C. Jakubyszyn, 'Le *Conseil d'État* s'efface derrière la justice européenne' *Le Monde* 9 February 2007, 10.

<sup>8</sup> See, inter alia, on the *Conseil Constitutionnel*'s decisions: P.-Y. Monjal, 'Le *Conseil Constitutionnel* français et les directives communautaires: l'incompétence du juge suprême comme garantie de l'inopposabilité de la Constitution au droit communautaire?', *Revue du droit de l'Union européen*, 3 (2004): 509; J.-P. Kovar, 'Commentaire des décisions du *Conseil Constitutionnel* du 10 juin et du 1er juillet 2004 rapport entre le droit communautaire et le droit national', *Revue trimestrielle de droit européen* 3 (2004): 580-597; B. Genevois, 'Le *Conseil Constitutionnel* et le droit communautaire dérivé', *Revue française de droit administratif* 4 (2004): 651; F. Chaltiel, 'Nouvelles variations sur la constitutionnalisation de l'Europe. A propos de la décision du *Conseil Constitutionnel* sur l'économie numérique', *Revue du marché commun* 480 (2004): 450 and 'Nouvelle précision sur les rapports entre le droit constitutionnel et le droit communautaire. La décision du *Conseil Constitutionnel* du 27 juillet 2006 sur la loi relative aux droits d'auteurs', *Revue française de droit constitutionnel* 68 (2006): 837; S. Denys, 'L'obscur clarté de la jurisprudence du *Conseil Constitutionnel* relative à la transposition des directives communautaires', *Europe* 10 (2006): 2. On the *Conseil d'État*'s decisions, see D. Simon, 'La jurisprudence récente du *Conseil d'État*: le grand ralliement à l'Europe des juges?', (2007) *Europe* 5; F. Lenica and J. Boucher, 'Note on CE ass., 8 February 2007, *Société Arcelor Atlantique* – Le juge administratif et le statut constitutionnel du droit communautaire dérivé', *AJDA* (2007): 577 and 'Note on CE Ass., 8 February 2007, *Gardedieu* – Hiérarchie des normes et contentieux de la responsabilité *AJDA* (2007): 585; C. Broyelle, 'La responsabilité de l'Etat du fait de la loi non conventionnelle: une nouvelle hypothèse de responsabilité sans faute de l'Etat législateur', *La Semaine Juridique Administrations et Collectivités territoriales* 14 (2007): 2083; G. Drago 'La "guerre des juges" n'aura pas lieu', *La Semaine Juridique Administrations et Collectivités territoriales* 14 (2007): 2081; M. Gautier and F. Melleray, 'Le *Conseil d'État* et l'Europe: fin de cycle ou nouvelle ère?', *Droit Administratif* 5 (2007): 9; P. Cassia, 'La décision *Gardedieu* est-elle suffisamment intelligible?', *RFDA* (2007): 1041; A. Levade, 'Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires', *RFDA* (2007) 564. The decisions of the *Conseil d'État* have also been vividly commented on the 'blogosphere'. See for example the blog 'Droit Administratif' at <www.blogdroitadministratif.net>.

<sup>9</sup> For an analysis of the motivations behind older case law on the status of EC law in French law, see Alter, *supra* n. 6, 124-208.

<sup>10</sup> E.g. Simon *supra* n. 8, and R. Errera, 'Recent decisions of the French *Conseil d'État* – note on M. Gardedieu, 8 February 2007', *Public Law* (2007): 595, 596.

learning<sup>11</sup> are the main explanations behind the new case law, whilst others hint instead at judicial empowerment<sup>12</sup> as a more likely motivation.<sup>13</sup>

Although peer-pressure and judicial learning certainly played a role in defining the modalities of the recent judicial cooperation and reception of European doctrines,<sup>14</sup> they cannot have been determinant in the timing of the judicial shift. Indeed, pressure from the European Court of Justice (ECJ)<sup>15</sup> as well as from the European Court of Human Rights (ECtHR),<sup>16</sup> had been exerted for many decades already, and did not particularly increase recently.

Furthermore, the recent cases were decided at a time when many national supreme courts were displaying some resistance to the supremacy of EU law over national constitutional provisions in relation to the national implementations of the European Arrest Warrant.<sup>17</sup> The constitutional courts of some of the new Member States even

<sup>11</sup> For arguments according to which time and learning matter for national courts' cooperation with the ECJ, see J. Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', *West European Politics* 19 (1996): 360.

<sup>12</sup> General explanations of domestic courts' attitude towards EU law based on judicial empowerment have been provided by J.H.H. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law* 1 (1981): 267; 'The transformation of Europe', *Yale Law Journal* 100 (1991) 2403; and 'A Quiet Revolution: The European Court of Justice and its Interlocutors', *Comparative Political Studies* 26 (1994): 510; A.-M. Burley and W. Mattli, 'Europe before the Court – A Political Theory of Legal Integration', *International Organization* 47 (1993): 41. See also the various contributions in A.-M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998).

<sup>13</sup> See J. Bell, 'French Constitutional Council and European Law', *Int'l & Comp. L.Q.* 54 (2005): 735, 736.

<sup>14</sup> In particular now that French judges have more frequent contacts with their counterparts in other Member States, through various networks such as the 'Association of the Councils of States and Supreme Administrative Courts of the European Union' or the 'Network of presidents of supreme judicial courts of the European Union.'

<sup>15</sup> The ECJ established the doctrine of supremacy of EC law back in 1964 (C-6/64 *Costa v. ENEL* [1964] ECR 584) and confirmed its application to national constitutional provisions in 1978 (C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629). As to State liability, the ECJ first imposed it more than 15 years ago (Joined Cases C-6 and 9/90, *Francovich v. Italy* [1991] ECR-I 5357) and confirmed it 10 years ago (C-46 and 48/93, *Brasserie du Pêcheur v. Germany and R. v. Secretary of State for Transport, ex. p. Factortame* [1996] E.C.R. I-4845).

<sup>16</sup> ECtHR case law on full compensation and State liability for legislative breaches dates back to the mid-1990s (*Papamichalopoulos and others v. Greece*, A 330-B [1995] ECHR 45, *Heinrich v. France*, Appl. 13616/88 of 3 July 1995 and *Beyeler v. Italy*, No. 33202/96 [2003] 36 E.H.R.R. 5).

<sup>17</sup> E.g., inter alia, Polish Constitutional Court, Decision P 1/05 of 27 April 2005; German Federal Constitutional Court, Decision 2BvR 2236/04 of 18 July 2005; Supreme Court of Cyprus, Decision 294/2005 of 7 November 2005; and Czech Constitutional Court Decision 66/04 of 3 May 2006.

took the opportunity offered by EU accession to assert the unconditional primacy of their national constitutions over EU law.<sup>18</sup>

Moreover, the French Constitutional Court and Supreme Administrative Court could not have been influenced by their judicial counterpart.<sup>19</sup> First, the *Cour de Cassation* has for long been a Euro-friendly court;<sup>20</sup> second, it has not decided any significant cases concerning the status of EU law over the recent years;<sup>21</sup> and third, judges of the *Cour de Cassation* are endowed with less prestige than their constitutional and administrative colleagues, who tend to look down on them.<sup>22</sup> The fact is, influence is more likely to travel in the other direction. For example, in 2000, it was the *Cour de Cassation*<sup>23</sup> which followed the *Conseil d'État*<sup>24</sup> in a 'nationalistic' move, where they both confirmed that the Constitution sat at the apex of the hierarchy of norms, and above international conventions.<sup>25</sup>

As for legalistic explanations, they have little explanatory value here. Indeed, in 1992, the French Constitution was amended to provide an additional and specific basis for France's participation in the EU. If the legal framework itself was exerting some normative pull on judicial decision-making, it should have provoked changes in the case law then, in the early 1990s, and not only a couple of years ago.

There is also no evidence that there has been a significant increase of pressure from litigants, either individual or corporate, which could have pushed the courts towards greater regard for EU law.<sup>26</sup>

<sup>18</sup> E.g. Polish Constitutional Court Decision, K 18/04. See comments in Chalmers et al., *European Union Law* (Cambridge: Cambridge University Press, 2006), 198-201.

<sup>19</sup> France has a dual judicial system, comprising of administrative courts on one side, with the *Conseil d'État* at its apex, and judicial courts on the other side, headed by the *Cour de Cassation*. The *Conseil Constitutionnel* stands apart from these two judicial orders. A *Tribunal des Conflits* decides on jurisdictional conflicts between the two courts regimes.

<sup>20</sup> The *Cour de Cassation* recognized the supremacy of EC law over national laws as early as 1975, in the Decision C.Cass., civ., *Société Cafés Jacques Vabre*, 24 May 1975 [1975] Dalloz 497.

<sup>21</sup> It has nonetheless recently decided a case (C.Cass, Com., *Zertuf*, 10 July 2007) in line with the case law of the ECJ on online gambling (C-243/01 (*Gambelli and Others*) [2003] ECR I-13031 and C-359/04 and C-360/04 (*Placanica and others*), judgment of 6 March 2007, nyr), opening a breach in the long standing monopoly of the national horse betting operator (PMU).

<sup>22</sup> B. Latour, *La fabrique du droit: Une ethnographie du Conseil d'Etat* (Paris: La Découverte, 2002).

<sup>23</sup> C. Cass, Ass., *Pauline Fraisse*, 2 June 2000 [2000] RTDciv. 672.

<sup>24</sup> CE, Ass., *Sarran, Levacher et autres*, 30 October 1998 [1998] Rec. 368.

<sup>25</sup> Both cases dealt with the European Convention on Human Rights and Fundamental Freedoms (ECHR).

<sup>26</sup> Arguments related to pressure from litigants have been put forward by neofunctionalists, e.g. W. Mattli and A.-M. Slaughter, 'Constructing the European Community Legal System from the Ground-Up: The Role of Litigants and National Courts', Jean Monnet Paper No 06/96, available at <[www.jeanmonnetprogram.org/papers/96/9606ind.html](http://www.jeanmonnetprogram.org/papers/96/9606ind.html)> or new institutionalist scholars, e.g. K.

Finally, one could not easily argue that the courts tuned in with the Government's line towards the EU,<sup>27</sup> and even less with public opinion. Indeed, earlier decisions were delivered at a time where the question of further European integration divided politicians beyond party or governmental lines, and the later decisions when anti-European feelings in France were at their peak, following the rejection of the 'European Constitution' by the French in the 2005 referendum.

The timing, as well as substance, of the recent case law developments may however well have been influenced by changes in composition and leadership of both courts. It is no secret that the then newly appointed President of the *Conseil Constitutionnel*, Pierre Mazeaud (2004-2007), a fervent Gaullist, wanted the EU Treaty amended to include an exception to the supremacy of Community law where it conflicted with a constitutional rule or principle of a Member State.<sup>28</sup> Yet, the 2004 decision also coincided with V. Giscard d'Estaing, the 'father' of the European Constitution, resuming its position in the *Conseil Constitutionnel*, and the membership of Simone Veil, a virulent supporter of the European Constitution. As noted by Bell, this provided for a spicy mix,<sup>29</sup> with powerful members likely to pull in opposite directions. On the other side of the *Palais Royal*, Jacques Biancarelli, former judge at the Court of First Instance (CFI), was appointed head of the *Conseil d'État's* Community law section, whilst Bernard Stirn became President of the *Conseil d'État's* Litigation section (from 2006).<sup>30</sup>

Moreover, it is obvious that considerations of opportunity prompted the adoption of some of the recent judicial decisions. For example, by clarifying its position on the relationship between EU law and French constitutional law in the summer of 2004, the *Conseil Constitutionnel* wanted to make its voice heard, in the final stage of the negotiations on the European Constitution.<sup>31</sup> One can also confidently assert that the recent *Conseil d'État's* ruling on Directives' implementation was triggered by the window opened by the constitutional decisions relating to Directives implementation, which not only paved the way for further judicial control by ordinary courts, but even instructed them to increase their oversight on national implementing instruments.

Alter, 'The European Legal System and Domestic Policies: spill-over or backlash', *International Organization* 54 (2000): 489.

<sup>27</sup> General argument put forward by M. Volcansek to explain national courts' acceptance of supremacy. See M. Volcansek, *Judicial Politics in Europe* (New York: Peter Lang, 1986).

<sup>28</sup> P. Mazeaud, *Le Monde*, 20 January 1996, 13, reproduced in *Revue Française de droit constitutionnel* 28 (1996): 702.

<sup>29</sup> Bell, *supra* n. 13, 737.

<sup>30</sup> For a sample of his views on EU matters, see interview with Bernard Stirn, 'Le droit administratif français, européen et global: bilan et perspectives', available at <europeanlawnetwork.eu/blog/wp-content/uploads/2007/08/el\_n\_interview\_1\_2007\_bernard\_stirn\_fr.pdf>.

<sup>31</sup> For a similar opinion, see Bell *supra* n. 13, 737.

However, notwithstanding the above, I submit that policy considerations regarding the risks of non-compliance with EU law, concerns regarding the influence of France and French values in European integration, and judicial empowerment, were the main driving forces behind the recent decisions.

In this article, I will present and analyze the recent decisions of the *Conseil Constitutionnel* and *Conseil d'État*, in the light of their wider political and legal context, in order to identify the reasons behind the recent constitutional and administrative jurisprudence. I will argue that, paradoxically, what lies behind the French new 'European' case law is a desire to protect French interests and to restore the place and influence of France in the process of European integration, as well as expanding the scope of judicial review of legislation. In the first part, I will introduce the relevant political and legal context. In the second and third part, I will analyze the decisions of the *Conseil Constitutionnel* and *Conseil d'État* respectively, and in the final part I will conclude on an assessment of the real motivations behind the jurisprudential shift.

## 2. The Wider Political and Legal Context: An Essential Element for Understanding Recent Case Law

French Supreme Administrative and Constitutional Courts are, even more than any other courts, likely to be influenced by the wider, including political, context of their decisions. This is so because of their special composition and roles. First, the *Conseil Constitutionnel* is composed for a large part of former politicians appointed on a political basis by the President of the Republic and the presidents of both chambers of the Parliament (*Assemblée Nationale* and *Sénat*), and includes former Presidents of the Republic, such as V. Giscard d'Estaing and J. Chirac.<sup>32</sup> Second, it is called upon to adjudicate on the basis of constitutional references (*saisines*) made by politicians in the context of political battles over legislation between the Majority and the Opposition. As to the *Conseil d'État*, it is composed of *énarques* (i.e. graduates of the famous *École Nationale d'Administration*, or ENA), who, during their career, navigate between judicial, administrative and political functions in the *Conseil d'État*, Government and Administration. Moreover, the *Conseil d'État* is not only the Supreme Administrative Court, but also acts as the Government's legal advisor. It reviews the legality of draft governmental acts and legislative bills (*projets de loi*) before their adoption. Therefore, although both the *Conseil Constitutionnel* and *Conseil d'État* couch their decisions in legal terms, it makes little doubt that, within the (sometimes wide) margin of discretion allowed by legal reasoning, they are influenced by political and policy considerations.<sup>33</sup>

<sup>32</sup> All former presidents are entitled to sit in the *Conseil Constitutionnel*.

<sup>33</sup> In fact, some sensitivity to the political context of their decision-making is considered desirable by most commentators. See G. Carcassone, '*Conseil Constitutionnel* on the European Constitutional

It is argued that three policy considerations have undeniably had a significant impact on the two courts' recent judicial positions: France's compliance problem, the loss of French influence in Europe, and the limited scope of constitutional review.

## 2.1 France's Endemic 'Implementation Deficit'

One of the most significant backgrounds against which the recent wave of pro-European judicial decisions must be assessed is the compliance situation. France has one of the worst records for compliance with EU law.<sup>34</sup> On 1 January 2007, France ranked 23rd out of 25 for the number of infringement procedures started against it, which placed it in a worse position than Italy.<sup>35</sup> France is also at the bottom of the scoreboard when it comes to transposing Directives properly and on time, and this despite some amelioration in the last few years.<sup>36</sup>

The initiative taken by the Commission, and supported by the Court,<sup>37</sup> to (finally) actively use the possibility introduced by the Treaty of Maastricht (1992) of imposing financial penalties on Member States found in breach of a prior ECJ ruling declaring them in breach of EC law (Article 228(2) EC), did not go unnoticed in French governmental quarters. Former Prime Minister D. de Villepin released various instructions (*circulaires*), aimed at improving France's transposition records,<sup>38</sup> in order to avoid heavy financial sanctions. A 'High Level Group for Adjustment to Community Law' was created, which gathered the two Implementation Delegates in each ministry, under the authority of the Government's General Secretary and the 'General Secretariat of the Inter-ministerial Committee for Questions on European Economic Co-operation' (shortened as SGCI), an inter-ministerial coordination body reporting to the Prime Minister.

Treaty. Decision of 19 November 2004, 2004-505 DC' *European Constitutional Law Review* (2005) 1: 293, 294.

<sup>34</sup> For a recent explanation of France's poor compliance record, see T. Borzel et al., 'Recalcitrance, Inefficiency and Support for European Integration: Why do Member States (Not) Comply with European Law' (paper presented at EUSA Conference, 2007) available at <[www.unc.edu/euce/eusa2007/papers/borzel-t-02a.pdf](http://www.unc.edu/euce/eusa2007/papers/borzel-t-02a.pdf)>.

<sup>35</sup> Rapport 2007 *supra* n. 1, 321.

<sup>36</sup> Scoreboard for Internal Market Directives Transposition 2007, available at <[ec.europa.eu/internal\\_market/score/docs/score15bis/score15bis\\_en.pdf](http://ec.europa.eu/internal_market/score/docs/score15bis/score15bis_en.pdf)>, 22 June 2007.

<sup>37</sup> In July 2000, the ECJ for the first time imposed on Greece a fine of 20000 EUR for each day of delay in implementation on Greece. See Case C-387/97 *Commission v. Greece* [2000] ECR I-5047.

<sup>38</sup> *Circulaire* of the Prime Minister of 27 September 2004 relating to the follow-up procedure to the transposition of Community Directives in internal law, <[www.admi.net/jo/20041002/PRMX0407654C.html](http://www.admi.net/jo/20041002/PRMX0407654C.html)> and *Circulaire* of the Prime Minister of 27 September 2004 relating to the procedure of transposition in internal law of directives and framework decisions negotiated in the framework on European institutions, <[www.admi.net/jo/20041002/PRMX0407654C.html](http://www.admi.net/jo/20041002/PRMX0407654C.html)>.

The movement amplified after the shock wave of summer 2005, when France was condemned to an EUR 20 million lump sum *and* more than an EUR 57 million periodic penalty payment, for failure to comply with a previous ECJ ruling which had found France guilty of allowing 'under-size fishing', in breach of Community law.<sup>39</sup> On 17 October 2005, the Government engaged in a reform of its European policy coordination structure. It adopted a decree creating an 'Interministerial Committee for Europe' (*Comité Interministériel pour l'Europe*) and transforming the SGCI into the more focused 'General Secretariat for European Affairs' (*Secrétariat Général pour les Affaires Européennes*, SGAE).<sup>40</sup> In November, another ministerial instruction was circulated relating more specifically to the transposition of Community acts by means of legislative measures.<sup>41</sup>

Meanwhile, in Brussels, the Commission released a Communication in which it exposed its plan to systematically ask the ECJ to impose both lump sum and periodic penalty payment on defaulting Member States and to adjust the amount of the financial penalties to the seriousness and length of the violation of Community law, so as to deter Member States from failing their compliance obligations.<sup>42</sup> Recently, the Commission reiterated that compliance with Community law was one of its priorities and issued recommendations for Member States on how to improve their implementation records.<sup>43</sup>

This pressure from Brussels led the French Prime Minister, in April 2006, to commission the *Conseil d'État* to carry out a study aiming at finding ways of improving the implementation of Community law in France, based on the practices of other Member States. The working group was led by the Head of the Community Law section of the *Conseil d'État*, Jacques Biancarelli, with as Rapporteur Jean-Luc Sauron. The latter, a former *magistrat* (ordinary judge), acted for almost a decade as a legal counsellor at the SGCI, where he developed a proper judicial strategy.<sup>44</sup> In 2000, he released a major study on 'The French Administration and the European Union',<sup>45</sup> where he recommended a stronger European strategy for the French administration. Sauron was thus more than well qualified to make a diagnosis on

<sup>39</sup> Case C-304/02, *Commission v. France* [2005] ECR I-6263.

<sup>40</sup> Decree of 17 October 2005 relating to the *Comité Interministériel sur l'Europe* (CIE) and to the *Secrétariat Général des Affaires Européennes* (SGAE), No. 2005-1283, JORF of 18 October 2005.

<sup>41</sup> *Circulaire* of the Prime Minister of 19 November 2005 relating to the application of Art. 88-4 of the Constitution, <[www.admi.net/jo/20051125/PRMX0508865C.html](http://www.admi.net/jo/20051125/PRMX0508865C.html)>.

<sup>42</sup> EC Commission, Communication on the application of Art. 288 of the EC Treaty, SEC (2005) 1658, at <[ec.europa.eu/community\\_law/eulaw/pdf/sec\\_2005\\_1658\\_en.pdf](http://ec.europa.eu/community_law/eulaw/pdf/sec_2005_1658_en.pdf)>.

<sup>43</sup> EC Commission, Communication 'A Europe of results – Applying Community law', COM (2007): 502 final, <[www.ec.europa.eu/community\\_law/eulaw/pdf/com\\_2007\\_502\\_en.pdf](http://www.ec.europa.eu/community_law/eulaw/pdf/com_2007_502_en.pdf)>.

<sup>44</sup> I am grateful to an anonymous referee for this information.

<sup>45</sup> J.-L. Sauron, *L'administration française et l'Union Européenne* (*La Documentation Française*, 2000).

the French European policy and to suggest appropriate remedies. The commissioned report, entitled 'For a better insertion of Community norms in national law,' was completed and approved on 22 February 2007,<sup>46</sup> just a few weeks after the *Conseil d'État*'s pro-European decisions. It called for better anticipation, simplification and adaptation in the process of implementation of EU law.

Despite these governmental efforts and pressure from EU quarters, France still has a bad record for the implementation of Community Directives, which under the new Community priorities is risky, both politically and financially.

## **2.2 Deficient European Policy Coordination and the Loss of Influence of France in the EU: the *Conseil d'État*'s Call for a 'True Strategy of Political Influence'**

Another influential political factor is a general loss of French influence over EU decision-making processes. To some extent, this comment could apply to all Member States, since enlargement from 15 to 27 countries reduces the 'power share' of every single Member State. Some countries are nonetheless using their voice more efficiently than others. The United-Kingdom, often cited as an example (including by the *Conseil d'État* itself),<sup>47</sup> has developed a strong policy of influence in Europe, supported by effective governmental decision-making, strategic planning and policy-definition.<sup>48</sup> France for its part, once a leading member of the EU whose European cooperation model organized around the SGCI was copied in other Member States, is nowadays losing ground. The slow demise of the French-German leadership, as well as the erosion of the use of French as the main EU communication language to the benefit of English certainly do not help. Yet, the main causes of France's loss of influence lay in major flaws in the definition and promotion of the French European policy. The *Conseil d'État* is very much aware of this, and in its role as governmental advisor, it chose to dedicate its influential 2007 annual report to European policy coordination and organized an international conference on national administrations and the EU.<sup>49</sup>

The thematic part of the 2007 *Conseil d'État*'s report was entitled '*The French Administration and the European Union. Which Influences? Which Strategies?*'.<sup>50</sup> Drafted by an eminent member of the *Conseil d'État* endowed with experience of

<sup>46</sup> *Conseil d'État*, 'Pour une meilleure insertion des normes communautaires dans le droit national', study approved on 22 February 2007, available at <[www.ensmp.net/pdf/2007/070405Etude%20transposition.pdf](http://www.ensmp.net/pdf/2007/070405Etude%20transposition.pdf)>.

<sup>47</sup> See below.

<sup>48</sup> See H. Kassim, G. Peters, and V. Wright, *The National Co-ordination of EU Policy – The Domestic Level* (Oxford: Oxford University Press, 2000).

<sup>49</sup> Journée d'Etudes du Conseil d'Etat: 'Les administrations nationales et l'Union européenne', 12 October 2007, Institut d'Etudes politiques, Paris.

<sup>50</sup> 2007 Report, *supra* n. 1.

European policy definition, Madame Josseline de Clausade<sup>51</sup> (from the Report and Studies Section), it allocated more than a hundred pages to the influence and strategy of the French Administration in the EU. The first part reviewed the opportunities for influence which EU decision-making structures provided Member States with, whilst the second part, entitled 'The French Administration, an important actor in EU processes: what strategies?',<sup>52</sup> dealt with how the French Administration should make use of these many opportunities.

In the editorial, Jean-Marc Sauvé, the new Vice President, emphasized the two key elements that needed to be taken seriously in any reform of the French European policy coordination. One must acknowledge first, that 'European time [was] a long time', and second, that 'the border between European questions and internal affairs' was 'increasingly porous'.<sup>53</sup>

The *Conseil d'État* thus made proposals which bore these two aspects in mind. The introduction to the report stressed the demographic, economic and political importance of the EU, before moving on to French influence on the process of European integration. It reminded the readers of the glorious past, the role played by famous Frenchmen in the European project (i.e. Duke of Sully, Victor Hugo, Aristide Briand, Jean Monnet, Robert Schuman), the signature of the European Coal and Steel Community Treaty in Paris in 1951, the fact that the first President of the High Authority was French (Jean Monnet), that the European Commission had two French presidents (Francois-Xavier Ortoli and Jacques Delors), that the European Parliament had six French presidents, and that the President of the European Central Bank is French (Jean-Claude Trichet). It then talked about the French financial contributions and benefits.

The *Conseil d'État* then abruptly stopped its praise, to make what it called a 'surprising' observation: 'today, France struggles to manage the whole range of strategies which would allow it to continue the pursuit, in harmonious conditions consistent with national interests, of European construction.'<sup>54</sup>

The *Conseil d'État* referred to its 1992 report,<sup>55</sup> which had already pulled the alarm bell, calling for a greater taking into account of the European dimension. Observing the changes which had occurred in EU governance since 1992, it remarked that European governance was 'culturally and sociologically closer to Anglo-Saxon methods of government than those originating in the legal tradition of Roman law,' and included a wider range of both institutional and non-institutional

<sup>51</sup> Mrs de Clausade acted as adviser to Edith Cresson when she was at the European Affairs Ministry and then when she was Prime Minister.

<sup>52</sup> My translation.

<sup>53</sup> Editorial by Jean-Marc Sauvé in 2007 Report, *supra* n. 1, 7-12, 10-11.

<sup>54</sup> 2007 Report, *supra* n. 1, 233.

<sup>55</sup> Conseil d'État, Rapport Public 1992, extract of '*Considerations Générales: Sur le droit communautaire*' (La Documentation Française, 1993).

actors. Consequently, 'the French Administration had to adapt its organization and procedures to this new reality.'<sup>56</sup>

The *Conseil d'État* was scathing in his comments about the French inability to make strategic alliances with economic and social actors as well as other Member States, something which it considered as indispensable in a Europe of 27 members.<sup>57</sup> It insisted that EU institutions are 'permeable' to influence and called for 'new strategies for [the French] Administration.'<sup>58</sup> These are: greater political anticipation, improved integration of priority objectives, increased coordination of French voices emanating from public authorities and economic and social actors, exemplarity in the transposition and application of Community law, development of a European reflex in law-making activities, greater legal information, more strategic interventions before the ECJ and public functions management.

It is very revealing that, straight at the beginning of the 'Strategies' part, the first model in terms of organization and strategies to influence EU decision-making mentioned by the *Conseil d'État* is the United-Kingdom (followed by Denmark, Finland, Ireland, Spain, Poland, Italy and Germany). From the study of these Member States, the *Conseil d'État* concluded that the French European policy should allow for listening to and debating with all interested domestic actors before the negotiation phase, to reach a common position consistent with the general interest. It considered that these early discussions could help reach a compromise which would be fully endorsed by interested domestic players and would then be effectively and consistently promoted by all institutional and non-institutional actors. These early discussions would be useful even further down the line, for they would facilitate fast implementation and proper application of Community law. A similar strategy of open early discussions should be pursued in relation to other Member States, with the view of forming ad hoc alliances on specific issues. The Government should also seek greater influence in the European Parliament, through increased contacts with MEPs and active participation in parliamentary committees and plenary sessions. Finally, France should maintain a strong presence within the various decision-making formations and working groups of the Council of Ministers. In order to achieve this, French positions should be clearly defined, by the SGAE or if needs be, the Cabinet, following all necessary consultations.

The *Conseil d'État* dismissed from the back of the hand the traditional excuse put forward to explain the loss of influence, i.e. the prominence of short-term concerns in French political life, since this was not typical of the French society, to conclude:

'it is not out of reach of the authorities and the Administration to agree to a harder effort of anticipation, search for alliance and exemplarity. The eminent place that

<sup>56</sup> 2007 Report, *supra* n. 1, 234.

<sup>57</sup> *Ibid.*

<sup>58</sup> 2007 Report, *supra* n. 1, 235.

Europe occupies in the choices governing the future of our country and in the elaboration of the legal corpus which will contribute to shape this future, calls also for the development, in all decision-making processes, of a real European reflex.<sup>59</sup>

The 2007 Report of the *Conseil d'État* thus sent out a clear message to the French Government and Administration. It should definitely abandon ineffective and costly non-compliance strategies, and replace them by effective strategies of political and legal influence. This strategy was proposed by the *Conseil d'État* acting as the Government's advisor; it carried it through when acting as the Government's watchdog (i.e. as Supreme Administrative Judge), assisted by its constitutional colleagues.

### **2.3. Limited *Contrôle de Conventionalité* and *Contrôle de Constitutionnalité* in France until 2004**

In France, until recently, the control of the conformity of laws and regulatory acts with the Constitution (in French *contrôle de constitutionnalité*) was limited, and so was, although to a lesser extent, the review of compatibility of French legal acts with international law, including Community law (in French, *contrôle de conventionnalité*). It is important to review these modalities of control, for they will be fundamentally altered by the recent jurisprudence of both the *Conseil Constitutionnel* and the *Conseil d'État*. Moreover, the fundamental question – which of the French Constitution or EC law should have ultimate supremacy – had not, until recently, been properly addressed by the French judiciary, although it could have real practical repercussions.

#### **2.3.1 Control of the Compatibility of National Laws and Administrative Acts with the Constitution**

The control of the conformity of legislation with the Constitution, introduced by the 1958 Constitution, marked a rupture with the sovereignty – some would say dictatorship – of the *loi*, which prevailed until then. However, this control, as originally planned, was very limited and aimed primarily at preventing the legislator from encroaching upon the law-making prerogatives of the executive. The *Conseil Constitutionnel* could only check the compatibility of laws referred to it by the Presidents of the Republic, of the Assembly and of the Senate, and the Prime Minister. Where all four institutions belonged to the same political group, as was the case until the 1980s, the newly created court would be reduced to forced silence.

<sup>59</sup> 2007 Report, *supra* n. 1, 296-297.

Things however changed in 1974 when a reform introduced the possibility for 60 members of the National Assembly (Lower Chamber) or the Senate (Higher Chamber) to refer laws to the *Conseil Constitutionnel*. This amendment enabled the Opposition to use the constitutional reference as a political tool, which increased the frequency of the constitutional review of legislation.<sup>60</sup> Moreover, in 1971, the *Conseil Constitutionnel*, on its own initiative, extended the scope of its review by incorporating into the *bloc de constitutionnalité*, i.e. the list of norms of reference, the Preamble of the 1958 Constitution, which itself referred to the 1789 Declaration of the Rights of the Man and Citizens, and the Preamble of 1946 Constitution.

Yet, it remained that the control of laws for their conformity with constitutional norms only took place *a priori*, that is before the promulgation of the law. Once the law was promulgated, its constitutionality could no longer be assessed. Moreover, the control was abstract in nature, which did not always enable the detection of incompatibility with constitutional rules, when they arose at the level of the practical application of the legislation.

Individuals could not refer legislation directly to the *Conseil Constitutionnel*, either before or after the promulgation of the law, and neither could national courts. Ordinary courts could nevertheless control that administrative acts conformed to the Constitution, but only if no legislative measures intervened to protect the administrative act. This doctrine of the '*loi-écran*', or legislative screen, which is still in force today in relation to the Constitution, was nonetheless definitely abandoned with regard to Community law.<sup>61</sup> This led to a paradoxical situation whereby ordinary courts could set aside the application of national legislation which did not conform to international law, but they could not do so where such legislation was contrary to the Constitution.

### **2.3.2. Control of Conformity of French Legal Acts with International Law, including Community Law**

Until recently, the *Conseil Constitutionnel* did not control the conformity of national legislation with international law (*contrôle de conventionnalité*). In a controversial decision of 1975 concerning the Abortion Act,<sup>62</sup> the constitutional judges refused to enforce the supremacy of international agreements over subsequent legislative acts, for it considered that, unlike that of the Constitution, the supremacy of international

<sup>60</sup> On the political use of the deferral of a law to the *Conseil Constitutionnel*, see A. Stone Sweet, *The Birth of Judicial Politics in France: The Conseil Constitutionnel in Comparative Perspective* (New York: Oxford University Press, 1992).

<sup>61</sup> See below, 2.3.2.

<sup>62</sup> Decision 74-54 DC of 15 January 1975 on the Abortion Act [1975] D. Jur. 529.

agreements referred to in Article 55 of the French Constitution was too limited and contingent to be enforced against posterior legislation.<sup>63</sup>

At the time, there were doubts as to whether ordinary courts could enforce Community law supremacy, but a few years later, the constitutional judges gave the go-ahead to their administrative and judicial colleagues and instructed them to control the compatibility of national laws with international conventions, within their respective jurisdictions.<sup>64</sup> The *Cour de Cassation* started carried out such compatibility review from the 1970s (*Jacques Vabre*). However, the *Conseil d'État* was far less willing to act as a Community court. In the 1960s and 1970s, it took a number of decisions which blocked the penetration of EC law into French law. In the *Semoules* case,<sup>65</sup> it refused to give precedence to a treaty over a posterior legislative act, thereby going against the ECJ case law on the supremacy of EC law over ordinary domestic law.<sup>66</sup> In *Cohn Bendit*,<sup>67</sup> it denied an individual the possibility to rely on Directives' provisions against individual administrative acts, thereby rejecting the direct effect of Directives, established by the ECJ in *Van Duyn*.<sup>68</sup> The *Conseil d'État* remained on its positions until the late 1980s-early 1990s, when it finally accepted the supremacy of Community law over ordinary (i.e. non-constitutional) domestic law.<sup>69</sup> In the following years, it adopted various rulings whose objects or effects were supportive of European legal integration.<sup>70</sup>

<sup>63</sup> Art. 55 of the 1958 Constitution reads: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.'

<sup>64</sup> Decision 86-216 DC of 3 September 1986 on the Act on the conditions for entry and residency of foreigners.

<sup>65</sup> *Semoules*, *supra* n. 69.

<sup>66</sup> Case C-6/64, *Costa v. ENEL* [1964] ECR 614.

<sup>67</sup> CE, *Ministre de l'Intérieur v. Cohn Bendit*, 22 December 1978, [1978] Rec. Lebon 524, [1980] 1 CMLR 545.

<sup>68</sup> Case C- 41/74, *Van Duyn* [1974] ECR 1337.

<sup>69</sup> CE, Ass., *Nicolo*, 20 October 1989, Rec.190 (in relation to EC Treaty provisions), CE, *Boisdet* [1991] 1 CMLR 3 (in relation to Regulations), CE, *Rothmans and Philip Morris and Arizona Tobacco and Philip Morris*, 28 February 1992 [1993] 1 CMLR 253 (in relation to Directives).

<sup>70</sup> See inter alia, CE, Ass., *Companie Alitalia*, 3 February 1989, Rec. 44 (duty of the administration to repeal decrees in breach of EU directive); CE, Ass., *Société Arizona Tobacco Products and S.A. Philip Morris* 28 February 1992 Rec. 78 (state liability for breach of EC Directives by implementing decrees); CE, sect., 23 June 1995, *Société Lilly France* (1995) RFDA 5. 1037 (impossibility for a public authority to rely on a non-implemented directive); CE, ass., *M. Tête et l'Association de sauvegarde de l'Ouest Lyonnais*, 6 February 1998 Rec. 30 (effects of EC Directives and application by administrative courts); CE, sect., *Association ornithologique et mammologique de Saône-et-Loire et Rassemblement des Opposants a la Chasse*, 3 December 1999, Rec. 379 (conflict between EU Directive and national law; discretion of minister in withdrawing incompatible acts and introducing compatible measures); CE, Ass., *Ligue pour la Protection des Oiseaux et Autres*, 25 January 2002, Rec. 429 (annulment of decree incompatible with EC Directive; preliminary reference to the ECJ as to whether derogations provided by decree compatible with EC Directive).

According to Alter, the *Conseil d'État* 'changed its jurisprudence regarding the primacy of European law because it became clear that not being involved in enforcing European law was undermining its own power and France's influence over European legal interpretation.'<sup>71</sup> It is argued that the recent rulings proceed on a similar logic, taken one step further.

To sum up, until the recent decisions, the control of the conformity with Community law of French parliamentary laws was carried out by the ordinary courts, through the judicial review of non-legislative measures adopted on the basis of parliamentary laws, themselves allegedly incompatible with EC law (i.e. mechanism of indirect review of legislation). The major inconvenience was that the legislative act was not formally invalidated, since only the *Conseil Constitutionnel* had such power of constitutional review of legislation. Only its application was set aside in the case at hand. This solution was thus not satisfactory in terms of legal certainty. It could place the Administration in a difficult position, requiring ministers, for example, to disobey the law in order to fulfil their Community obligations.

### **2.3.3 Control of Compatibility between the French Constitution and International Law, including Community Law, and the Question of Ultimate Supremacy**

Regarding the question of the compatibility between French constitutional norms and international law, under Article 54 of the Constitution, *the Conseil Constitutionnel* could review the compatibility of not yet ratified international agreements with the Constitution. If there was a discrepancy, either the treaty should be modified, or the Constitution should be amended, to guarantee compatibility, before the treaty could be ratified. The latter has been done many times, to allow the ratification of EU Treaties. As far as international treaties which were signed before the coming into force of the 1958 Constitution, such as the EC Treaty,<sup>72</sup> were concerned, as well as provisions of treaties which had been duly ratified and published, these were unchallengeable under Article 54. This was the case even at the occasion of amending treaties.<sup>73</sup> The constitutional judges also refused to control, under both Article 54 and Article 61 of the Constitution (relating to the control of conformity of national laws with the Constitution), the compatibility of EC Regulations with the French Constitution.<sup>74</sup>

Until 1992, the French Administrative and Judicial Supreme Courts had grounded their acceptance of the supremacy of Community law over national legislation on Article 55 of the Constitution, which concerned more generally the supremacy of international treaties over national laws. However, in 1992, a constitutional amend-

<sup>71</sup> Alter *supra* n. 6, 129.

<sup>72</sup> Decision 70-39 DC of 19 June 1970.

<sup>73</sup> Decision 92-308 DC of 9 April 1993.

<sup>74</sup> Decision 77-89 DC and Decision 77-90 DC of 30 December 1977.

ment introduced a new specific constitutional basis for France's participation in the EU and EC. The new Article 88-1 of the Constitution read: 'The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.'<sup>75</sup> This new Article 88-1 could provide an additional, and more suitable, constitutional basis for recognizing the supremacy of Community law, as well as for the control by the Constitutional Council of the conformity of legislative acts with EU law. It is nevertheless not until 12 years later that the *Conseil Constitutionnel* drew the full consequences of this amendment.

Furthermore, the question of which, of the French Constitution or of EC law prevailed, had not been definitely and consistently addressed by the French judiciary. The *Conseil Constitutionnel* had not come back on its 1975 position, whilst the *Conseil d'État* in its *Sarran et Levacher* decision (1998) and the *Cour de Cassation* in *Fraisse* (2000) had affirmed the supremacy of the French Constitution over international agreements.<sup>76</sup> It was however not clear whether this would be also applicable to Community law. Only the *Conseil d'État* explicitly addressed this question in 2001, in the *SNIP* case, where it held that the Constitution prevailed also over Community law.<sup>77</sup> Furthermore, the following year, it delivered, in its advisory capacity, an opinion in which it recommended a revision of the Constitution, to reduce contradictions between the EU Framework Decision on the European Arrest Warrant and the French Constitution.<sup>78</sup> One was thus expecting some confirmation of this position by the constitutional court sooner rather than later.

The recent case law of both the *Conseil Constitutionnel* and the *Conseil d'État* must be studied against this background of incomplete control of domestic acts for their compatibility with two higher sources of law, Community law and the French Constitution, and in the context of an unresolved question of ultimate supremacy, which has practical consequences with which the courts will be confronted.

<sup>75</sup> Version prior to its amendment related to the EU Constitution.

<sup>76</sup> *Supra* n. 23 and n. 24.

<sup>77</sup> CE *Syndicat national de l'industrie pharmaceutique* (SNIP), 3 December 2001, AJDA (2002): 1219.

<sup>78</sup> CE Ass., *avis*, 26 September 2002 No. 368282 (2003) EDCE 192. One should bear in mind however that, first, this opinion was delivered before the 2004 *Conseil Constitutionnel's* decision on Directives' implementation, and second, the context of this decision is different, since it operated within the intergovernmental Third Pillar of the EU, in which supremacy and direct effect are not (yet) applicable.

### **3. The New Case Law of the *Conseil Constitutionnel*: EU Compliance and Protection of National Constitutional Identity Combined for Greater Influence**

The *Conseil Constitutionnel*'s recent case law on EU Directives, as well as its decision on the compatibility of the 'Constitution for Europe' with the French Constitution, must be studied if one is to fully understand the wider context in which the recent case law of the *Conseil d'État* was elaborated. Indeed, the constitutional judges paved the way for their judicial and administrative colleagues to increase judicial scrutiny over implementing measures, in relation to their compatibility with both the French Constitution and Community law. These judicial developments, together with some of the policy considerations mentioned in the previous sections, strongly influenced the timing of the *Conseil d'État*'s recent decisions, as well as their substance.

The *Conseil Constitutionnel* has, since the summer of 2004, adopted a number of important decisions, in which it clarified its own jurisprudence on the relationship between French law and EU law and on the jurisdiction of French courts to directly or indirectly review the compatibility of domestic acts with both constitutional law and EU law. These constitutional rulings found some echoes in other constitutional jurisdictions in Europe, but the French approach remained an original one, aimed primarily at improving France's compliance record, whilst protecting and promoting core French values, as well as extending the scope of judicial control.

It is argued that the delay in making use of the constitutional window opened in 1992 by the introduction of the new Article 88-1 in the Constitution was not only because of an absence of judicial opportunity,<sup>79</sup> but also to the lack of emergency in guaranteeing the full and proper implementation of Community laws. In 2004, the problem of non-compliance became suddenly more acute, due to the Commission's increased activism. Moreover, the discursive context was suddenly more enticing, due to the on-going debate on the European Constitution, which included an explicit supremacy clause (Article I-6). In its recent decisions, the *Conseil Constitutionnel* thus clearly took a position aimed at facilitating the transposition of Directives into the French legal order, whilst trying to maintain sufficient judicial scrutiny over the conformity of Directives and their implementing acts with fundamental rights and values protected by the French Constitution, as well as improving opportunities for French values to influence the development of European constitutional values. To do so, it, first, reinforced the constitutional duty of transposition by granting

<sup>79</sup> Cases relating to the compatibility with the Constitution of national legislative measures implementing Directives did not concern the actual implementing measures. E.g. Decision 78-100 DC of 29 December 1978, Decision 94-348 DC of 3 August 1994, and Decision 96-383 DC of 6 November 1996, cited in C. Richard, 'The Supremacy of Community Law before the French Constitutional Court', *E.L.Rev.* 31 (2006): 499-517, 502.

constitutional immunity to EC Directives and incited the French 'ordinary' (i.e. non-constitutional) judges to exercise greater control over domestic implementing measures. Second, it made sure that core French constitutional values would remain untouched, and that the French Constitution ultimately prevailed. Third, it called for greater influential dialogue between French courts (including Supreme Courts) and the ECJ.

### 3.2 The New Constitutional Case Law: the 'Constitutional Duty' of Transposition of Directives and the Principle of Directives' Constitutional Immunity<sup>80</sup>

The Law on Confidence in E-Commerce was adopted on 13 May 2004, after 18 months of parliamentary debates. It provided a basis for Internet law in France, whilst implementing, with two years delay, the E-commerce Directive.<sup>81</sup> The Opposition referred the draft Law to the *Conseil Constitutionnel*. They challenged three of its provisions. One of them, Article 2, concerned the criminal and civil liability of service providers for information stored at the request of the recipient of services, and merely repeated the content of Article 14 (1) of the E-Commerce Directive. The Opposition argued that this provision conflicted with the freedom of communication protected by Article 11 of the French Declaration of the Rights of the Man and Citizen, with the rights of the defence and the right to a fair trial guaranteed by Article 16 of the same declaration, and with Article 66 of the Constitution on the prohibition against arbitrary detention.<sup>82</sup>

The *Conseil Constitutionnel* referred to the 'new' Article 88-1 of the Constitution cited above, from which it concluded that 'the transposition in domestic law of a Community Directive result[ed] from a *constitutional requirement*.'<sup>83</sup> This blunt statement was, expectedly, immediately qualified by a limitation, i.e. unless it conflicted with 'an express contrary provision of the Constitution.' The scope of this limitation will be discussed below, but let us remember for the moment that the declared constitutional duty of transposition conferred to the Directive a quasi-immunity from constitutional control.

The potential impact of this decision was well perceived by the *Conseil Constitutionnel*, which decided to delay the publication of the judgment by five days, in

<sup>80</sup> The expression 'constitutional immunity' has been used by various commentators. Amongst them, D.Rousseau in 'Il faut maintenant démocratiser l'Europe' in *Le Monde* of 9 February 2007, 10.

<sup>81</sup> Directive 2000/31/EC of the European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 1781.

<sup>82</sup> The 1789 Declaration of the Rights of the Man and Citizens belongs to the *bloc de constitutionnalité*, i.e. norms used by the *Conseil Constitutionnel* to control the constitutionality of legislative acts.

<sup>83</sup> Decision 2004-496 DC *supra* n. 4.

order to prevent interference with European Parliament elections due to take place on 13 June 2004. It feared, not without reason, that the decision could be portrayed by nationalistic and anti-European movements as a surrender of French sovereignty and could affect the electoral results.

### **3.3 Limits to Directives' Constitutional Immunity (from 'Express Provisions' to the 'Constitutional Identity' Exception) and Judicial Control over Directives**

In the first of the 2004 decisions, on the E-commerce law, the *Conseil Constitutionnel* stated that 'an express contrary provision of the Constitution' would override the constitutional duty to transpose a Directive.<sup>84</sup> At the time, the constitutional judges provided no further explanation as to what these express provisions might be, and why only such express provisions should be able to block transposition, irrespective of their actual importance in the constitutional framework.

It may be that this formulation was influenced by British judges, for it strongly reminded of the words used by Laws L.J. in the 2002 *British Metric Martyrs* case,<sup>85</sup> who, in substance, argued that only an 'express' provision from an 'ordinary' legislative act could repeal a 'constitutional' act such as the 1972 European Community Act (basis for the supremacy of Community law over British law).

The expression was nonetheless criticized by renowned French legal scholars, who considered that the clarity of the formulation of a constitutional provision did not reflect its normative value.<sup>86</sup> Moreover, if interpreted narrowly, it could exclude many elements of the *bloc de constitutionnalité*, such as fundamental rights, which are not protected directly by the Constitution but by the 1789 Declaration or other 'constitutionalized' sources.

It remained that where no such express contrary constitutional provision was at stake, it was for the Community judge, through direct actions (Article 230 EC) or preliminary rulings (Article 234 EC), to control the respect by a Community Directive of the competences defined by the Treaties as well as the fundamental rights guaranteed by Article 6 TEU.

One must note here that the *Conseil Constitutionnel* only granted quasi constitutional immunity to national legislative measures which drew 'the consequences of unconditional ... and ... precise ... provisions of the ... Directive.' This formula recalls the ECJ's definition of direct effect, which enables individuals to invoke Directives before national courts against incompatible national laws. The fact that the *Conseil Constitutionnel* limited the application of the immunity only to this type of provisions proceeded of practical considerations, since only such uncon-

<sup>84</sup> *Ibid.*

<sup>85</sup> Queen's Bench Division, *Thoburn v. Sunderland City Council* [2002] EWHC 195, LJ Laws.

<sup>86</sup> Genevois, *supra* n. 8.

ditional and precise provisions would be capable of imposing clear obligations of transposition on national legislators, leaving them little or no margin of discretion. Moreover, the limitation to national measures which drew the consequences of these unconditional and precise Directives' provisions was aimed at avoiding giving a 'blank check' to national legislations which either improperly transposed Directives, or for which the legislator has used some of the lee-way left by the directive to adopt an approach which did not conform to French constitutional rules, although such an approach was not required by the Directive. In other words, any implementing legislative measures which would *not* be the direct consequence of directives would remain subject to constitutional review.

This E-commerce decision marked the first step taken by the constitutional judges towards surrendering the constitutional control of Directives to the ECJ. This solution was confirmed in later decisions.<sup>87</sup> It was also further refined and modified, in particular in relation to the nature of constitutional norms that could block proper transposition.

In the case concerning the Bioethics Act,<sup>88</sup> Members of Parliament argued that an express provision of the Constitution, Article 11 of the 1789 Declaration of the Rights of the Man (free communication of ideas and opinions), stood in the way of the legislative transposition of an EC Directive. However, as noted by the *Conseil Constitutionnel*, since freedom of expression was also protected at EU level, in particular by means of a general principle based on Article 10 ECHR which the EU was bound to observe (Article 6 EU), it was for the ECJ to assess the validity of the directive in the light of these higher ranking EU norms. The *Conseil Constitutionnel* thus refrained from any further assessment of that claim and left the matter to its Luxembourg colleagues, who would take a stance on the matter when a case concerning the validity of the directive would be brought before them.<sup>89</sup>

The French constitutional judges explained that where a similar constitutional norm exists at EU level, then it would be against this norm that the Directive and its direct implementing measures should be evaluated, and not against the norm's French equivalent. Reasoning *a contrario*, one would find that directives' implementing measures could still be checked against constitutional principles which have no equivalent at European level. This interpretation was supported by the *Conseil Constitutionnel*'s official commentary on the decision, which stated that 'the only constitutional norms which c[ould] be opposed to the transposition of Community Directive are express provisions of the French Constitution which [we]re specific to it.'<sup>90</sup>

<sup>87</sup> Decision 2004-497 DC *supra* n. 4, paras 18-19 and Decision 2004-499 *supra* n. 4, paras 7-8.

<sup>88</sup> Decision 2004-498 DC *supra* n. 4.

<sup>89</sup> Note that the ECJ did so in its ruling on Case C-377/98 *Kingdom of the Netherlands v. European Parliament* [2001] ECR I- 7079.

<sup>90</sup> *Cahiers du Conseil Constitutionnel* (2004) No. 17, commentary on Decision 2004-498, available at <[www.conseil-constitutionnel.fr/cahiers/ccc17/jurisp498.htm](http://www.conseil-constitutionnel.fr/cahiers/ccc17/jurisp498.htm)>.

This was made explicit two years later, in a decision on the Copyright Act.<sup>91</sup> The main objective of that law was to adapt French intellectual property law to new information and communication technology and to transpose the relevant EC Directive.<sup>92</sup> The text was referred to the *Conseil Constitutionnel*, which enumerated the various constitutional norms against which the statute would be reviewed, starting with a number of fundamental rights, and finishing with obligations specific to a transposition statute. In relation to the latter, it specified that the constitutional obligation of transposition contained two limitations, one substantive and one procedural.<sup>93</sup>

The first limit, the substantive one, consisted in a ‘constitutional identity’ exception to the duty of transposition. The constitutional judges based their reasoning on Article I-5 of the Treaty establishing a Constitution for Europe (not ratified), which provided for the Union respecting the Member States’ national identities, inherent in their fundamental political and constitutional structures. They stated that ‘the transposition of the Directive [could] not run counter to a *rule or principle inherent to the constitutional identity of France*, except when the constituent power consent[ed] thereto.’ The *Conseil Constitutionnel* did not explain what these rules or principles inherent to the constitutional identity of France were. *Laïcité* (secularism) immediately sprang to mind. However, other norms, such as the republican form of government, the rules related to the organization of public services or the use of French language, the indivisibility of the Republic, and so on, could also fall in this category, for these would either not gather consensus at European level or, because of the nature of the EU as a supranational organization, would not be suited to such entity and thus would not have an equivalent at EU level.

The constitutional identity exception to the constitutional immunity of Directives nevertheless appeared narrowly circumscribed and unlikely to have important practical consequences, unless it would be interpreted widely. In fact, it could be argued that this identity-based exception was more aimed at sweetening the pill, rather than placing a real limit to the surrender of constitutional control. By this case law, the *Conseil Constitutionnel* signalled that it would only review national legislation directly transposing Directives against ‘core’ constitutional norms inherent to the constitutional identity of France and which have no equivalent at EU level. The ordinary ‘constitutional control’ of Directives (i.e. its compatibility with fundamental rights and competence rules) would thus be handed over to the ECJ, which should assess them in the light of European constitutional rules. National im-

<sup>91</sup> Decision 2006-540 DC *supra* n. 4, para. 19.

<sup>92</sup> Directive 2001/29/EC relating to the harmonization of some aspects of copyright and related rights in the information society [2001] OJ L 167, p. 10.

<sup>93</sup> The procedural limit concerned the inability of the *Conseil Constitutionnel* to refer a question for a preliminary ruling to the ECJ, due to the time-limit of one month (or even one week) within which it must deliver its decisions and to the abstract nature of the a priori constitutional review it carried out. See below for further development on this issue.

plementing measure would thus benefit from a 'presumption of constitutionality,'<sup>94</sup> unless they did not properly transpose the Directives, or were in breach of a French constitutional norm, which had no equivalent at EU level.

It is important to note however, that the *Conseil Constitutionnel* did not provide for a blanket immunity, but for a case-by-case approach. In that way, it followed in the footpath of the Italian Constitutional Court, which announced that it would still control on a case-by-case basis whether transposing legislation was not contrary to fundamental principles of the Italian constitutional order or did not violate inalienable human rights.<sup>95</sup> It was different from the general presumption of compatibility with fundamental rights granted by the German Constitutional Court since its '*Solange II*' ruling<sup>96</sup> or the European Court of Human Rights in its *Bosphorus* decision,<sup>97</sup> by which these courts surrendered control to the ECJ as long as the EU provided for an 'equivalent protection.' In that respect, the case-by-case approach of the French Constitutional Judges was more careful than the blanket approach of their Karlsruhe or Strasbourg colleagues, but the scope of their control was more limited, focused on norms specific to the French constitutional order, whilst its foreign counterpart would check the substantial equivalence of overall regime of rights protection. Moreover, the French judges have handed over the control of *Kompetenz-Kompetenz* to the ECJ, whilst many of their European counterparts have refused to do so. Indeed, the Danish and German constitutional courts reserved for themselves the power to check whether an EC measure fell within EU competence.<sup>98</sup>

The limits imposed by the French *Conseil Constitutionnel* may appear not very substantial. Indeed, the constitutional judges surrendered both the control of competence to the ECJ, as well as the general control of respect of fundamental rights, with the only exception based on French constitutional identity. If the exception were restricted to norms such as secularism and the republican form of government, then the constitutional immunity would be almost complete. If, however, it would be interpreted more extensively, that is as including norms which did not receive *substantially* similar protection at EU level, then it might constitute a more real barrier to EC law supremacy and to the surrendering of constitutional control over the conformity of EU secondary acts with the national constitution. We will see below that the latter interpretation is the one favoured by the *Conseil d'Etat*.

<sup>94</sup> Lenica and Boucher *supra* n. 8, 581.

<sup>95</sup> *Corte Costituzionale, SpA Fraga v. Amministrazione delle Finanze*, Dec. 232, 21 April 1989.

<sup>96</sup> *Bundesverfassungsgericht, Wünsche Handelsgesellschaft ('Solange II')* 22 October 1986 [1987] CMLR 225, at 265.

<sup>97</sup> ECtHR, *Bosphorus v. Ireland*, Application No. 45036/98, judgment of 30 June 2005.

<sup>98</sup> *Bundesverfassungsgericht, Brunner v. EU Treaty (So lange III)*, 12 October 1993 [1994] CMLR 57; Danish Supreme Court, *Carlsen and Others v. Prime Minister* 6 April 1998 (1999) 24 ELR 80.

One must also point out that the constitutional judges not only limited possible exceptions to the constitutional immunity of Directives, but that they also provided for an escape-route in case of direct conflict between a rule or principle inherent to the constitutional identity of France and an EU norm. They enabled the constituent power to 'consent' to EU law impinging upon such norms inherent to the constitutional identity of the State. The 'constitutional identity' exception is thus not absolute, for it can be waived by the constituent power.

This analysis of recent constitutional case law showed that the *Conseil Constitutionnel* granted a quasi constitutional immunity to national legislative acts faithfully implementing EU secondary law. It surrendered most of its control over the constitutionality of Directives and their direct legislative measures of implementation. The basis for such surrender of power was nonetheless a national constitutional provision, Article 88-1, which suggested that it was ultimately the Constitution which prevailed, not Community law itself. This was confirmed in the decision on the Constitution for Europe.

### **3.4 Supremacy v. Supremacy: the Ultimate Supremacy of the French Constitution**

As soon as the Treaty establishing a Constitution for Europe (TCE) had been signed, the President of the Republic J. Chirac submitted it for constitutional review to the *Conseil Constitutionnel*. Various European provisions were scrutinized, including its Article I-6 regarding the supremacy of Union law over the law of the Member States.<sup>99</sup> For sure, the supremacy of Community law over national laws, including national constitutional law, was not news (despite some tabloids' headlines on the matter), for it had been confirmed by the ECJ some thirty years before.<sup>100</sup> Yet, inscribing supremacy in the Treaty would undeniably increase its normative weight.

The supremacy clause thus appeared at odds with the constitutional case law elaborated during summer 2004, to the extent that the case law allowed a constitutional identity exception to supremacy. How would the constitutional judges reconcile these two conflicting sets of norms, in a way which did not close the door to the domestic ratification of the TCE?

They did so by means of a strange 'consistent' interpretation.<sup>101</sup> They read Article I-6 TCE in the light of the declaration annexed to the Treaty relating to Article I-6, which explained that the purpose of this provision was to codify the

<sup>99</sup> Article I-6 of the Treaty establishing a Constitution for Europe provides: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

<sup>100</sup> *Supra* n. 15.

<sup>101</sup> Decision 2004-505 DC on the Treaty establishing a Constitution for Europe, of 19 November 2004.

existing status quo, and not to grant to the principle of supremacy a scope wider than it already had. Moreover, they referred to Article I-5 TCE according to which the Union respected the 'national identity' of the Member States, 'inherent in their fundamental structures, political and constitutional.'<sup>102</sup> In the judges' mind, this provision offered a sufficient Union legal basis for affording limited exceptions to the principle of supremacy of EU law based on national constitutional specificities. The combined interpretation of Article I-5 and I-6 led the *Conseil Constitutionnel* to conclude that the TCE modified 'neither the nature of the European Union, nor the scope of the principle of supremacy of Union law',<sup>103</sup> and therefore did not require constitutional revision.

It nonetheless took that opportunity to remind us that the Constitution was still 'at the apex of the internal legal order',<sup>104</sup> and this notwithstanding the name of Constitution granted to the TCE, which remained by nature an international treaty. It however recognized the specificity of Community law, as a legal order 'integrated to the internal legal order and distinct from the international legal order.'<sup>105</sup>

The argumentation of the *Conseil Constitutionnel* was puzzling, for it was unclear how the current scope of Community law supremacy, defined by the ECJ as absolute, could be compatible with the French constitutional identity exception. The most probable explanation for this contorted reasoning was the judges' motivations. There were clearly a majority of members who did not want to block the national ratification of the TCE, and the acknowledgment of a conflict between Article I-6 TCE and the French Constitution would have led to tremendous difficulties. Either the Constitution would have to be amended to include a provision expressly granting supremacy to Union law even over French constitutional norms, or the TCE would have to be renegotiated to remove the primacy clause. Both were politically unachievable.<sup>106</sup> The only option was thus to adopt the ostrich strategy and pretend that there was no problem. Other provisions of the TCE were found incompatible though, and led to unproblematic revisions of the Constitution. But as we know, the TCE collapsed before another obstacle than the *Conseil Constitutionnel*, since it died by the hand of the original constituent, the French people themselves.

In any case, that decision provided a clear answer from the *Conseil Constitutionnel* to the supremacy question, and its position on the matter was in line with those adopted a few years before by the *Conseil d'Etat* and the *Cour de Cassation*.<sup>107</sup> One of the important side-effects of the recent constitutional case law was that it

<sup>102</sup> Para. 12. Note that a similar provision already exists in the EU Treaty, although in softer and more vague terms, under para. 3 of the current Art. 6 EU.

<sup>103</sup> *Ibid.*, para. 13.

<sup>104</sup> *Ibid.*, para. 10.

<sup>105</sup> *Ibid.*, para. 11.

<sup>106</sup> See C. Richards, 'The Supremacy of Community Law before the French Constitutional Court', *E.L.Rev.* 31 (2006): 499-517, 511.

<sup>107</sup> *Supra* n. 23 and 24.

increased judicial control of national implementing legislation with Directives, which contributed to improve the compliance pull.

### 3.5 Assuming The Control of the Compatibility of National Legislative Acts with Directives

The control of conformity of national legislation with EU law is an important aspect of the recent constitutional decisions. Indeed, in these recent decisions on implementing laws, the *Conseil Constitutionnel* finally departed from its 1970s passive case law and assumed jurisdiction to check the compatibility of national laws with EU Directives. We remember that in its controversial 1975 Abortion decision,<sup>108</sup> the Constitutional Judges had declared themselves incompetent to check the compatibility of national statutes with international treaties, in that case the ECHR. The seeds for a reversal of that case law were already planted in the 2004 decisions, and in March 2006, another decision prepared the ground for it.

Following the fall 2005 riots in Paris and other French cities, an Equal Opportunities Act was adopted which aimed at reducing the ‘*fracture sociale*.’ It was referred in draft to the *Conseil Constitutionnel*, which stated that

‘whilst the transposition in domestic law of a Community Directive result[ed] from a constitutional requirement, it d[id] not belong to the *Conseil Constitutionnel*, whilst it [was] seized in application of Article 61 of the Constitution, to examine the compatibility with the provisions of a Community Directive of a law whose object [was] *not* to transpose it in domestic law.’<sup>109</sup>

Reasoning *a contrario*, one would conclude that the *Conseil Constitutionnel* would check the compatibility with the Directive of national measures whose purpose *was* to transpose the Directive. Explicit confirmation came soon after.

In the Copyright Law decision, the Constitutional Judges referred to the existence of a procedural limitation to the constitutional duty of transposition, in addition to the substantive one concerning the constitutional identity of France. They reminded that, they, themselves, could not request a preliminary ruling from the ECJ under Article 234 EC. They then relied on the ECJ doctrine of ‘*acte clair*,’<sup>110</sup> although without naming it, and declared that they ‘could only find a statutory provision unconstitutional under Article 88-1 of the Constitution if this provision [was] obviously incompatible with the Directive which it intended to transpose.’ Consequently, in other – less clear – cases, it would be ‘incumbent upon national courts of law ... to refer a matter to the [ECJ] for a preliminary ruling.’<sup>111</sup>

<sup>108</sup> *Supra* n. 62.

<sup>109</sup> Decision 2006-535 DC *supra* n. 4, para. 28.

<sup>110</sup> Case C-283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415.

<sup>111</sup> Decision 2006-540 DC *supra* n. 4.

By this decision, the *Conseil Constitutionnel* not only confirmed its own competence to check the compatibility of legislative implementing statutes with directives and invalidate them if they were clearly in breach of an EC Directive, but also instructed administrative and judicial courts to use the preliminary reference procedure where a legislative implementation was not clearly in breach of a Directive, but might be so. In the case at hand, it was possible to interpret national legislation in conformity with the Directive, and therefore it was not invalidated.

This jurisprudence relating to the scope of French courts' jurisdiction to review implementing measures in the light of Community law was further developed in a case decided in November 2006, relating to the Energy Act. The statute's immediate aim was to privatize *Gaz de France*, the historic public natural gas provider, in order to allow its merger with the group *Suez*. The Act also purported to transpose all Community Directives on the opening up of the energy market as from 1 July 2007.<sup>112</sup> The law was referred to the *Conseil Constitutionnel* by the Opposition,<sup>113</sup> which challenged its Article 39 on the transfer of GDF to the private sector. The challenge did not concern the implementation of the Directives in any way, but the constitutional judges decided, of their own initiative,<sup>114</sup> to check the compatibility of Article 17 of the Act with the Directives. In doing so, they sent a clear signal that they considered as one of their constitutional tasks to routinely control the compatibility of national legislation placed under their scrutiny with EC law, even if the issue was not brought up in the constitutional reference.

In the case at hand, Article 17 provided for regulated price for the provision of gas and electricity. EU law generally aims at the free fixing of prices, and only allows for the possibility of regulated tariffs, to the extent that they are made strictly necessary because of a specific requirement of public service. The *Conseil Constitutionnel* found that the legislative provisions imposed regulated price conditions which had no connection with an objective of public service, and therefore were manifestly against the objective of opening-up the competitive markets for electricity and natural gas provided by the Directives. This was therefore, in the constitutional judges' mind, a situation of 'clear' violation. They declared the national provision contrary to the duty of transposition imposed by Article 88-1 of the Constitution.

The reasoning applied by the constitutional court confirmed that, from now on, a breach of a Directive would constitute a constitutional violation, which it would be empowered to raise of its own motion and sanction, where the violation left no

<sup>112</sup> Directive 2003/54 of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market of electricity and repealing Directive 96/30/EC and Directive 2003/55/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market of natural gas and repealing Directive 96/30/EC.

<sup>113</sup> Decision 2006-543 DC *supra* n. 4.

<sup>114</sup> The *Conseil Constitutionnel* is not bound by the terms of the reference and can examine any aspects of an act which could affect its constitutionality.

doubt. In more doubtful situations, it would be for ordinary courts to refer the matter to the ECJ, which was thereby identified as the competent court for such matters.

This jurisprudence should have some impact on legislative law-making, and incite the legislator to run its bills through a thorough EU law compatibility check, if it does not wish to have them rejected by the constitutional judges, or 'disgraced' by the ECJ following a preliminary ruling by ordinary courts. Indeed, due to the frequent use of reference to the *Conseil Constitutionnel* by the Opposition as a political tool, most laws pass nowadays through the *Conseil Constitutionnel*, and could, from now on, be routinely controlled for their compatibility with relevant EU norms, if they aim at transposing Community law, which is increasingly the case since a large share of national measures constitutes implementation of Community rules. Moreover, even if these laws would escape the *Conseil Constitutionnel's* scrutiny, or if the constitutional judges overlooked some incompatibilities with EC Directives, the ordinary courts should take the baton and disapply the national laws incompatible with such Directives, if needs be following a request for a preliminary ruling.

These constitutional decisions clearly tackle the compliance problem, and increase the pressure on the Government to propose, and on the Parliament to adopt, legislation which is compatible with Community law.

### **3.6 The Constitution under the Mask of EU Law: Increasing the Scope of the Control of National Legislation for Compatibility with Fundamental Rights**

It is observed that, more often than not, rather than pulling in opposite directions, EU law and national constitutional law draw subordinate legal norms towards 'higher constitutionality.' French constitutional judges are aware of their limited constitutional review power, due to the abstract and *a priori* nature of their control. Through their recent case law, they opened new avenues for individuals to challenge the compatibility with fundamental rights of national legislative and administrative acts, by means of appeal to EU 'constitutional' norms. As eloquently put by G. Drago, the French Constitution 'advances ... under the mask of the principles of Community law.'<sup>115</sup>

The recent case law therefore further undermined the theory of the *loi-écran*, which still prevented ordinary courts from controlling statutes' implementing measures with the Constitution, for the (unconstitutional) law protected the implementing measures from the Constitution. It not only opened the door for ordinary courts to engage in the control of compatibility of national laws and their application decrees with Community Directives, it also imposed on them a constitutional duty to do so, and to cooperate more with the ECJ in the process.

<sup>115</sup> G. Drago, *supra* n. 8.

The *Conseil d'État* reacted rather swiftly, and in early 2007, called for a greater control by administrative courts of the proper application of Community law, even where national legislative acts were at stake.

#### **4. *Sté de Groot, Gardedieu and Arcelor*, or the *Conseil d'État's* European Trilogy: Towards Greater EU Compliance and French Influence**

The most visible signs that the wind of change was blowing strongly in a new direction was the *Arcelor* ruling,<sup>116</sup> in which the *Conseil d'État* refused to check the compatibility of national regulatory measures directly implementing an EU Directive with French constitutional norms. But the 'European' turn of the *Conseil d'État* had already been announced in a previous decision adopted at the end of 2006, in the case *Sté de Groot en Slot Allium*,<sup>117</sup> in which it acknowledged the *erga omnes* binding effect of ECJ decisions. The *Arcelor* decision also cast some shadow over another important decision of the same day, which, although not dealing with EU, was directly connected to the enforcement of EU law in France. Nonetheless, in the *Gardedieu* ruling,<sup>118</sup> the *Conseil d'État* made it easier for individuals to sue the State for damages caused by national legislation adopted in violation of international conventions.

The three decisions will be analysed below, in the light of the historical background and their wider context, so as to assess their scope and to identify the deeper reasons behind these judicial developments. The analysis reveals that the judicial surrender is not as extensive as may appear at first sight, and that the real purpose of the new jurisprudence is to protect French interests and promote French values at European level.

##### **4.1.1 *The Franco-Dutch Shallots War' and the Erga Omnes Authority of ECJ Preliminary Rulings***

The *De Groot en Slot Allium BV* case arose from the 'Franco-Dutch Shallots War', in which a ministerial measure was challenged, which prevented the marketing under the name of 'shallots' of Dutch shallots, less scented and tasty, than the French ones grown in Brittany and the Loire Valley. The case had been heard by the *Conseil d'État* which had referred the case to the ECJ for a preliminary ruling on the interpretation of the relevant directives. Early 2006, the ECJ delivered its ruling, in which it declared that the relevant directives were not applicable and

<sup>116</sup> *Arcelor* decision, *supra* n. 5.

<sup>117</sup> *Sté De Groot en Slot Allium BV*, *supra* n. 5.

<sup>118</sup> *Gardedieu*, *supra* n. 5.

that the French ministerial act should be assessed in the light of other rules of Community law.<sup>119</sup> The Court concluded that the French act was in breach of the free movement of products (Article 28 EC), and was not justified by the need to protect consumers, since a less damaging measure could have been adopted instead (i.e. proper labelling).

Had the *Conseil d'État* followed its classic case law on the matter,<sup>120</sup> it would have concluded that the ECJ ruling had no binding authority for it went beyond the scope of the reference. However, it decided that the interpretation of the ECJ was binding on the national judge hearing the case. Of course, the national court could still decide on the facts, i.e. whether the two types of shallots could be properly distinguished by the consumers through labelling. The judge concluded that it was the case, and invalidated the decision which refused to withdraw the ministerial measure.

Following this ruling, there remained one important question, which was whether administrative courts would accept a real *erga omnes* authority of preliminary rulings, i.e. in a case brought before other courts and different parties. As put forward by D. Simon,<sup>121</sup> a firm stance of the *Conseil d'État* on the matter would be highly desirable, in particular since the tax authorities have imposed limits to the authority of Community preliminary rulings.<sup>122</sup> According to them, preliminary rulings only have binding authority when delivered by the ECJ on a reference by a French court, and not those resulting from preliminary references originating in other Member States' courts. A 2005 decision of the Administrative Court of Appeal of Douai<sup>123</sup> suggested however that administrative judges would accept the *erga omnes* effect of ECJ preliminary rulings, since it set aside French fiscal procedures, on the basis of a preliminary ruling delivered on a reference originating in the House of Lords.<sup>124</sup>

The effects of such jurisprudence should certainly reinforce the authority of Community case law, and impose a stronger pressure on the Executive to comply with ECJ interpretative rulings. Indeed, if they do not, they would be sanctioned for it in their own courts, which is far more compelling than the unlikely prospects of being brought to Court by the Commission under Article 226-228 EC enforcement procedure.

<sup>119</sup> Case C-147/04 *De Groot en Slot Allium BV et Bejo Zaden*, 10 January 2006, nyr.

<sup>120</sup> CE, sect., No 42204, 26 July 1985, ONIC, (1985) AJDA 615.

<sup>121</sup> D. Simon, *supra* n. 8, 6.

<sup>122</sup> Instruction DGI No 35 of 19 August 2006, BOI 13-0-1-06; Dr. Fisc. 2006, inst 13588.

<sup>123</sup> *Cour Administrative d'Appel* of Douai, No. 02DA00736, *Sté Segafredo Zanetti France*, 26 April 2005, Jurisdata No. 2005-277586.

<sup>124</sup> Case C-102/86 *Apple and Pear Development Council* [1988] ECR 1443.

#### 4.1.2 Gardedieu, a 'Quiet Revolutionary Judgment'<sup>125</sup>

In *Gardedieu*, the *Conseil d'État* created a new cause of action to engage state liability for legislative acts in breach of international agreements. Despite no direct connection with EC law, this case was nonetheless of significant importance for the relationship between French and EC law, since it went beyond what was required by the ECJ's jurisprudence on state liability.

Mr Gardedieu brought an action before the Social Security Affairs Tribunal to obtain reimbursement for contributions he had paid to a pension scheme, since the decree that provided for these contributions had been declared illegal. However, the decree was *a posteriori* validated by means of a legislative act, which led the tribunal to reject his claim. M. Gardedieu thus brought another action before the administrative court seeking compensation for the damage caused by the validating legislation, which, he argued, was contrary to Article 6(1) of the ECHR on the right to a fair trial.

The *Commissaire du Gouvernement* Derepas, advising the *Conseil d'État* on the case, presented its colleagues with three options.<sup>126</sup> First, the judges could stay within the remit of the existing regime of liability for legislative acts, i.e. a no-fault regime based on the principle of *rupture d'égalité devant les charges publiques* (breach of equality before public burdens), available only in the rare cases of special and serious damage and providing only for limited compensation. Second, they could resort to the principle of fault-based liability, traditionally used for engaging the State's liability for *administrative* acts. Third, the court could create a new cause of action. According to Derepas, the first option would risk causing confusion and diluting the concept of equality before public burden, and not provide for integral compensation of the damage and the second would amount to acknowledging that the legislator could commit a fault, which would be delicate. He therefore proposed to create a new cause of action, based on an objective regime independent of the concept of fault, according to which the State should be held responsible for legislative acts incompatible with international agreements if three conditions are fulfilled: violation of an international convention, damage and a causal link between the two.

The *Conseil d'État* adopted a solution, which was not completely consistent with the suggestions of its adviser. In fact, the exact nature of the new regime remains unclear.<sup>127</sup> In a *considérant de principe*, the *Conseil d'État* held that:

'[s]tate responsibility for legislative acts can be engaged, on the one hand, on the basis of the equality of citizens before public burdens, ... on the other hand, by reason of its obligations to guarantee the respect of international conventions by

<sup>125</sup> D. Simon, *supra* n. 8, 6.

<sup>126</sup> L. Derepas, concl. on CE Ass., *Gardedieu*, 8 February 2007, *RFDA* (2007): 361.

<sup>127</sup> On the lack of clarity of the *Gardedieu* decision, see P. Cassia *supra* n. 8.

public authorities, to compensate for all damage resulting from the intervention of a statute adopted in violation of France's international commitments.<sup>128</sup>

By not making any reference to the regime of liability for fault, it seemed that the *Conseil d'État* wanted to position the new regime outside of the traditional mechanism for administrative liability for fault, and within the remit of a specific regime for damages caused by legislative acts. It therefore opened a new ground for liability *du fait des lois* (for legislative acts), based on a violation of an international agreement. Unlike the regime of breach of equality before public burdens, this new regime allowed full compensation and did not require a special and unusual damage. Although it could be argued that this new regime is a fault-based regime 'without the name,' eminent commentators seem to agree that the new regime remains a no-fault regime.<sup>129</sup> What is important for our purpose is that the *Conseil d'État* adopted a solution which went further than that adopted by the ECJ, since it neither required that the international law provision intended to confer rights to individuals, nor imposed to demonstrate the existence of a sufficiently serious breach.<sup>130</sup>

In order to understand better this revolutionary case law, it is important to look at the position which the *Conseil d'État* had previously taken on damages caused by administrative acts adopted on the basis of a statute conflicting with an international agreement. Since 1992, the *Conseil d'État* decided to lay blame, and impose the duty to repair, on the Administration (Tobacco case law).<sup>131</sup> As noted by Derepas,<sup>132</sup> this solution had been vividly criticized as a hypocritical solution. The administrative judges probably felt it was now time for the Legislator to bear the responsibility of its misdemeanors. The *Palais Royal* did not say so explicitly, but it is argued that in situating the new regime under the umbrella of legislative liability and not administrative liability, it sent a clear signal to the French Legislator, that legislative failure to comply with international agreements would directly engage State liability. The administrative courts would thus check, within the framework of public tort actions, the compliance by the French Legislator with its international commitments. Failure to comply with such obligations would impose an obligation on the State to provide full compensation.

This development may be interpreted as a desire of the Supreme Administrative Court to increase its supervision over the Legislator, within the context of a competition between the various branches of the state (i.e. judicial empowerment argument). However, a subtler and probably more accurate explanation consists in

<sup>128</sup> My translation.

<sup>129</sup> E.g. Broyelle *supra* n. 8.

<sup>130</sup> See cases *Francovich* and *Brasserie du Pêcheur/Factortame* *supra* n. 15.

<sup>131</sup> *Arizona Tobacco*, *supra* n. 70.

<sup>132</sup> *Supra* n. 126.

seeing it as the *Conseil d'État* closing the Exit door.<sup>133</sup> Indeed, by making it easier for individuals to sue the State for legislative failure to comply with international obligations, and *a fortiori* with Community law, the Supreme Administrative Judge made it more costly for the Government and its majority in the Parliament to escape their international commitments.

If one follows Hirschman's Exit-Voice theory, this closing of the Exit should logically lead to an increase in Voice. And it is argued that this is exactly what the *Conseil d'État* aimed at. It meant to create an additional incentive on both the Parliament and the Government to monitor more thoroughly the EU decision-making process and to try harder to influence it. By tightening the implementation net, the *Conseil d'État* signalled to the French politicians that if they did not want to be tied up by rules they did not like or did not want to apply, then they should make sure that the rules adopted at EU level were in tune with national values and interests. They should be aware that once adverse EU rules are adopted, they would be enforced by courts, for this is what courts are supposed to do. The *Conseil d'État*'s desire to improve both compliance and influence, as exposed in the 2007 report, thus visibly transpires in this case law on liability.

#### 4.2.3. Arcelor: Final Surrender, or Stronger Influence Strategy?

Although *Arcelor* was not the first Euro-friendly decision of the *Conseil d'État*, it was nevertheless meant to become a landmark case for the relationships between French law and EU law, and for the relationships between the ECJ, the *Conseil d'État* and the *Conseil Constitutionnel*. It is worth remarking that, for the first time in its long history, the *Conseil d'État* organized an information session, to explain and justify the *Arcelor* ruling. It is also worth noting that the judges were at pains to make their decision as elaborate as possible (which is not amongst their habits), with a very long *considérant de principe* which envisaged a variety of possible scenarios as well as their principled outcomes.

At first sight, the decision looked like a surrender of French sovereignty over to the EU. It should nevertheless be read in a subtler manner, and in the light of other statements made by the *Conseil d'État*. Such contextual interpretation leads to an alternative understanding of the decision, as consisting in reality of an attempt to increase French influence over EU law-making. Indeed, it called for greater engagement with the ECJ, to impact on the judicial definition of the essential features of the Community legal order and to secure their compatibility with fundamental national values and interests. It also increased pressure on the Government to comply with European Directives, which should incite them to adopt a real strategy of influence in Brussels.

<sup>133</sup> J.H.H. Weiler 1991 *supra* n. 12. Weiler borrowed the Exit/Voice concept from Albert O. Hirschman, *Exit, Voice and Loyalty: Responses in Decline in Firms, Organizations and States* (Cambridge MA: Harvard University Press, 1970).

In 2002, the EU approved the 1997 Kyoto Protocol, and the following year, it adopted the Emission Trading Directive, which established a system of quotas trading for emissions of greenhouse gases.<sup>134</sup> Each Member State must define a maximum emissions quantity and distribute it amongst installations. It must elaborate a national allocation plan, specifying the quotas which it intended to allocate for the considered period. Installations carrying out activities listed in Annex I to the Directive (activities in the energy sector, iron and steel production and processing, the mineral industry and the wood pulp, paper and card industry) and emitting the specific greenhouse gases associated with that activity, must possess an appropriate permit issued by the competent authorities.

In 2004, Arcelor was the world's biggest steel producer (it is now the second), with installations for the production of pig iron and steel in various EU countries (e.g. France, Spain, Germany and Belgium). When the company realized that the scheme would apply to them, it, together with its subsidiaries, brought an action for annulment of the directive under Article 230 EC, before the European Court of First Instance (CFI).<sup>135</sup> They challenged the directive on the basis of breaches of the right to property, the free pursuit of an economic activity and the principle of equality. This last argument was based on the fact that the scheme did not apply to industries presenting similar features, and which were at least as polluting as the iron and steel sector.

This case is still pending before the Court of First Instance.<sup>136</sup> Even if the directive would be clearly in breach of some EU general principles, there would be no guarantee that the CFI case would succeed, due to stringent *locus standi* requirements for private parties to challenge Community acts other than decisions addressed to them (Article 230 EC). The Treaty did not provide for private parties to challenge directives. The CFI was nonetheless willing to accept such possibility, provided that the applicant company could show that it was individually and directly concerned by the Directive.<sup>137</sup> Individual concern would not be easy to prove, since *Arcelor* was only affected as a steel and iron producer, and following the traditional *Plaumann* case law, anyone could become such a producer.<sup>138</sup> Moreover, establishing direct concern in a situation involving a Directive would often be difficult, due to

<sup>134</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275/32.

<sup>135</sup> T-16/04 *Arcelor S.A. v. the European Parliament and the Council of the European Union*, brought on 15 January 2004 (OJ C 71/36).

<sup>136</sup> At the date of publication of this article.

<sup>137</sup> Cases T-135/96 *UEAPME v. Council* [1998] ECR II-2335, T-99/94 *Asociacion Espanola de Empresas de la Carne (ASOCARNE) v. Council* [1994] ECR II-871, and T-172/98, 175-177/98, *Salamanca and others v. Parliament and Council* [2000] ECR II 2487.

<sup>138</sup> C-25/62 *Plaumann v. Commission* [1963] ECR 95, confirmed in C-50/00-*Union de Pequeños Agricultores v. Council* [2002] ECR I-677.

the intervention of national implementing measures (although in this case it may be easy to establish, since the directive left no margin of discretion to domestic implementing agencies, by imposing the application of the scheme to the fixed list of industries provided in Annex 1).

In France, the general scheme of the directive was implemented by means of an *ordonnance* (i.e. governmental act adopted in the field usually reserved to the legislator)<sup>139</sup> and the modalities of application specified in various ministerial decrees adopted in 2004 and 2005.<sup>140</sup> Article 1 of the 2004 implementing decree reproduced the list provided in Appendix 1 of the Directive. Note that no legislative act was adopted to implement the directive,<sup>141</sup> which meant that the doctrine of *loi-écran* did not interfere.

In July 2005, *Arcelor* requested from the Administration the abrogation of Article 1 of the 2004 Decree, to the extent that it was applicable to the iron and steel sector, as well as that of Articles 4 and 5 of that act. The Administration ignored these requests. The companies challenged this implicit refusal before the *Conseil d'État* and asked the court to enjoin the Administration to abrogate the orders, or at least to wait until the CFI delivered its decision on the matter of the validity of the Directive.

The *Conseil d'État* appeared to have been strongly influenced by its *Commissaire du Gouvernement* Guyomar. It is therefore essential to analyse the substance of his argumentation, for it can offer an insight into the motivations of the court. Guyomar started its conclusions with the following question, which summarized the issue put to the *Conseil d'État*: 'To what extent can you control the compatibility with the Constitution of regulatory [i.e. non-legislative] acts transposing a Community Directive?'<sup>142</sup> Stressing that the case 'pose[d] delicate questions relating to the articulation between [the French] internal legal order and the Community legal order,' he presented his colleagues with a solution inspired by the recent constitutional jurisprudence, and called upon them to engage in 'judicial dialogue' and not 'judicial war' with the ECJ. But first, he reminded his peers of

<sup>139</sup> *Ordonnance* 2004/330 of 15 April 2004, JO 91 27 April 2004, p. 7089. An *ordonnance* can be ratified by the Parliament through a ratification act, and by this it will acquire legislative status. If it is not ratified, it conserves its regulatory nature (sub-legislative). The fact that an ordinance is ratified or not has jurisdictional consequences. A non-ratified ordinance falls under the judicial control of the *Conseil d'État*, whilst a ratified ordinance can only be challenged before the *Conseil Constitutionnel*. In the present case, the ordinance was ratified through a law 2004-1343 of 9 December 2004 on the simplification of law (JO No. 185 of 210 December 2004).

<sup>140</sup> Order 2004-832 of 19 August 2004, JO 21 August 2004, modified by Order 2005-189 of 25 February 2005 (JO of 26 February 2005).

<sup>141</sup> The decree had been adopted on the basis of Article 229-5 of the Environment Code, resulting from the *ordonnance* of 9 September 2004, which empowered the administration to implement the Directive.

<sup>142</sup> Commissaire du Gouvernement Guyomar, concl. sur CE Ass., *Société Arcelor*, 8 February 2007, RFDA (2007): 384.

their incompetence to check the compatibility of international agreements with the Constitution,<sup>143</sup> since this fell under the competence of the constitutional court. However, the control of conformity to the Constitution of secondary Community law, to be operated through the control of their national implementing measures of a regulatory nature, fell within the ambit of the administrative court's jurisdiction. He suggested that the *Conseil d'État* should do for regulatory acts implementing Directives what the *Conseil Constitutionnel* did in relation to legislative measures of transposition of Directives.

He proposed a 'translation' approach, consisting of two steps: first, checking whether the national constitutional rule or value had an equivalent in the Community legal order (this phase was probably inspired by the 'equivalence' approach of the European Court of Human Rights and German Constitutional Court); second, substituting the legal basis from national constitutional law to Community law. This should ultimately lead to assessing the validity of the Directive in the light of equivalent higher Community norms. Guyomar nevertheless reminded that, in case of serious doubt as to the validity of the Directive and its direct implementing acts, the *Conseil d'État* should refer the matter to the ECJ, in application of the *Fotofrost* case law.<sup>144</sup>

He concluded by applying his proposed reasoning to the case brought before the *Conseil d'État*. He observed that legal certainty, the right to property, and free pursuit of an economic activity were all recognized as general principles of Community law and protected at EU level in a way which 'guaranteed the effectiveness of the respect of the principles and provisions of constitutional value invoked.' He considered that the implementing acts did not breach any of these principles. However, when it came to the principle of equality, he submitted that it was not clear whether the Directive and its implementing acts respected this principle, interpreted in the light of Community case law on the matter. He therefore called on the *Conseil d'État* to refer the matter to the ECJ. They should do so, first, in order to show their good will to engage in judicial cooperation, and second, in order to influence the Community definition of the principle of equality and its scope of application. Finally, he incited his colleagues to 'participate in the concert of the national supreme courts,' which all sought to ensure that legal integration was matched by effective judicial cooperation, guaranteeing the respect of national traditions.

This argumentation of Guyomar, which combined pure legal reasoning and policy considerations, is extremely enlightening as to what were the real motivations of the *Conseil d'État* in adopting the *Arcelor* decision. It is argued that they were threefold.

The first one is pragmatic. One needs to find a way of dealing satisfactorily with the practical problems posed by European legal integration, and in particular

<sup>143</sup> CE, *Commune de Porta*, 8 July 2002, (2002) AJDA No. 15. It can nonetheless interpret such agreement in conformity with the Constitution (CE, Ass., *Koné*, 3 July 1996, Rec. 255).

<sup>144</sup> C-314/85 *Firma Fotofrost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199.

the transposition of Community legislation. To the extent that the domestic legal orders of the Member States and the Community legal order are interconnected and integrated, one needs to find a way of managing this, and the most obvious way is to design this system in collaboration with other parties concerned, that is the Supreme Courts of the various Member States and the Community Courts. In that sense, it is important to take into account and adopt positions compatible with that of these other parties.

The second one is influence. Guyomar wanted the *Conseil d'État* to realize that judicial war, which was the prevailing situation until the 1990s, was counterproductive. First, it did not manage to bring down or temper the ECJ 'integrationist' case law. Second, by limiting constructive interactions between the two courts, it also undermined the influence that French courts could have had on the designing of the Community legal order by the ECJ. In that sense, Guyomar invited the *Conseil d'État* to follow in the path of the German Constitutional Court, which through a balanced mix of threat of revolt and cooperation, obtained significant results and impacted substantially on the shape and content of EU law (e.g. elaboration of a jurisprudential catalogue of fundamental rights, more thorough management by the ECJ of the border between Community and national competences, etc.).

A third consideration also transpires: empowerment. By deciding in the suggested way, the *Conseil d'État* will not lose powers. On the contrary, this approach would bring about the possibility to review Directives, and to the extent that they may conflict with communitarized constitutional norms, to be in a position to influence the ECJ's shaping of Community norms, and to contribute to the decision on the validity of the Directive. Furthermore, in case of clear contradiction between the Directive and the specifically French constitutional norms, the *Conseil d'État* would still be empowered to invalidate the national implementing measures, thereby depriving the EC act from any practical effect.

No doubt that all these considerations weighed on the *Palais Royal's* decision in *Arcelor*. In its ruling, the *Conseil d'État* first recalled that Article 55 of the Constitution did not specify that international agreements should prevail over principles and provisions of constitutional value. However, in the footsteps of the constitutional judges, it held that Article 88 imposed a constitutional obligation of transposition of directives. It then exposed with some considerable details the modalities of control of the 'constitutionality' of regulatory acts transposing precise and unconditional provisions of directives:

'[I]t falls within the competence of the administrative judge, before whom a breach of a provision or principles of constitutional value has been raised, to search whether there exists a rule or general principle of Community law which, in the light of its nature and scope, as interpreted in the existing case law, guarantees through its application the effectiveness of the respect of the constitutional provision or principle invoked; that, if this is the case, it is for the administrative judge, in order to check the constitutionality of the decree, to find out whether the Directive which the decree transposes conforms to this rule or general principle

of Community law; it is for the administrative judge, where there is no serious difficulty, to reject the ground invoked, or, on the contrary, to send the [ECJ] a request for a preliminary ruling [under] ... Article 234 [EC]; however, if there is no rule or general principle of Community law which guarantees the effectiveness of the respect of the provision or constitutional principle invoked, then it is for the administrative judge to examine directly the constitutionality of the regulatory provisions under challenge.<sup>145</sup>

There was a slight, yet significant, difference between the *Conseil d'État's* approach and that of Guyomar. Indeed, the court emphasized the need for the Community norm to guarantee the 'effectiveness' of the respect of the constitutional norm. Therefore, for the *Conseil d'État*, it was not enough that there was *formally* a Community equivalent to the national constitutional norm, but the scope of protection afforded by the Community norm must match that of the national norm. Guyomar had mentioned this requirement, but only at the level of application of the doctrine and not at the level of its definition. This emphasis suggests that in case of discrepancy between the scope of apparently similar Community norms and constitutional norms, the *Conseil d'État* would try to influence the scope of the Community norm by means of submitting a request for a preliminary ruling to the ECJ. If that would not be successful, it would feel obliged to invalidate the transposition measure and give precedence to the substance of the constitutional norm.

The *Conseil d'État's* approach was therefore not as Euro-friendly as it could have appeared from a first reading. In fact, it is suggested that the *Palais Royal's* position could exercise some kind of pressure on the ECJ, which would be left with two options: either it would adjust the Community norm to the French norm, or the French administrative judge would not apply it.

In relation to the outcome of the case at hand, the French Supreme Administrative Court followed its advisor. It found most of the grounds invoked to challenge the implementing measures unfounded, but considered that the argument based on the breach of the principle of equality posed a 'serious difficulty' of interpretation of the Directive, and should therefore be referred to the ECJ for a preliminary ruling.

It is useful to analyse the *Conseil d'État's* ruling according to typical French terminology, using the concept of screens. To some extent, the *Conseil d'État*, in the footsteps of the *Conseil Constitutionnel*, resorts to a kind of theory of '*Directive-écran*', whereby the Directive shields its direct implementing measures from domestic constitutional control. However, the screen is not total, since the Directive's protection would fall in front of constitutional norms which have no effective equivalent at EU level.

One important question nonetheless remained, which concerned the application of the traditional *loi-écran* theory to the implementation of Directives. Imagine a situation where a private party would challenge a decree which has been adopted

<sup>145</sup> My translation.

on the basis of a legislative act, which turned out to be incompatible with some constitutional provisions, which have equivalent protection at EU level. The base legislation had not been invalidated by the *Conseil Constitutionnel*, either because the legislation was never referred to it, or because the abstract nature of the review did not enable the constitutional judges to foresee violations of both constitutional law and Community law. Whilst the *Conseil d'État* still insists that the law's incompatibility with the Constitution cannot be pleaded before it because of the *loi-écran* doctrine,<sup>146</sup> it would nonetheless be able to invalidate the application decree for incompatibility with equivalent EU norms, since in relation to EU law, the *loi-écran* does not operate. No doubt that private parties bringing claims before the *Conseil d'État* will try to use this less direct but more favourable 'Community argument' to indirectly challenge the compatibility of national legislation and their implementation acts with constitutional rules and principles.

Were the *Conseil d'État* to sustain such claims, it would appropriate substantial *a posteriori* constitutional review powers, in particular considering the amount of legislation directly or indirectly originating in Brussels. This would sign the death of the *loi-écran*, for the EU based argument would go around it, and lead to the introduction of more comprehensive constitutional control in France.

Reading the decision in the light of the *Commissaire du Gouvernement's* conclusions and the 2007 report confirms that what the *Conseil d'État* was aiming for was a real strategy of influence on European decision-making, to be carried out by all State actors, i.e. the Government, the Parliament and the courts, whilst, like the British, playing by the rules. This approach is consistent with the greater emphasis being placed on the rule of law, and in particular constitutional law, by French courts over the last two decades. By these decisions, the administrative judges put additional pressure on the Administration to take the EU seriously, and to do more to protect French values and interests in European decision-making. They also extended the scope of constitutional review to acts which were, until then, beyond its reach, thereby increasing judicial scrutiny over the Legislator and Executive.

## **5. Concluding Remarks: A Greater Plan to Restore French Influence on European Integration and Increase the Scope of Judicial Control in France**

The relationships between French law, including constitutional law, and Community law, as well as the relationship between the *Conseil Constitutionnel*, the *Conseil d'État*, the *Cour de Cassation* and the ECJ, have been deeply transformed by the recent constitutional and administrative rulings. It turns out that the main motivations behind this apparently 'pro-integrationist' case law proceeds from a

<sup>146</sup> CE, sect., *Arrighi*, 6 November 1936 (1936) Rec. 966; CE, No 257341 and 257534 *Deprez et Baillard* of 5 January 2005 (2005) Rec.1.

desire to revive French influence at EU level, in which all State actors, including courts, should be involved. It is also significant that this new jurisprudence, far from depriving the *Conseil d'État* of its review powers, on the contrary reinforces them, in particular its power to review legislation.

The *Conseil d'État* not only pressures the Government and Parliament so that they 'sort out' their European policy, but it also redefines its own policy of influence. Influence should not only target Brussels, but also Luxembourg. The *Gardedieu* and the *Arcelor* decisions are perfect illustrations of the new European strategy of compliance and influence. On one hand, *Gardedieu* will clearly incite the French Administration and Legislator to show 'exemplarity' in the application of Community law. On the other hand, the *Arcelor* 'translation approach' should undeniably lead national administrative courts to engage in a constructive dialogue with the ECJ, in particular where some discrepancies arise between national and European constitutional standards. The expected result would be a win-win situation from the French perspective. Either the ECJ would 'europeanize' the French standards, or the French courts would apply the French standards which would then be without European equivalent. French constitutional norms and values would thus be, at best, promoted and, at least, protected. Furthermore, the annulment of a national administrative act transposing a Directive due to its incompatibility with specific French constitutional norms would, in the words of the *Conseil d'État* itself, 'constitute a clear signal addressed to the authorities that, either they engage in a revision of the Constitution in order to reduce these specificities, or that they request a renegotiation of the secondary Community act found indirectly incompatible with the Constitution.'<sup>147</sup> No doubt that the option favoured by the *Conseil d'État* would be the second one, although it might not be the easiest to achieve, in a Europe of 27 members.

It is clear from the *Arcelor* ruling that the *Conseil d'État* is fully aware of the importance of the preliminary reference procedure in giving flesh to EU primary and secondary law. In fact, in its report, it called upon the Government to be more active in submitting observations to the ECJ in preliminary proceedings, so as to influence the judicial interpretation of Community rules. The *Conseil d'État* also understands that national courts too can be influential through preliminary references, by asking the right questions at the right time, and presenting them in a manner which suggests a particular answer to the ECJ. This is a strategy which has been successfully used by German courts, and which the French judges now wish to emulate.

'*La guerre des juges n'aura pas lieu*' (judicial war will not take place) titled a French commentator, G. Drago, above his commentary on the *Arcelor* case, by reference to the famous play by Jean Giraudoux *La guerre de Troie n'aura pas lieu*

<sup>147</sup> Press release on the *Arcelor* decision, at <[www.conseil-etat.fr/ce/actual/index\\_ac\\_1c0704.shtml](http://www.conseil-etat.fr/ce/actual/index_ac_1c0704.shtml)>, 22 June 2007.

(1935).<sup>148</sup> Although the title is ill-chosen since, in the play, war eventually broke out, on one point Drago was right: judicial war, which was raging in the past, will not be restarted. However, this is not out of 'pacifist' concerns, but because it proved completely counterproductive. It was detrimental not so much to European integration, which continued its way due to the persistence of the ECJ, but to the pursuit of French interests and values in Europe. The *Conseil d'État* now clearly believes that resistance should be abandoned and replaced by influential cooperation, something which some of its counterparts in other Member States have already understood and applied, with a certain success. The political strategy of the *Conseil d'Etat* is obviously modelled on the British strategy of political influence in Brussels, for which the *Conseil d'État* did not hide its admiration in its 2007 Report, and its judicial strategy is largely influenced by the German judicial pressure technique.

To conclude, the recent pro-European jurisprudential developments are in fact aimed at promoting French values and interests, and are inspired by the successful strategies of foreign counterparts. Moreover, the fact that in doing so the French *Conseil d'État* and *Conseil Constitutionnel* expand the scope of constitutional control is like the cherry on the cake, since both ultimately benefit from it, in their struggle for influence with the Legislative and Executive branches.

<sup>148</sup> G. Drago, *supra* n. 8.



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