

France
Conseil Constitutionnel on the Status of (Secondary)
Community Law in the French Internal Order.
Decision of 10 June 2004, 2004–496 DC.¹

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INTRODUCTION

Shortly before the European Council reached political agreement on the European Constitutional Treaty (18 June 2004), the *Conseil constitutionnel* [the French constitutional court], rendered a decision on the relationship between (secondary) community law and the French Constitution that will still be pivotal once the Constitutional Treaty has entered into force. Taken on 10 June 2004, the decision was only made public five days later. The *Conseil* feared that it would be presented as ‘a French abdication in the face of the European institutions’ and might influence the elections for the European Parliament of 13 June 2004.² If one looks at the headlines in French newspapers, this seems not to have been unrealistic. On its front page, *Le Monde* heralded that the *Conseil* had consecrated the supremacy of the European law (*Le Conseil constitutionnel consacre la suprématie du droit européen*); *Le Figaro*, less subtle, spoke of the primacy of Brussels (*Le Conseil constitutionnel consacre la primauté de Bruxelles*)! There is certainly truth in these statements, in the political and in the legal sense, for the decision minimises the chances of conflict between community law and French constitutional law. But at the same time the decision might be presented as a victory of the *souverainistes*, because it also fits tailor made in the French conception of national sovereignty.

¹ The decision, as all other decisions of the *Conseil constitutionnel* (CC), can be found on <www.conseil-constitutionnel.fr>.

² *Le Monde*, 17 June 2004, p. 1. A juicy detail is that the ‘father’ of the European constitutional treaty, Valéry Giscard d’Estaing, who as a former president of the French Republic has the constitutional right (Art. 56) to sit in the *Conseil constitutionnel* (CC), took part in the first deliberation dedicated to the deferred Act, but not in the decisive second, on 10 June 2004 – he then attended the funeral of Ronald Reagan. For that reason the decision lacks his signature: he is not regarded as one of its ‘fathers’; Hervé Gattegno & Christophe Jakubyszyn, *idem*, p. 8.

THE BACKGROUND OF THE DECISION AND ITS MOST IMPORTANT CONSIDERATIONS

While constitutional courts in other member states over the years have rendered more or less clear-cut decisions on the relationship between national constitutional law and secondary community law, the position of the French constitutional court has remained foggy. What has become clear however is that the *Conseil constitutionnel* normally has no competence to review secondary community law *directly*. Article 54 of the French Constitution excludes this. It only allows for the review of 'international engagements' that need (national) approval or ratification, something that generally is not needed for secondary community law.³

Furthermore, on 30 December 1977 (77-90 DC), the *Conseil* refused to declare unconstitutional an Act of Parliament that implemented a community regulation and thereby neglected a constitutional provision on the legislative competence of the French Parliament (Article 34). With a reference to the (actual) Article 249 EC, that defines regulations as binding in their entirety and directly applicable in all member states, the *Conseil* stated that the ensuing limitation 'on the conditions of exercise of national sovereignty is only the consequence of international obligations subscribed to by France'. Generally French scholars have concluded from this that Acts implementing regulations enjoy constitutional immunity.⁴ That idea was reinforced by the recognition by the *Conseil* of the international law principle *pacta sunt servanda* as a constitutional principle in its decision on the Treaty of Maastricht (9 April 1992; 92-308 DC). That principle would be violated if an Act giving the necessary implementation to a regulation would be declared void.

Nevertheless, it remained possible to doubt whether these swallows made the European summer.⁵ The decision of 1977 remained isolated and the *pacta sunt*

³ CC 31 Dec. 1997, 97-394 DC point 24. Community acts which need national approval, can be tested by the CC, *see*, for instance the decision of 30 Dec. 1976, 76-71 DC. Over the years several constitutional amendments have been proposed giving the CC the competence to review secondary community legislation, one of them in 1996 by Pierre Mazeaud, presently the chairman of the CC; *see* on the proposal: Olivier Passelecq et al., 'Les constitutions nationales face au droit européen', *RFDC* (Revue française de droit constitutionnel) (1996) p. 675; Thomas Meindl, 'Le contrôle de constitutionnalité des actes de droit communautaire dérivé en France. La possibilité d'une jurisprudence Solange II', *RDP* (Revue du droit public) (1997) p. 1665.

⁴ For instance Bruno Genevois, *La jurisprudence du Conseil constitutionnel* (Paris, Editions STH 1988) p. 371; Ronny Abraham, *Droit international, droit communautaire et droit français* (Paris, Hachette 1989) p. 52-53.

⁵ Olivier Dord, *Rapport Français for the FIDE conference 'droit communautaire et constitutions nationales*, 17 Oct. 2002, under II.3.b; Patrick Gaia, 'Le contrôle de constitutionnalité des normes communautaires' in Hélène Gaudin (ed.), *Droit Constitutionnel Droit Communautaire* (Paris, Economica 2001) p. 39; Olivier Dutheillet de Lamothe, 'Le Conseil constitutionnel et le droit européen', *RFDC* (2004) p. 30.

servanda reasoning did not convince everyone.⁶ At least, according to some, Acts implementing directives should be treated differently from Acts implementing regulations, because Article 249 EC defines directives as binding as to the result to be achieved, leaving the national authorities the choice of form and methods. The *Conseil* should therefore review such an Act, and, in case it were to be contrary to the Constitution, the implementation of the directive would have to be preceded by constitutional amendment.⁷

Although the *Conseil* over the years has tested several Acts implementing directives, it never had to decide the issue. The appeals against these acts never concerned provisions which were the necessary consequences of the directives. That was different in the appeal lodged on 18 May 2004, on the basis of Article 61 of the Constitution,⁸ by both members of the *Assemblée nationale* and the *Sénat* against the *Loi pour la confiance dans l'économie numérique*. Four days earlier Parliament had accepted that Act.

The paragraphs 2 en 3 of the second section of Article 6 of the Act exclude civil and penal liability of companies, which act as 'hosts', for activities and information stored on their systems if they have no actual knowledge of its illegality, or of facts and circumstances from which the illegality is apparent. Liability is also excluded if the hosts, upon obtaining knowledge or awareness of illegality, act immediately to remove or to disable access to the information. In their petitions, the representatives and senators pleaded that these exonerative clauses were contrary to a whole range of constitutional provisions, essentially because Parliament had not phrased them precisely enough. Consequently the conditions for civil and penal liability of hosts were also uncertain and insufficiently clear.

The petitioners were well aware of the fact that the legislature had enacted the provisions in pursuance of the implementation of Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000. However, according to them that directive, as all community directives, only constituted 'an objective to be fulfilled within the constitutional framework of each member state'. They added that the objective set by the directive was already realised in domestic law, so there

⁶ For example J. Robert, 'Le Conseil constitutionnel en Europe', *Les Cahiers du Conseil constitutionnel* No. 1 (1996); these *Cahiers* are first published in paper, but later become available online on <www.conseil-constitutionnel.fr>.

⁷ Bruno Genevois, 'Le Conseil constitutionnel et le droit communautaire dérivé', *RFDA* (Revue française de droit administratif) (2004) p. 651, at p. 653; cf. P. Gaïa, *Le Conseil constitutionnel et l'insertion des engagements internationaux dans l'ordre juridique interne* (Paris, Economica 1991), p. 69-71, 96.

⁸ Which gives the president of the Republic, the prime minister, the presidents of both chambers of Parliament and (at least) 60 members of the *Assemblée nationale* or of the *Sénat* the possibility to refer Acts of Parliament to the *CC* before their promulgation. Once an Act is promulgated, its constitutionality cannot be tested anymore, neither by the *CC*, nor by the ordinary courts.

was no reason to change it, especially not by adding provisions that infringed fundamental rights. 'De ce chef, la censure est déjà encourue', they concluded this part of their argumentation: 'On that account only, there is a reason to quash'.⁹

Although such a self-assured remark is not uncommon in petitions (varieties: 'La censure est certaine' or 'inévitabile'), even as an appeal stands no chance of success at all, it could be used with some reason here. In a decision of 27 July 2000 (2000-433 DC), the *Conseil* declared a provision void that very much resembled the challenged provisions of 2004, but with an important difference. While the 2004 provisions only excluded liability in the situations referred to, without creating it in other situations, the provisions in 2000 vested liability except in the situations referred to. In 2000, the *Conseil* was of the opinion that parliament had 'forgotten' to define the 'essential characteristics' of the behaviour of the hosts that would lead to their liability and thus had neglected the legislative powers assigned to it by the Constitution (Article 34). Behind that stood the notion that such a vague liability clause, because of its chilling effect, threatens the freedom of speech.

However, on 10 June 2004, the *Conseil constitutionnel* stated that the complaints against Article 6 could not *utilement* be presented before it.¹⁰ As they give rise to such various interpretations, the most important considerations leading up to that conclusion will be given here in full, in my own translation:

7. Considering that Article 88-1 of the Constitution states: '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'; that as a consequence the implementation in national law of a community directive results from a constitutional duty which can only be obstructed by an explicit contrary constitutional provision; that in the absence of such a provision it is only for the community judge, as the occasion arises by way of the preliminary procedure, to test the compatibility of the directive against both the competences defined by the Treaties as well as the fundamental rights guaranteed by Article 6 of the Treaty on European Union.

9. Considering that the numbers 2 and 3 of the first paragraph of Article 6 of the Act at hand only intend to exclude civil and penal liability of hosts in the two situations they refer to; that these provisions ought not lead to liability of a host which has not removed information that is illegal according to a third person if the information is not manifestly illegal or the removal has been not ordained by a judge; that, with that reservation, the paragraphs 2 and 3 of the first section of

⁹ <www.conseil-constitutionnel.fr/decision/2004/2004496/saisine1.htm>, under II.1.1.

¹⁰ Decision 2004-496 DC; see also the decisions of 1 July 2004, 2004-497 DC and 29 July 2004, 2004-498 DC en 2004-499 DC.

Article 6 only are the necessary consequences of the unconditionally and precisely phrased first section of Article 14 of the aforementioned directive on which the *Conseil constitutionnel* should not pronounce; that, accordingly, the complaints invoked by the applicant can not successfully be presented before it.¹¹

As a matter of principle, the *Conseil constitutionnel* states in point 7 that the implementation of directives into national law is a constitutional duty. This duty finds its basis in Article 88-1 of the Constitution, which was inserted in 1992 by the constitutional amendment that was needed to ratify the Treaty of Maastricht. The duty is not absolute and can be set aside by a *disposition expresse contraire de la Constitution*, an explicit contrary constitutional provision. However, as long as such a provision is not encountered, it is up to the community judges to decide whether the community legislature has respected both the (limited) competences conferred on the Union by its founding Treaties (EU and EC) as well as the fundamental rights which Article 6 EU coins as general principles of community law, i.e., the rights enshrined in the European Convention on Human Rights and the constitutional traditions common to the member states. Specifically the *Conseil* notes in point 9 that the deferred Act was taken with the view of implementing Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000, and that the contested provisions were copied, almost literally, from that directive. Only if the contested provisions in the implementing Act are interpreted in the way suggested by the *Conseil*, they are the necessary consequences of unconditionally and precisely phrased provisions in the directive, on which it is not for the *Conseil* to rule.

The reasoning employed by the *Conseil* gives directives, or at least Acts implementing them, a very special status in the French legal system. Although it is not

¹¹ '7. Considérant qu'aux termes de l'article 88-1 de la Constitution: "La République participe aux Communautés européennes et à l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences"; qu'ainsi, la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison d'une disposition expresse contraire de la Constitution; qu'en l'absence d'une telle disposition, il n'appartient qu'au juge communautaire, saisi le cas échéant à titre préjudiciel, de contrôler le respect par une directive communautaire tant des compétences définies par les traités que des droits fondamentaux garantis par l'article 6 du Traité sur l'Union européenne; (...) 9. Considérant que les 2 et 3 du I de l'article 6 de la loi déferée ont pour seule portée d'écarter la responsabilité civile et pénale des hébergeurs dans les deux hypothèses qu'ils envisagent; que ces dispositions ne sauraient avoir pour effet d'engager la responsabilité d'un hébergeur qui n'a pas retiré une information dénoncée comme illicite par un tiers si celle-ci ne présente pas manifestement un tel caractère ou si son retrait n'a pas été ordonné par un juge; que, sous cette réserve, les 2 et 3 du I de l'article 6 se bornent à tirer les conséquences nécessaires des dispositions inconditionnelles et précises du 1 de l'article 14 de la directive susvisée sur lesquelles il n'appartient pas au Conseil constitutionnel de se prononcer; que, par suite, les griefs invoqués par les requérants ne peuvent être utilement présentés devant lui?'

totally clear what is meant by a *disposition expresse contraire de la Constitution*, it is quite sure that Acts that simply draw the necessary consequences of directives, without adding something that is not mandatory, can only be tested against specific constitutional provisions, not against every constitutional provision.¹² Thus in France directives have, as it were, the status of constitutional law, and they can, more or less according to the principle *lex specialis derogat legi generali*, only be set aside by specific constitutional provisions.

While the general scope of the decision is thus relatively clear, at the same time it raises a whole series of questions, some of which will be discussed here. For instance, does what the *Conseil* states on EC directives also apply to regulations and EC law in general and to other Union law? Subsequently different interpretations of the concept *disposition expresse contraire de la Constitution* will be examined, as well as the meaning of the reservation that the *Conseil* attaches to the contested provisions. Finally, it should be noted that the *Conseil* recognises the specificity of community law, but only on the basis of the French Constitution, not on the basis of the Community legal order.

COMMUNITY DIRECTIVES AND OTHER COMMUNITY LAW

Is the reasoning employed in the decision specific to directives, or does it also apply to regulations and more generally to all community law? There is no doubt that the *Conseil constitutionnel* will also consider the implementation of regulations, and *a fortiori* that of the EC Treaty, as a constitutional duty. But can Acts implementing regulations also be set aside by a *disposition expresse contraire de la Constitution*? Or is the aforementioned decision of 1977, in which the *Conseil* refused to test such an Act, still standing in the light of the different definitions given to directives and regulations by Article 249 EC? For several reasons, the latter seems not to be the case.

First, it should be noted that there is no reference to Article 249 in the commented decision. Secondly, a distinction between directives and regulations is not unproblematic. According to the Court of Justice, directives under certain conditions (the period within which the directive has to be implemented has elapsed, unconditional and precise phrasing) can have an effect comparable to that of regulations.¹³ If the *Conseil constitutionnel* accepts this, like its German counterpart has explicitly done,¹⁴ this would take the heart out of a constitutional differ-

¹² Provisions in implementing Acts, which are not the necessary consequences of unconditional and precise provisions of directives, will be tested 'normally', i.e., against every constitutional provision, 1 July 2004, 2004-497 DC (point 20). It will not always be easy to distinguish between the two categories.

¹³ For instance ECJ 4 Dec. 1974, Case 41/74, *Van Duyn v. Home Office*.

¹⁴ 8 April 1987, BverGE 75, 223 (Frau Kloppenburg).

ence between directives and regulations. Actually, in the case at hand, the conditions for direct effect of the directive were fulfilled: Directive 2000/31/EC should have been implemented before 17 January 2002; the phrasing of the section of its Article 14, which was the base for the challenged provisions, was unconditional and precise. The latter is pointed out explicitly by the *Conseil*, which thereby clearly, although implicitly, refers to the Court of Justice's case-law.

Finally, there is the *Conseil's* recent decision of 19 November 2004 on the European Constitutional Treaty.¹⁵ Therein it decided that the supremacy clause contained in Article 6 of the Treaty ('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') is not contrary to the French Constitution. The reason for this is that the clause does not alter the scope of the 'principle of primacy of Union law as it results from Article 88-1 of the Constitution as interpreted by the *Conseil constitutionnel* in the aforementioned decisions' (paragraph 13), meaning the decisions to which the *Conseil* referred in the so called *visa* (the legal bases of the decision). In those *visa*, the *Conseil* only refers to the decision of 10 June 2004 and subsequent decisions in the same line. The 1977 decision is conspicuous for its absence.

It seems therefore reasonable to draw the following two conclusions. The first is that community directives and community regulations are placed on the same footing (which perhaps also counts for primary community law).¹⁶ Their implementation is a constitutional duty resulting from Article 88-1 of the Constitution as interpreted by the *Conseil constitutionnel*, unless an explicit contrary constitutional provision demands otherwise. That reservation differentiates the position of the *Conseil* from that of the Austrian *Verfassungsgerichtshof*, whose jurisprudence, although giving absolute precedence to community law, seems to have been a source of inspiration,¹⁷ and brings the French constitutional court in line with, for instance the German *Bundesverfassungsgericht* and the Italian *Corte Costituzionale*. Both constitutional courts have accepted that community law in general overrides their constitutional law, unless specific conditions are fulfilled. The German court reserves the right to test whether the Community stays within the limits of the powers conferred upon it. It also reserves the right to review

¹⁵ See the case note on the decision by Guy Carcassonne in this issue of EuConst.

¹⁶ That review of an Act implementing a Treaty that has been reviewed and declared not contrary to the Constitution (24 July 1991, 91-294 DC; Schengen) is not excluded, is made clear by the decision of 13 Aug. 1993, 93-325 DC. One wonders, however, whether at least community acts necessary for the establishment of European economic and monetary union and concerning freedom of movement for persons and related areas must not be excepted. To be able to ratify the transfers of these powers via the Treaties of Maastricht and Amsterdam, France had to amend its Constitution, in 1992 and 1999 respectively. These transfers have been specifically agreed upon in Article 88-2 of the Constitution.

¹⁷ Genevois, *supra* n. 7, at p. 655.

community acts against national fundamental rights when the human rights protection in the EC generally is of a significantly lower level than that offered by the *Grundgesetz*.¹⁸ The Italian court reserves the right to review community law against core values enshrined in the *Costituzione*.¹⁹

The second conclusion that can be drawn is that the decision of 10 June 2004 not only guides the actual relationship between community law and the French Constitution but will keep on guiding the relationship between Union law and France's constitutional law once the Constitutional Treaty has entered into force.

A PRIVILEGED POSITION FOR SECOND AND THIRD PILLAR LAW?

Article 88-1 of the French Constitution not only states that France shall participate in the European Community, but also in the European Union. That begs the question whether the *Conseil's* reasoning concerning community law also counts for other Union law. Although the *Conseil* only characterises the implementation of a community directive as a constitutional duty (point 7), one might be tempted to deduce from the decision, in combination with the text of Article 88-1, that the duty to implement actual second and third pillar law (for instance joint actions, joint positions and framework decisions) is of the same nature. Acts implementing these decisions would thus enjoy the same privileged position as Acts implementing community law. They could only be declared unconstitutional when contravening a *disposition expresse contraire de la Constitution*.²⁰

However, the differences between the EC legal order and the Union legal order are such that this may well not be the case. The *Conseil constitutionnel* has ruled that the transfer of powers to an international organisation lacking an international court supervising their exercise is only acceptable if the decisions taken have no direct effect and the measures taken by the French authorities to implement them can be reviewed by French judges.²¹ That is why the remark of the *Conseil* that it is up to community courts, if necessary by way of the preliminary procedure, to check if the community legislature has not overstepped the boundaries of its competences or has infringed human rights (point 7) seems to be full of mean-

¹⁸ See the decisions of 22 Oct. 1986, BVerfGE 73, 339 (Solange II) and 12 Oct. 1993, BVerfGE 89, 155 (Maastricht-Urteil); 7 June 2000, BVerfGE 102, 127 (Europäische Bananenmarktverordnung).

¹⁹ Decisions of 27 Dec. 1973 (Frontini), 1974 CMLR, p. 381; 8 Aug. 1984 (Granital), in A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: the Cases* (Cambridge: CUP 1994) p. 643; 21 April 1989 (Fragd), *idem*, p. 655; see also Monica Claes, *The National Courts' Mandate in the European Constitution* (dissertation University of Maastricht 2004) p. 423-426.

²⁰ Cf. Jérôme Roux, 'Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution', *RDP* (2004) p. 912, at p. 925-6.

²¹ CC 25 June 1991, 91-294 DC; cf. CC 9 April 1992, 92-308 DC.

ing. When it comes to the first pillar, the community courts have the competence to review these acts, and they can be called upon to do so by several means. In this view, any equation of community law on the one hand and second and third pillar law on the other depends on (the scope of) the jurisdiction of the Court of Justice. In this context, the remark of an insider, Jean-Éric Schoettl, secretary general of the *Conseil constitutionnel*, must be quoted. According to him, the *Conseil* in the commented decision has not so much accepted the primacy of European law, but that of the European court.²² Because the Court of Justice lacks any jurisdiction in the second pillar, it is therefore probable that, if the case arises, the *Conseil constitutionnel* will not refrain from testing an Act of Parliament implementing a second pillar decision in the normal way.

Concerning third pillar decisions, legal protection by the Court of Justice is also of a lower level. Although France has given all its judges the right to follow the preliminary road (cf. Article 35(2) and (3) EU), there is still as yet no obligation for French judges whose decisions cannot be appealed, to ask preliminary questions on third pillar decisions (cf. Article 234 EG). So as long as France has not enacted national provisions which oblige them to do so, a right which has been reserved by the French government,²³ or as long as the Treaty is not amended in that sense, as the European Constitutional Treaty will do, the role of the preliminary procedure in third pillar is inferior to that in the first pillar. So it is uncertain whether the *Conseil* will equate actual secondary third pillar law with first pillar law.²⁴

The question has practical relevance. On 25 March 2003, France had amended its Constitution to enable the implementation of the framework decision on the European Arrest Warrant. According to the *Conseil d'Etat*, not acting in its capacity of France's highest administrative judge but as the government's most important (legal) advisor, this framework decision contravened a *principe fondamental reconnu par les lois de la République*, i.e. an unwritten constitutional provision, in this case the principle that the French State must reserve the right to refuse extradition for criminal acts of a political nature.²⁵ If the framework decision would

²² Jean-Pierre Camby, 'Le droit communautaire est-il soluble dans la Constitution?', *RDP* (2004) p. 878, at p. 886.

²³ Decree 2000-668 of 10 July 2000, *Journal officiel* 19 July 2000, p. 11073.

²⁴ Perhaps the case of decisions based on the provisions on the fourth title of the EC Treaty (immigration and asylum) must be reserved too, because here also the jurisdiction of the ECJ is restricted, cf. Art. 68(2) EC.

²⁵ Opinion No. 368.282, 26 Sept. 2002: to be sure, Art. 1, para. 3 of the Framework decision states that it does not allow a violation of the fundamental rights as they result from the constitutional traditions common to the member states, and the principle that a person should not be extradited for political offences is recognised in many member states, but that does not redeem the constitutional defects of the framework decision for want of recognition of this principle as 'general principle of Community law with same legal status as the Union Treaty'.

indeed enjoy the same privileged position as community directives, then, in retrospective, this constitutional amendment was perhaps unnecessary,²⁶ as we shall see.

WHAT IS A 'DISPOSITION EXPRESSE CONTRAIRE DE LA CONSTITUTION'?

The constitutional duty to implement directives must be fulfilled unless a *disposition expresse contraire de la Constitution* opposes it. This is at the heart of the decision. By introducing the concept *disposition expresse contraire de la Constitution*, the *Conseil* means to give Acts implementing directives a very special position in the French legal order, but what position exactly?

A first possibility is that only a provision that explicitly states that it must be applied even contrary to Article 88-1 of the Constitution, or whatever community law demands, is a *disposition expresse contraire de la Constitution*.²⁷ The situation would thus strikingly resemble the situation in Great-Britain as it is presented by Lord Justice Laws in *Thoburn v. Sunderland City Council*, a decision of the Divisional Court of the Queen's Bench Division. Community law, present and future, is transformed into British law on the authority of the European Communities Act 1972 (ECA). As the House of Lords decision in *Factortame* made clear, that Act cannot be impliedly repealed by a later Act of Parliament. That gives community law *de facto* supremacy in Great Britain. That does not mean, however, that Parliamentary sovereignty has vanished altogether. According to Lord Justice Laws, the ECA is, by force of common law, a constitutional statute, as is for instance the Magna Carta and the Bill of Rights. Contrary to ordinary statutes, constitutional statutes cannot not be impliedly repealed:

For the repeal of a constitutional Act (...) the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. (...) A constitutional statute can only be repealed, or amended (...) by unambiguous words on the face of the later statute.²⁸

²⁶ Cf. Bertrand Mathieu, *Le Monde*, 17 June 2004, p. 8.

²⁷ François Luchaire, 'Le Conseil constitutionnel devant la Constitution pour l'Europe', *RFDC* (2004) p. 465, at p. 467-468.

²⁸ Divisional Court of the Queen's Bench Division, 18 Feb. 2002, *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), 2002 LLR 548, point 63; cf. T.C. Hartley, *Constitutional Problems of the European Union* (Oxford, Hart 1999) p. 168-178.

In the same way, an explicit statement of the French constitutional legislature that a provision must be applied even contrary to Article 88-1, will be followed by the *Conseil constitutionnel*, and in that sense it will be a *disposition expresse contraire de la Constitution*. In fact, this is the consequence of the idea that the effect and status of community law in the national legal order is determined by the Constitution (text after n. 44 *infra*). If the constitutional legislature can repeal Article 88-1 of the Constitution and thus deprive community law of its effect and status in France, it can also amend the Article.

However, according to more current interpretations and in contrast to Great Britain, in France even provisions that do not in some way explicitly refer to the 'constitutional Act' to be amended, i.e., to Article 88-1, can be 'explicit contrary constitutional provisions'. Neither do provisions have to be enacted subsequently to Article 88-1 to deny community law effect in the French legal order; even provisions that were in force before Article 88-1 was inserted in the Constitution (1992) seem to have that potential.

In a comment on the decision on the website of the *Conseil constitutionnel*, an anonymous but certainly well informed author divides this so-called *bloc de constitutionnalité*, the corpus of (written and unwritten) French constitutional rules, in on the one hand explicit constitutional clauses ['énoncé constitutionnel explicite'], and, on the other hand, judicial constructions ['construction jurisprudentielle'].²⁹ Only the former can obstruct the implementation of directives. The reasoning behind this distinction seems to be that where the 'Pouvoir constituant' or the 'pouvoir de révision constitutionnelle', the constitutional legislature, is the author of the norm the Constitution should take precedence, while European law should take precedence when the judge is the author of the norm.³⁰ We may assume that in this interpretation unwritten constitutional law cannot override the duty to implement directives.³¹ We may also assume that the *principes fondamentaux reconnus par les lois de la République* (PFRLR) lack that capacity. To be sure the preamble of the Constitution of 1958 refers to them by way of the preamble of the Constitution of 1946, but only in general terms: it is the *Conseil* itself which finds or identifies these principles.³² That is why they may be re-

²⁹ <www.conseil-constitutionnel.fr/cahiers/cc17/jurisp496.htm>, under II C; the comment will be published the *Cahiers du Conseil constitutionnel* No. 17.

³⁰ Roux, *supra* n. 20, at p. 927-928.

³¹ Bertrand Mathieu, 'Point de vue', *Recueil Dalloz* (2004), p. 1740; Henri Oberdorf, 'Le Conseil constitutionnel et l'ordre juridique communautaire: coopération et contrôle', *RDJ* (2004), p. 869 at p. 873; Camby, *supra* n. 22, at p. 886; Marie Gautier and Fabrice Melleray, 'Le refus du Conseil constitutionnel d'apprécier la constitutionnalité de dispositions législatives transposant une directive communautaire', *AJDA (L'actualité juridique-droit administratif)* (2004) p. 1537 at p. 1540.

³² The Conseil d'Etat sometimes also 'finds' a PFRLR, as it did when it characterized the principle that extradition must be refused for political offences as such.

garded as a *construction jurisprudentielle*. Thus, tentatively assuming that the *Conseil* treats framework decisions in the same way as community directives, the aforementioned constitutional amendment of 25 March 2003 did not have to take place.

This interpretation, which was at first leading, seems to have conceded its place to another one, which draws on a decision of 29 July 2004 (2004-498 DC). In this case the *Conseil* refused to test a provision in an implementing Act to the freedom of expression contained in Article 11 of the Declaration of 1789, which is part of the *bloc de constitutionalité*, because this freedom is also protected by Article 10 of the European Convention of Human Rights and therefore is a general principle of community law.³³ Accordingly, a *disposition expresse contraire de la Constitution* is a provision which can only be found in French constitutional law, or at least neither in the European Convention on Human Rights nor in the constitutional traditions common to the member states (Article 6 of the Union Treaty). To phrase it differently, the *Conseil constitutionnel* will only intervene if the Court of Justice cannot intervene. Although the object differs, the control of the two Courts is thus complementary.

In this interpretation an unwritten constitutional norm is not disqualified from being a *disposition expresse contraire de la Constitution*; what is decisive is not its explicitness, but whether it is more or less exclusively French, as is for instance the principle that the State is secular (*laïcité*, Article 1 of the Constitution).³⁴ In this view, and again assuming that *Conseil constitutionnel* treats community directives and framework decisions in the same way, the constitutional amendment of 25 March 2003 was *not* unnecessary, because the PFRLR that extradition should be refused for political offences is not a general principle of community law.³⁵ This latter interpretation is in keeping with the trust in the Court of Justice of which the decision testifies and seems, both intellectually and practically, superior to the former.

Whatever the exact meaning of the concept may be, all in all the position of the French constitutional court strikingly resembles that of the Italian constitutional court, in two respects. First, just as the *Corte Costituzionale*, the *Conseil* accepts that community law overrides 'normal' constitutional provisions, but not very special ones. Second, there is no indication that the *Conseil* tests Acts implementing community law against Article 88-1 of the Constitution itself, i.e., reviews whether they fall within the limits of the powers conferred on the Union by

³³ Cf. the *Table analytique des décisions*, <www.conseil-constitutionnel.fr/tables/2004/table0016.htm>, where what seems to be implied in the decision is explicitly stated in this way ...

³⁴ Genevois, *supra* n. 7, at p. 658.

³⁵ Another assumption must be that the CC accepts this PFRLR, which was discovered not by itself, but by the Conseil d'Etat.

France. In other words, only substantive provisions of the Constitution seem to have the potential of becoming *disposition expresse contraire de la Constitution*. In that respect also the *Conseil* is more in line with the *Corte costituzionale* than with the *Bundesverfassungsgericht*. Contrary to the case-law of the German court, that of the Italian court actually bears no witness of the reservation of the final right to decide on the demarcation-line between the powers of the Union and those of the member states ('Kompetenz-Kompetenz'). However, at least theoretically in Italy that possibility cannot be excluded.³⁶

A 'CONFORMITÉ SOUS RÉSERVE'

In point 9 the *Conseil* performs a (veiled) review of the implementing Act, precisely on the point where the Act copies the unconditionally and precisely phrased provisions of the directive. It states that the challenged provisions only are the 'necessary consequences of the unconditionally and precisely phrased first section of Article 14' of the directive if they do not lead to 'liability of a host which has not removed information that is illegal according to a third person if the information is not manifestly illegal or the removal has been not ordained by a judge'. Of course, it cannot be denied that constitutional review lies at the bottom of this consideration. However, it does not lead to a straight declaration of conformity of the contested provisions to the Constitution and neither to a declaration of non-conformity, but to something in between: a *conformité sous réserve*, a conditional declaration of conformity. Those who have to apply the provisions and especially the courts will have to apply them in conformity with the interpretation attached to them by the *Conseil*. That is why, contrary to what the *Conseil* itself suggests, the members of Parliament that submitted the Act for review got what they wanted.

The question remains whether this means that the *Conseil* has reviewed the directive, albeit indirectly. Of course one can take that stance, because on the crucial point the Act copies the directive almost word for word.³⁷ But it also seems possible to consider that the interpretation of the provisions in the Act is not necessarily an interpretation of the provisions in the directive. In my view, to be able to defend this position, the Act should 'do' or 'suggest' something, which the directive does not 'do' or 'suggest'. That is the case here, for as we have seen the reviewed provisions carry a history with them that the directive is lacking: in 2000, somewhat comparable provisions were declared unconstitutional (*see text*

³⁶ Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union', in Anne-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998) p. 142-144.

³⁷ Anne Levade, 'Le Conseil constitutionnel aux prises avec le droit communautaire dérivé', *RDJ* (2004) p. 889 at p. 904-906; Roux, *supra* n. 20, at p. 930.

between n. 9 and n. 10 *supra*). This stance finds support in the text of the decision itself – if the Act is interpreted in a certain way, it implements the directive correctly. The directive itself is an ‘acte clair’ not bearing the censured interpretations.

In the end however the interpretative condition, in whatever way one looks at it, is, at least potentially, a source of conflict with the Court of Justice. As the *Conseil* recognises, it is finally the Court of Justice that decides on the interpretation of the directive. That interpretation can be a different one – although that is hard to imagine in this case.³⁸

A PRIVILEGED POSITION ON THE BASIS OF THE NATIONAL CONSTITUTION

The decision testifies of the incorporation of community law in the French legal order, something which the *Conseil* in fact already recognised earlier³⁹ and which seems actually nothing very special in a state with a monist conception of the relationship between national and international law. It also contains the recognition of the specificity of community law and the community legal order when compared to other treaty law. Lacking the specific constitutional basis that community law finds in Article 88-1 of the Constitution, ‘normal’ treaty law stands in another relationship to the Constitution than Community law.

In a rather puzzling decision of 5 May 1998 and on the basis of the fourteenth and fifteenth sections of the Preamble of the Constitution of 1946,⁴⁰ the *Conseil constitutionnel* has allowed Parliament to derogate from the Constitution when it executes treaties, but under two conditions only: that it is necessary for the execution of the Treaty and that ‘the essential conditions for the execution of national sovereignty’⁴¹ and, most probably, fundamental rights are respected.⁴² Thus, tentatively, two differences between community obligations and normal treaty obli-

³⁸ Jacques Arrighi de Casanova, *AJDA* (2004) p. 1534 at p. 1537.

³⁹ Decision of 9 April 1992, 92-308 DC (Maastricht Treaty).

⁴⁰ Which state respectively that the French Republic shall respect the rules of public international law and that France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace.

⁴¹ Decision of 5 May 1998, 98-399 DC. The Act stipulated that representatives of the High Commissioner for Refugees would have a seat in the *commission de recours des réfugiés*, an administrative court deciding in appeal on asylum requests. According to the CC, the constitutional principle that persons of foreign nationality and representatives of international organisations may not exercise functions inextricably bound up with the exercise of national sovereignty, such as the judicial function which is exercised in the name of the French people, may be deviated from if it is necessary for the execution of an international obligation subscribed to by France, under the condition that essential conditions for the exercise of national sovereignty are not affected (‘dans la mesure nécessaire à la mise en oeuvre d’un engagement international de la France et sous réserve qu’il ne soit pas porté atteinte aux conditions essentielles d’exercice de la souveraineté nationale’).

⁴² Etienne Picard, ‘Petit exercice pratique de logique juridique. A propos de la décision du Conseil constitutionnel No. 98-399 DC du 5 mai 1998 ‘Séjour des étrangers et droit d’asile’’, *RFDA* (1998) p. 620.

gations can be construed. First, unlike the execution of community law, the execution of normal treaties is not a constitutional duty.⁴³ Secondly, an *a contrario* reading of the decision leads one to expect that Acts executing community law profit from a more lenient constitutional testing regime than acts executing 'normal' treaty obligations, and, certainly, decisions of 'normal' secondary international law. It must be submitted however that all this is not entirely clear.

Although the decision in several ways recognises the specificity of community law, the *Conseil constitutionnel* does not base this on the autonomous legal order that has been proclaimed by the Court of Justice. As is well-known, according to the Court of Justice, primary and secondary EC law, on their own strength and independently of the constitutions of the member states, are part and parcel of the national legal orders of the member states and enjoy, at least when they have direct effect, precedence over national law, even of a constitutional nature.⁴⁴ The *Conseil constitutionnel* however founds the effect and the status of European law in the French legal order on Article 88-1 of the national Constitution. This comes as no surprise, for two reasons. First this is also the point of view of constitutional courts in other member states, not only in Germany and Italy, but also for instance in Denmark, Spain and Portugal.⁴⁵

Secondly, French legal thinking is totally drenched in terms of national sovereignty, of which the Constitution is the expression. *Dans l'ordre interne, tout procède de la Constitution*: in the internal legal order, everything proceeds from the Constitution.⁴⁶ On the basis of this axiom, the *Conseil d'Etat*, in its capacity as the country's highest administrative court, and the *Cour de cassation*, in its capacity as

⁴³ The qualification as 'constitutional' of the duty to implement directives raises the question whether the CC will start testing Acts of Parliaments against European law, something which according to long standing case-law it refuses to do until now, reasoning that an Act which contravenes a Treaty obligation does not *ipso facto* contravene the Constitution (decisions of 15 Jan. 1975, 75-54 DC). See Guy Carcassonne in his case note in this issue of *EuConst* on CC 19 Nov. 2004, 2004-505 DC; Levade, *supra* n. 37, at p. 907 ff.; Roux, *supra* n. 20, at p. 921 ff.

⁴⁴ ECJ 17 Dec. 1970, Case 11-70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para. 3: 'the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'.

⁴⁵ The reports of Hjalte Rasmussen, Jose Martin y Perez de Nanclares and Antonio Lopez Castillo, Miguel Poires Maduro on the 2002 Fide conference on European Union Law and National Constitutions, <www.fide2002.org/reportseulaw.htm>. On Spain see also the case note of Schutte in this issue of *EuConst*. In general, Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP 1999) p. 177.

⁴⁶ Abraham, *supra* n. 4, at p. 35.

France's highest criminal court, have stated, in 1998 en 2000 respectively, that in the French legal order treaties stand hierarchically under the Constitution.⁴⁷ At least for the *Conseil d'Etat* that also seems to count for the EC Treaty.⁴⁸ It would have been outright revolutionary if the *Conseil constitutionnel* had taken a different position and instead of the Constitution had taken the EC Treaty as the *Grundnorm*. At the same time, however, the fact that the *Conseil* gives community law *de facto* the ranking of constitutional law is a huge constitutional step.



⁴⁷ Conseil d'Etat 30 Oct. 1998, *Recueil des décisions du Conseil d'Etat* 1998, p. 368 (Sarran et Levacher et autres); Cour de Cassation 2 July 2000, 2000 *Recueil Dalloz*, p. 865 (Mlle Fraisse), with a note by Bertrand Mathieu & Michel Verpeaux.

⁴⁸ Conseil d'Etat 3 Dec. 2001, *Recueil des décisions du Conseil d'Etat* 2001, p. 624 (Syndicat national de l'industrie pharmaceutique).