The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil Constitutionnel* and the *Conseil d'Etat*

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Conseil constitutionnel and *Conseil d'Etat* now both hold that Article 88-1 of the French Constitution contains the duty to implement Community law – The *Conseil constitutionnel* tests whether acts of parliament manifestly contravene unconditional and precisely phrased provisions of Community law – Reservation of sovereignty: duty to implement Community law limited by France's constitutional identity for the *Conseil constitutionnel*, by the absence of equivalent protection on the Community level for the *Conseil d'Etat* – Supremacy of the Constitution not affected

Introduction

Recently the *Conseil constitutionnel,* France's constitutional court, and the *Conseil d'Etat*, in its capacity as France's highest administrative court, rendered pivotal decisions about the relationship between French constitutional law and Community law.

On 27 July 2006,[1] the *Conseil constitutionnel*, on the basis of Article 61 of the Constitution,[2] decided on the constitutionality of the *Loi relative au droit d'auteur et aux droits voisins dans la société d'information,* which was enacted in pursuance of the Directive 2001/29/CE of 22 May 2001. The petitioners pleaded that this Act of Parliament contravened both a whole range of constitutional provisions and the aforementioned Directive itself. This decision is the outcome of a cycle of

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[1] CC 27 July 2006, 2006-540 DC (Loi relative au droit d'auteur et aux droits voisins dans la société de l'information), <http://www.conseil-constitutionnel.fr/>.

[2] This 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.

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the 'jurisprudential revolution',[3] which got under way two years ago with the now famous decision in principle of 10 June 2004 concerning the *Loi pour la confiance dans l'économie numérique*, [4] which was confirmed by several judgments in the following months.[5] In the judgment of 27 July 2006, the constitutional court not only confirmed the framework for the testing the constitutionality of laws implementing directives, but also coined the concept of 'French constitutional identity' in exchange for the very controversial concept 'express contrary constitutional provision' used in 2004. Moreover, in this decision, the *Conseil constitutionnel* for the first time clearly accepted and defined its competence to review Acts of Parliament against the directive, which it purported to implement.

In its *Arcelor* judgment rendered on 8 February 2007,[6] the *Conseil d'Etat* also defined its position on the relationship between the Constitution and Community law. On 12 July 2005, the *Société Arcelor et Lorraine and al* had asked the president of the Republic, the prime minister, the minister of ecology and sustained development and the minister delegated to Industry to abrogate Article 1 of the Decree of 19 August 2004, which intended to implement in the French legal order Directive 2003/87/CE of 13 October 2003. Subsequently, the *Conseil d'Etat,* as the highest administrative court, was asked to quash the implicit decisions dismissing this request. As the petitioners pleaded that Article 1 of the Decree contravened several constitutional principles, the *Conseil d'Etat* for its part was induced to clarify the issue of its competence to test a decree implementing a directive against the Constitution. The decision of the administrative court was clearly inspired by the constitutional court's case-law, which it adapted to its specific judicial function.

This article explains how both courts, via the procedure of testing acts implementing Community directives, have changed the framework of the relationship between French constitutional law and Community law. Both the *Conseil constitutionnel* and the *Conseil d'Etat* now refer to a specific constitutional provision, Article 88-1 of the Constitution, when faced with the issue of the status of Community law and thereby recognise the specificity of Community law as compared to classical international law. The two courts have also clarified the very technical question of how to test Acts of Parliament (*Conseil constitutionnel*) or

[3] *See* B. Mathieu, 'Le droit constitutionnel fait son entrée au Conseil constitutionnel', 167 *Les Petites Affiches* (2006) p. 3 at p. 4.

[4] CC 10 June 2004, 2004-496 DC (Loi pour la confiance dans l'économie numérique).

[5] CC 1 July 2004, 2004-497 DC (Loi relative aux communications électroniques et aux services de communication audiovisuelle); CC 29 July 2004, 2004-498 DC (Bioéthique II); CC 29 July 2004, 2004-499 DC (Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel et modifiant la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés).

[6] Conseil d'Etat Ass. 8 Feb. 2007, petition No. 287110 (Société Arcelor Atlantique et Lorraine et autres), <http://www.legifrance.gouv.fr/>.

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government decrees (*Conseil d'Etat*) implementing Community directives against the Constitution. After discussing these issues, we will finally digress upon the consequences of this recent case-law on the issue of the hierarchical relationship between constitutional law and Community law.

Article 88-1 of the Constitution and the constitutional duty to implement community law

Until recently, the *Conseil constitutionnel* and the *Conseil d'Etat* refused to recognise the specificity of Community law. According to both courts, the primacy of Community law *vis-à-vis* national law resulted from Article 55 of the French Constitution, which is phrased in general terms and does not recognise Community law's specificity.[7] The *Conseil constitutionnel* changed its view in 2004; the *Conseil d'Etat* followed on 8 February 2007. Through the reference to Article 88-1 of the Constitution, both courts now recognise the specificity of Community law as compared to classical international law. Moreover, they regard the implementation of Community directives, and more generally of Community law, as a constitutional duty.

The now well-established reference of the Conseil constitutionnel to Article 88-1 Constitution

Before 2004, the *Conseil constitutionnel* looked at Community law through the lens of Article 55 of the Constitution:

> The 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 implementation by the other party.[8]

In its decision of 19 June 1970 on the Treaty creating own resources for the Communities and extending the budgetary powers of the European Parliament, the *Conseil constitutionnel* stated that the founding EC Treaties of 1951 and 1957 had been lawfully ratified and therefore entered into the field of Article 55.[9] The constitutional court thus clearly put the aforementioned Treaties under the aegis of the regime governing classical international law. The same approach can be

[7] *See* E. Bruce, 'La primauté du droit communautaire (retour sur la portée de l'article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)', 192 *Les Petites Affiches* (2005) p. 3 at p. 10.

[8] Art. 55 of the Constitution: 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.'

[9] CC 19 June 1970, 70-39 DC.

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found in the decision of 9 April 1992 on the Treaty of Maastricht. In this case, the *Conseil* expressly referred to Article 55 as one of the constitutional provisions applicable to the review performed.[10]

On 10 June 2004, the *Conseil constitutionnel* modified this stance. On the basis of Article 88-1 of the Constitution, which was inserted in 1992 by the constitutional amendment needed to ratify the Treaty of Maastricht, it accepted the specificity of Community law. Article 88-1 reads:

> 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.

From this Article, the purpose of which is to sanction France's participation in the European Communities and the European Union, it follows that respecting the Community duties resulting from this participation must be considered to be a constitutional duty. Accordingly, the *Conseil constitutionnel* bases on Article 88-1:

> the obligation to implement directives, and, more generally, the existence of a Community legal system, incorporated into the internal legal order and different from the international order.[11]

Moreover, in the eyes of the constitutional court, Article 88-1 also underlies the primacy of Community law.

This view, which brings Article 88-1 to the forefront of the constitutional stage, has been reiterated several times in 2004[12] and in 2006,[13] especially by the decision rendered on 27 July 2006 concerning the *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*.[14] In these recent judgments, the *Conseil constitutionnel* did not mention Article 55 again, which justifies the conclusion that the Article has been entirely eclipsed by Article 88-1.[15] In any case, the ordinary courts should draw the consequences from this now well-established case-law concerning both the specificity of the Community legal system and the constitutional foundation of the primacy of Community law. That is what the *Conseil d'Etat* did in a judgment of 8 February 2007.

[10] CC 9 April 1992, 92-308 DC (Maastricht I).

[11] CC 19 Nov. 2004, 2004-505 DC (Traité établissant une Constitution pour l'Europe) para. 11; *See* E. Schoettl, 'La ratification du "Traité établissant une Constitution pour l'Europe" appelle-t-elle une révision de la Constitution française', 238 *Les Petites Affiches* (2004) p. 3 at p. 25.

[12] Cf. CC 10 June 2004, 2004-496 DC; CC 1 July 2004, 2004-497 DC; CC 29 July 2004, 2004-498 DC; CC 29 July 2004, 2004-499 DC; CC 19 Nov. 2004, 2004-505 DC.

[13] *See* CC 30 March 2006, 2006-535 DC (Loi pour l'égalité des chances); CC 27 July 2006, 2006-540 DC; CC 30 Nov. 2006, 2006-543 DC (Loi relative au secteur de l'énergie).

[14] Cf. para. 17.

[15] Bruce, *supra* n. 7.

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The Conseil d'Etat's recent reference to Article 88-1

Like the constitutional court, the *Conseil d'Etat* in its traditional case-law always refused to distinguish Community law from classical international law. Each time it was faced with the subject of the status of Community law, it only referred to Article 55 of the Constitution. Thus, in the well-known *Nicolo* case,[16] in which it for the first time accepted the primacy of Community law on an Act of Parliament that was later enacted, there is no doubt that the *Conseil d'Etat* followed the advice of *Commissaire du Gouvernement* Frydman. He proposed to 'base the decision on Article 55 of the Constitution, and to extend this provision's scope to all international agreements'.[17] The *Sarran* judgment[18] was also based on Article 55. In this judgment, the *Conseil d'Etat* stated the supremacy of the Constitution *vis-à-vis* international law, probably including Community law.[19] A judgment of 3 December 2001[20] confirmed this; the very general terms in which the decision was phrased this time left no doubt about the lack of recognition of Community law's specificity.

However, in its judgment of 8 February 2007, the *Conseil d'Etat* decided to draw consequences from the constitutional court's recent case-law:

> Considering that while Article 55 of the Constitution states: 'The 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 implementation by the other party', the supremacy thus conferred to international agreements cannot override, in the internal order, constitutional principles and provisions; that in view of Article 88-1 which 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', and from which a constitutional obligation follows to implement directives, the constitutional review of decrees which directly aim to implement them must proceed according to distinctive methods when precise and unconditional provisions have been implemented.[21]

[16] Conseil d'Etat Ass. 20 Oct. 1989 (Nicolo).

[17] P. Frydman, II. 2137 *La Semaine Juridique* (1989) p. 199.

[18] Conseil d'Etat Ass. 30 Oct. 1998 (Sarran, Levacher et autres).

[19] *See* M. Long, et al., *Les grands arrêts de la jurisprudence administrative* (Dalloz, 2003) 14th edn.

[20] Conseil d'Etat 3 Déc. 2001 (Syndicat national des industries pharmaceutiques), with the case note of A. Rigaux and D. Simon, 2002 *Europe* p. 6; *See also* Conseil d'Etat 30 July 2003, *Juris-Data* 2003-065803 (Association Avenir de la langue française).

[21] 'Considérant que si, aux termes de l'article 55 de la Constitution, "les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie", la suprématie ainsi conférée aux engagements internationaux ne saurait s'imposer, dans l'ordre interne, aux principes et dispositions à valeur constitutionnelle; qu'eu égard aux dispositions de l'article 88-1 de la Constitution, selon lesquelles "la République participe aux Communautés européennes et à l'Union

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By referring to both Article 55 and Article 88-1 of the Constitution, the *Conseil d'Etat* gave up the traditional amalgam of Community law and classical international law and recognised the specificity of the Community legal order. But notably, unlike the *Conseil constitutionnel*, the highest administrative court has chosen not to give up its traditional reference to Article 55, thereby signalling that this Article still has relevance for the issue of Community law's primacy. For both the *Cour de Cassation* and the *Conseil d'Etat,* the primacy given by Article 55 to international law is limited. They have stated in 1998 and 2000 respectively that in the French legal order, treaties stand hierarchically under the Constitution.[22] The *Arcelor* decision therefore seems to imply that according to the *Conseil d'Etat*, the authority of Community directives and their ranking in the normative hierarchy result not only from Article 88-1, but also from Article 55.

As we have seen, the *Conseil d'Etat* derives a duty to implement Community directives in the internal order from Article 88-1. It thus chose to follow the *Conseil constitutionnel* and to give up the view expressed in an opinion of 26 September 2002.[23] In this opinion, the *Conseil d'Etat*, acting as the government's most important legal advisor, was faced with the question whether a framework decision contravened a *principe fondamental reconnu par les lois de la République*. Of course, directives and framework decisions are formally different acts. However, as regards content, no significant material differences can be noticed apart from direct effect, which is excluded for framework decisions (Article 34(2)(b) EU).[24] The *Conseil d'Etat* interpreted Article 88-1 as guaranteeing that implementing framework decisions is not unconstitutional, i.e., it is in accordance with the principle of national sovereignty. To phrase it differently, implementation was only presented as a possibility, not as a duty.[25] In *Arcelor,* the *Conseil d'Etat* reversed this interpretation of Article 88-1 and adopted the 'radically different'[26] view expressed by the *Conseil constitutionnel* on 10 June 2004. It then interpreted the words 'shall participate' as an imperative, which is linguistically more appropriate.

européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences", dont découle une obligation constitutionnelle de transposition des directives, le contrôle de constitutionnalité des actes réglementaires assurant directement cette transposition est appelé à s'exercer selon des modalités particulières dans le cas où sont transposées des dispositions précises et inconditionnelles.'

[22] Conseil d'Etat 30 Oct. 1998 (Sarran et Levacher et autres); Cour de Cassation 2 July 2000 (Mlle Fraisse), with a note by B. Mathieu & M. Verpeaux.

[23] Conseil d'Etat Ass. 26 Sept. 2002, Opinion No. 368282.

[24] *See* M. Gautier, *L'influence du modèle communautaire sur la coopération en matière de justice et d'affaires intérieures* (Bruylant, 2003).

[25] *See* O. Dupéré, 'Jurisprudence constitutionnelle, Le contrôle de constitutionnalité du droit dérivé de l'Union européenne, Lectures croisées par le *Conseil d'Etat* et le Conseil constitutionnel', 61 *Revue Française de Droit Constitutionnel* (2005) p. 147 at p. 168.

[26] Ibid.

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Testing acts implementing Community law against the Constitution

The recognition of the specificity of Community law requires adjusting the method of testing acts implementing a directive, and particularly their constitutionality. Review of acts implementing Community legislation could indeed easily lead to review of the Community legislation itself against the Constitution, which is contrary to the Community court's case-law. Accordingly, since its decision of 10 June 2004, the *Conseil constitutionnel* has constructed the so-called theory of a 'screen-directive' (*Directive écran*). It has elaborated on this theory on several occasions, especially in its decision of 27 July 2006, in which it has altered the phraseology. Moreover, in this decision, the constitutional court for the first time explicitly recognised its competence to review a law against the directive, which it purported to implement. The *Conseil d'Etat* on 8 February 2007 also defined its position on this issue. It had chosen, once again, to follow the *Conseil constitutionnel*.

The Conseil constitutionnel and the testing of Acts of Parliament implementing directives

The question of whether the *Conseil constitutionnel* has the power to test Acts of Parliament implementing directives can be divided into two closely related issues. First, is the *Conseil constitutionnel* competent to test an Act implementing a Community directive against the Constitution, and, secondly, is it competent to test such an Act's compatibility with the directive implemented?

As to the first issue: such a competence could indeed amount to a review of the Community legislation itself. This would contravene the Court of Justice's case-law, which, on the basis of the primacy of Community law,[27] has resolutely and repeatedly stated that national rules, even of a constitutional nature, cannot override Community law, as this would challenge the foundations of the European Community.[28] It incidentally clearly emerged from the *Conseil constitutionnel's* case-law that it has no competence to review secondary Community law *directly*. This is excluded by Article 54 of the Constitution, which only allows for the review of 'international agreements' that need (national) approval or ratification, and thus generally is not applicable to secondary Community law.[29] Nevertheless, until 2004, the position of the French constitutional court remained unclear

[27] EJC 22 Oct. 1987, Case 314-85, *Foto-Fros*t; EJC 9 March 1978, Case 102-79, *Administration des finances* v. *Simmenthal*); EJC 11 April 1978, Case 100-77.

[28] EJC 12 Dec. 1970, Case 11-70, *Internationale Handellsgesellschaft* v. *Einfuhr und Vorrattstelle für Getreide und Futtermittel*; EJC 21 May 1987, Case 249-85, *Albako*.

[29] 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.

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on its competence ex Article 61 of the Constitution to review laws implementing secondary Community law.

On 30 December 1977,[30] the *Conseil* refused to declare an Act of Parliament unconstitutional which implemented a Community regulation but neglected a constitutional provision on the legislative competence of the French Parliament (Article 34). With a reference to the (present) Article 249 EC, which 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, from this French scholars have concluded that Acts implementing regulations enjoy constitutional immunity. 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. That principle would be violated if an Act containing the necessary implementation of a regulation would be declared void.

Reestman, in his case note on the decision of 10 June 2004, rightly has stressed that the decision of 1977 remained isolated and the *pacta sunt servanda* reasoning did not convince everyone. Indeed, some have argued that 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 constitutionnel* should therefore review such an Act, and, if it were to be contrary to the Constitution, the implementation of the directive would have to be preceded by a constitutional amendment. The question never really presented itself to the *Conseil constitutionnel*, as it was never confronted with Acts implementing directives holding unconditionally and precisely phrased provisions.[31]

The *Loi pour la confiance dans l'économie numérique*, however, implemented such unconditionally and precisely phrased provisions of a directive. On 10 June 2004, the *Conseil constituionnel* refused to test this Act against the Constitution. Indeed, such a review would amount to review of the directive itself. Considering that implementation of a directive is a constitutional duty, the *Conseil constitutionnel* stated that it is only for the Community court to test the compatibility of the directive with both the competences defined by the Treaties as well as the fundamental rights which Article 6 of Treaty on European Union coins as general principles of Community law.

[30] CC 30 Dec. 1977, 77-90 DC (Dernière loi de finances rectificative pour 1977 et, notamment, son article 6).

[31] J.H. Reestman, 'Conseil constitutionnel on the Status of (Secondary) Community law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC', *EuConst* (2005) p. 302 at p. 317.

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Nevertheless, it reserved the possibility to review an implementing Act against an 'explicit contrary constitutional provision' (*disposition expresse contraire de la Constitution*). However, as long as such a provision is not encountered, it is not for the *Conseil constitutionnel* to intervene. In other words, when the Act challenged simply draws the necessary consequences of unconditionally and precisely phrased provisions of a Community directive, the *Conseil* is not competent to test its constitutionality. The Community directive, which enjoys constitutional immunity, is standing as a screen between the Act and the Constitution. This screen only disappears if an 'explicit contrary constitutional provision' is at stake.

The clumsiness of this phrase has been remarked upon by scholars.[32] They stressed that it is not clear what is meant by an 'explicit contrary constitutional provision'. In a decision of 29 July 2004,[33] the *Conseil constitutionnel* added a condition relating to the specific nature of the constitutional provision. In this case, it refused to test a provision of an implementing Act against the freedom of expression contained in Article 11 of the Declaration of 1789, which is part of the *bloc de constitutionnalité*, because this freedom was also protected by Article 10 of the European Convention on Human Rights and therefore is a general principle of Community law. This decision could be construed as meaning that an 'explicit contrary constitutional provision' is a provision which can only be found in French constitutional law, not in Community (and Union) law.[34] Accordingly, unwritten constitutional norms do not *per se* seem to be disqualified from being 'explicit contrary constitutional provisions', since decisive is not their explicitness, but whether they are more or less exclusively French. Nevertheless, doubts still remained about the concept. Is it, for instance, the right or the interpretation of this right which must be specific?[35] The concept thus needed clarification.[36]

[32] B. Mathieu, 'Le respect par l'Union européenne des valeurs fondamentales de l'ordre juridique national', 18 *Les Cahiers du Conseil constitutionnel* (2005) p. 141 at p. 143; J. Arrighi de Casanova, 'La décision n°2004-496 DC du 10 juin 2004 et la hiérarchie des normes', *Actualité Juridique Droit Administratif* (26 July 2004) p. 1534 at p. 1537; M. Verpeaux, 'Contrôle de la loi transposant une directive communautaire', *Revue mensuelle du JurisClasseur – Droit administratif* (Aug.-Sept. 2004) p. 27; M. Gautier and F. Melleray, 'Le refus du Conseil constitutionnel d'apprécier la constitutionnalité de dispositions législatives transposant une directive communautaire', *Actualité Juridique Droit Administratif* (26 July 2004) p. 1537 at p. 1541; F. Picod, 'Le contrôle de constitutionnalité des actes de droit dérivé de l'Union européenne', 18 *Les Cahiers du Conseil constitutionnel* (2005) p. 144 at p. 147.

[33] CC 29 July 2004, 2004-498 DC, point 7.

[34] *See* B. Genevois, 'Le Conseil constitutionnel et le droit communautaire dérivé. A propos de la décision n°2004-496 DC du 10 juin 2004', *Revue Française de Droit Administratif* (July-Aug. 2004) p. 651 at p. 661; J.-E. Schoettl, 'La brevetabilité des gènes, le droit communautaire et la Constitution', 164 *Les Petites Affiches* (2004) p. 10; Bruce, *supra* n. 7.

[35] Mathieu, *supra* n. 32, at p. 142.

[36] Ibid., at p. 142.

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A new concept: French constitutional identity

In the decision of 27 July 2006, the constitutional court altered the formula of the reservation. The court considered that the implementation of a directive could not neglect 'a rule or a principle inherent in French constitutional identity, unless the constituent power has agreed to it.'[37] This concept of *identité constitutionnelle de la France* is without doubt inspired by Article I-5 of the European Constitutional Treaty, by virtue of which the European Union must respect the national identities of the member states 'inherent in their fundamental structures, political and constitutional'. Incidentally, in the decision relating to the European Constitutional Treaty,[38] the *Conseil* refused to declare unconstitutional Article I-6 of the Constitutional Treaty on the primacy of Union law, only because it should be combined with Article I-5. To phrase it differently, the specificity of Community law is acceptable only because the French constitutional and political fundamental structures are guaranteed.

It is not easy to determine what effect the new phrasing of the reservation has on its scope. On the one hand, one might think that it restricts it. As mentioned before, the concept of 'explicit contrary constitutional provision', used by the *Conseil* in 2004, should be construed as a provision which can only be encountered in the French legal order, and not in Community or Union law. In contrast, the reference to 'constitutional identity', besides its specificity, underlies the fundamental and founding nature of the constitutional provision, which was not required before. It thus now seems very difficult to find a constitutional provision which is likely to justify the *Conseil* getting its power back to review secondary Community law via its implementing Act. On the other hand, because the borders of the concept used in 2004 depended on the guarantees found in Community and Union law, the definition of the reservation's scope was not in the hands of the *Conseil constitutionnel*. In 2006, quite the reverse seems to be the case. It appears that in each case it is up to the *Conseil* to determine whether the constitutional provisions at stake concern the French constitutional identity, i.e., whether they are likely to entail the *Conseil's* competence to test if they are well respected by a law implementing secondary Community law. Here, the *Conseil constitutionnel* enjoys a broad freedom of action. It is certainly in order to obtain this leeway that it coined the new concept. It refuses to be confined within too strict boundaries. Since the concept of constitutional identity can be given an extensive interpretation, some scholars have concluded that the *Conseil constitutionnel* actually wid-

[37] '19. Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti.'

[38] CC 19 Nov. 2004, 2004-505 DC.

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ened the scope of the reservation.[39] Surely, the new concept is no easier to understand than its predecessor.[40]

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. We further think that the reservation will, as the occasion arises, also be applied to Acts implementing regulations. In other words, Acts implementing regulations should also be set aside by a *règle ou principe inhérent à l'ídenté constitutionnelle de la France*.[41]

The second question concerning the constitutional court's competence is whether it may test an implementing Act's compatibility with the directive which is implemented. It must be recalled that in its famous Abortion Law judgment, [42] the *Conseil constitutionnel* stated that it has no competence in the framework of Article 61 of the Constitution to test the *conventionnalité* of an Act, i.e., to test the Act against international agreements. It has applied this reasoning also to Community treaties[43] as well as secondary Community law.[44] Ordinary judges thereby seemed to be put in the exclusive charge of performing such a review. The *Cour de Cassation* and the *Conseil d'Etat* have accepted this competence respectively in 1975[45] and 1989 (*Nicolo)*,[46] even when it comes to testing Acts of Parliament against secondary Community law.[47] This well-established case-law seems at first sight to exclude the competence of the *Conseil constitutionnel* to review Acts against the directive they implement. However, at the same time, given the constitutional duty to implement directives, these Acts might be placed in different category.

[39] *See* F. Chaltiel, 'Droit constitutionnel et droit communautaire, 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', 68 *Revue française de Droit Constitutionnel* (2006) p. 837 at p. 847.

[40] *See* D. Simon, 'L'obscure clarté de la jurisprudence du Conseil constitutionnel relative à la transposition des directives communautaires', 10 *Europe* (Juris-classeurs) (2006) p. 2 at p. 3.

[41] Those reasons have been summarised by Reestman in his comment of the decision of 10 June 2004, *supra* n. 31, at p. 307.

[42] CC 15 Jan. 1975, 74-54 DC (Interruption Volontaire de Grossesse).

[43] CC 23 July 1991, 91-293 DC (Accès des étrangers à la fonction publique); CC 21 Jan. 1994, 93-335 DC (Urbanisme et construction); CC 29 Dec. 1998, 98-405 DC (Loi de finances pour 1999); CC 23 July 1999, 99-416 DC (Couverture maladie universelle); CC 27 Dec. 2001, 2004 - 457 DC (Loi de finances rectificative pour 2001).

[44] CC 24 July 1991, 91-298 DC (Dispositions fiscales rétroactives).

[45] Cass. Ch. Mixte, 24 May 1975 (Société des cafés Jacques Vabre).

[46] Conseil d'Etat Ass. 20 Oct. 1989 (Nicolo).

[47] G. Alberton, 'De l'indispensable intégration du bloc de conventionnalité au bloc de constitutionnalité', *Revue Française Droit Administratif* (March-April 2005) p. 249 at p. 268.

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The Conseil constitutionnel *as a European court*

In its decision of 27 July 2006, the *Conseil constitutionnel* for the first time confirmed unambiguously that it has the competence to test the compatibility of Acts with the directive they implement. The court considered that:

> it is up [..] to the Conseil constitutionnel, when it is called in under the conditions of Article 61 of the Constitution to test an Act of Parliament, the purpose of which is to implement a Community directive in national law, to guard that this duty is respected.

In other words, since the implementation of Community directives is a constitutional duty resulting from Article 88-1, an incorrect implementation should be declared unconstitutional because of infringement of Article 88-1 of the Constitution.

An analysis of the *Conseil constitutionnel's* case-law makes it possible to identify the premises of such a decision. In its decision of 20 May 1998,[48] the constitutional court tested an organic Act implementing a directive concerning European Union citizens' right to vote and to be elected at local elections against both Article 88-3 of the Constitution (which states this right and provides such an organic Act of Parliament to enforce it)[49] and the directive. The reasoning adopted was the same as in the decision of 27 July 2006: since the principle of extending the right to vote and to be elected in local elections to Union citizens is a constitutional duty, the court has to test the Act against the directive.[50] This issue was also encountered between the lines in the decision of 10 June 2004. This decision stated that when petitioners plead that constitutional provisions are infringed by an Act implementing a directive, the *Conseil constitutionnel* must test whether the challenged Act actually faithfully copies the directive before it can rule on its competence to review the Act against the directive. That is exactly what happened in the decision of 29 July 2004, in which the *Conseil constitutionnel* took care to quote the implemented directive before ruling that 'the challenged legislative provisions simply draw its necessary consequences.'[51] Scholars noticed that this operation could lead the *Conseil constitutionnel* to indirectly review the Act against

[48] CC 20 May 1998, 98-400 DC.

[49] Art. 88-3: 'Sous réserve de réciprocité et selon les modalités prévues par le Traité sur l'Union européenne signé le 7 février 1992, le droit de vote et d'éligibilité aux élections municipales peut être accordé aux seuls citoyens de l'Union résidant en France. Ces citoyens ne peuvent exercer les fonctions de maire ou d'adjoint ni participer à la désignation des électeurs sénatoriaux et à l'élection des sénateurs. Une loi organique votée dans les mêmes termes par les deux assemblées détermine les conditions d'application du présent article.'

[50] B. Mathieu et M. Verpeaux, *Droit constitutionnel* (Droit fondamental PUF, 2004) p. 774.

[51] CC 29 July 2004, 2004-498 DC.

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the directive being implemented.[52] Such an interpretation was reinforced by the decision of 30 March 2006. In this case, the French constitutional court ruled explicitly that 'when an application is introduced by virtue of Article 61 of the Constitution', it has no competence 'to test the Act against a Community directive's provision which it did not purport to implement.'[53] This implies *a contrario* that when legislative provisions do purport to implement a Community directive, the *Conseil constitutionnel* should test the compatibility of the former with the latter. To phrase it differently, if legislative provisions purporting to implement a Community directive are incompatible with this directive, the court should quash them because they would contravene Article 88-1 of Constitution. The decision of 27 July 2006 thus is in line with earlier cases, but stands out as it states unambiguously that the *Conseil constitutionnel* has competence to review the compatibility between a deferred Act and the implemented directive.

The decisions of 30 March and 27 July 2006 concerned Acts implementing directives; neither the Founding Treaties nor Community regulations were involved. However, as the constitutional court drew the full consequences of Article 88-1 and has made Community law the exception to its Abortion Law case-law,[54] there is no reason to apply this case-law only to directives, as Article 88-1 is also directed at Community regulations or Treaties.

However, it is important to emphasize that these decisions do not challenge the case-law inaugurated with the Abortion Law judgment: that the *Conseil constitutionnel* has no competence to review Acts against treaties. First, directives are not enshrined in the *bloc de constitutionnalité*. The impugned Act will be quashed on the basis of Article 88-1 and not on the self-sufficient basis of violation of the directive. Moreover, the scope of the review is limited, as it is restricted to Acts purporting to implement directives. In a decision of 29 December 1998,[55] in which two financial laws were challenged, the *Conseil constitutionnel* stated that it could not review Acts in general against directives. In line with this, the decision

[52] *See* A. Levade, 'Les sages ne disent pas ce qu'on voudrait leur faire dire!', *Le Figaro*, 18 June 2004, p. 12; B. Mathieu, 'Le Conseil constitutionnel conforte la construction européenne en s'appuyant sur les exigences constitutionnelles nationales', 25 *Recueil Dalloz – Sirey* (2004) p. 1739; Gautier and Melleray, *supra* n. 32, at p. 1537; J. Roux, 'Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution', 4 *Revue du Droit Public et de la science politique* (2004) p. 912 at p. 933; P.-Y. Monjal, 'La Constitution, toute la Constitution, rien que le droit communautaire…', *Les Petites Affiches* (12 Aug. 2004) p. 16; B. Genevois, *supra*, n. 34.

[53] Cf. para. 28: 'il n'appartient pas au Conseil constitutionnel, lorsqu'il est saisi en application de l'article 61 de la Constitution, d'examiner la compatibilité d'une loi avec les dispositions d'une directive communautaire qu'elle n'a pas pour objet de transposer en droit interne.'

[54] X. Magnon, 'La singularisation attendue du droit communautaire au sein de la jurisprudence IVG. Brèves réflexions sur la décision du Conseil constitutionnel n° 2006-535 DC, 30 mars 2006', 6 *Europe* (2006) p. 4 at p. 6.

[55] CC 29 Dec. 1998, 98-405 DC, point 21; this decision has been reinforced by the decision of 27 July 2000, 2000-433 DC.

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of 30 March 2006 indicated that the review cannot be extended to the laws which simply enter into the field of a directive's implementation. However, this questionable restriction probably will not hold very long. It is difficult to imagine that the *Conseil constitutionnel* would refuse to test a law that does not purport to implement a directive, but for instance, alters another Act which has implemented a directive.

The difference between contrôle de constitutionnalité *and* contrôle de conventionnalité

There is no doubt that the Abortion Law case-law still stands as far as classical international agreements are concerned. One wonders, though, whether the *Conseil constitutionnel* will not totally abandon it in the future and accept the test of Acts in general against international treaties. Indeed, why the restriction to Acts implementing Community law? The reasoning employed in the decision of 27 July 2006 (the Constitution, in Article 88-1, holds a constitutional obligation of accordance between French laws and Community law such that the *Conseil* is competent to test this accordance) can also be used to review Acts against international agreements, which bind France in general, since a duty of accordance between French Acts and international agreements or treaties is laid down in Article 55 of the Constitution.

However, for several reasons, this line of thinking is not convincing. Indeed, the reasoning adopted by the *Conseil constitutionnel* in its Abortion Law case-law rests on foundations that still stand for the *contrôle de conventionnalité* based on Article 55 of the Constitution, although they are not applicable to the review of the compatibility of Acts of Parliament with the directives they implement on the basis of Article 88-1. In the Abortion Law judgment, the constitutional court had to decide on its competence to test Acts of Parliament against international treaties in the framework of Article 61 of the Constitution. Its reasoning was the following: Article 55 states the principle of primacy of international treaties over Acts of Parliament. However, Article 55 does not state that adherence to this principle should be checked when reviewing of Acts of Parliament in the framework of Article 61 of the Constitution. Moreover, it does not even imply it. Indeed, the two kinds of review – the *contrôle de conventionnalité* of Article 55 and the *contrôle de constitutionnalité* of Article 61 – are distinct by their very nature. Whereas the former is relative and contingent, the latter has an absolute and definitive nature. According to the *Conseil constitutionnel*, the relative and contingent nature of the *contrôle de conventionnalité* results from the fact that the primacy of international treaties is limited to the treaties' field of enforcement and is dependent on a condition of reciprocity. It must be understood that the declaration of *inconventionnalité* is dictated by circumstances, which can change. This led the

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Conseil constitutionnel to assert that an Act of Parliament which contravenes an international agreement does not *per se* contravene the Constitution. That is why the *Conseil* rejected its competence to perform such a *contrôle de conventionnalité*. In contrast, the compatibility between Acts of Parliament and implemented Community directives is neither relative nor contingent since Article 88-1 of the Constitution states an unconditional obligation to respect Community duties and to execute community law without any condition of reciprocity. This argument should nevertheless be relativised since the reciprocity condition is not applicable to all international agreements: the European Convention on Human Rights, for example.[56]

Now we come to the second argument, which seems more decisive. Article 55 only holds a rule of conflict: the principle of primacy of international agreements over national Acts of Parliament. Accordingly, international agreements are still considered to be external sources of law. Therefore, they cannot be used by the *Conseil constitutionnel* as norms of reference. However, Article 88-1 induces the constitutional reception not only of the principle of primacy, but of all Community law. The result is that Community law is constitutionalised (*constitutionnalisé*) and no longer counts as an external source of law. To be short: a violation of Community law violates Article 88-1 more directly than a violation of an international treaty violates Article 55.[57] We can conclude from this that the decisions of 2004 and of 27 July 2006 are not premonitions of a development in which the *Conseil constitutionnel* will start testing Acts against all international agreements.

No preliminary questions by the Conseil constitutionnel

In its decision of 27 July 2006, the *Conseil constitutionnel* also clarified the mode of testing the conformity of an Act with the directive implemented. This review is not only subject to the absence of a rule or a principle inherent in the French constitutional identity, [58] a concept which we already have discussed, but is also restricted by a second condition, which lies in its summary nature:

> … given that it has to rule before the promulgation of the Act, within the timeframe required by Article 61 of the Constitution, the *Conseil constitutionnel*

[56] The European Court of Human Rights has thus stated: '239. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"' (ECtHT 18 Jan. 1978, Case No. 5310/71, *Ireland* v. *the United Kingdom*).

[57] *See* Magnon, *supra* n. 54, at p. 5.

[58] Cf. para. 28: 'que la directive du 22 mai 2001 susvisée […] n'est contraire à aucun principe inhérent à l'identité constitutionnelle de la France [et qu'elle] comporte des dispositions inconditionnelles et précises,'

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> cannot refer preliminary questions to the Court of Justice of the European Communities as provided for by Article 234 EC; that it should therefore declare contrary to Article 88-1 only a legislative provision which is plainly incompatible with the directive it purports to implement; anyhow, it is up to ordinary national courts to refer, by way of the preliminary procedure, to the Court of Justice, as the occasion arises.[59]

The review of the Act against the directive as performed by the *Conseil constitutionnel* seems to partially lose its substance, since the Act can only be quashed in case of an obvious incompatibility. Because of this second restriction, the exception to the Abortion Law case-law seems very limited.

The phrasing of the consideration attracts attention. It emerges that the *Conseil constitutionnel* cannot, in practice, review the exact accordance of the challenged text with the directive because of the timeframe allowed to it. In other words, the *Conseil* is competent, but in practice incapable of performing the review. One wonders whether the constitutional court did not implicitly invite the constituent power to give it the practical possibility to converse with the Court of Justice. If such power were to be given, the review would become more relevant. At the same time, the question of testing the conventionality of the directive itself, i.e., the test of the directive against primary Community law, would arise. The *Conseil constitutionnel* excluded its competence to perform such a review in its decision of 10 June 2004, stating that:

> … it is only for the Community court, 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.[60]

However, if a constitutional amendment would enable the *Conseil constitutionnel* to refer to the Court of Justice, one can imagine the *Conseil* accepting that a complaint that a directive is illegal can *utilement* be presented before it. In that case, it would not be competent to declare the complaint founded: it could either

[59] '20. 'devant statuer avant la promulgation de la loi dans le délai prévu par l'article 61 de la Constitution, le Conseil constitutionnel ne peut saisir la Cour de justice des Communautés européennes de la question préjudicielle prévue par l'article 234 du traité instituant la Communauté européenne; qu'il ne saurait en conséquence déclarer non conforme à l'article 88-1 de la Constitution qu'une disposition législative manifestement incompatible avec la directive qu'elle a pour objet de transposer; qu'en tout état de cause, il revient aux autorités juridictionnelles nationales, le cas échéant, de saisir la Cour de justice des Communautés européennes à titre préjudiciel.'

[60] Para. 7: '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.'

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reject it or, in case of doubt, refer it to the Court of Justice by way of the preliminary procedure.

The Conseil d'Etat *and the testing of decrees implementing directives*

In the *Arcelor* case, the complaints of the petitioners led the *Conseil d'Etat*, for its part, to clarify the methods which apply to testing decrees implementing directives against the Constitution. The highest administrative court once again chose to follow the opinion of *Commissaire du Gouvernement* Guyomar, who suggested that the *Conseil* draw inspiration from the judgments of the constitutional court.

However, before examining this judgment, it may be useful to review in a few words the highest administrative court's previous case-law. First, it should be noted that the *Conseil d'Etat* has always refused to test, even indirectly, the content of treaties against the Constitution. It considers that it is not its task, in the administration of justice, to take cognizance of complaints against the violation of constitutional principles by international agreements.[61] The *Conseil d'Etat* thereby rules out complaints against violation of the Constitution by decrees which simply copy the provisions of an international convention.[62]

Commissaire du Gouvernement Guyomar used several arguments for holding on to this stance. One of them was that Article 54 of the Constitution puts the *Conseil constitutionnel* in charge of testing whether international agreements contain provisions which contravene the Constitution before their ratification or approval. That prevents the *Conseil d'Etat* from performing the same test. However, concerning more precisely the issue of constitutional review of secondary Community legislation upon petitions against decrees implementing it, the *Commissaire du Gouvernement* considered that the *Conseil d'Etat*'s case-law was not in accordance with the *Conseil constitutionnel*'s case-law.

The legal immunity generally allowed to international law could at first sight be construed to mean that the *Conseil d'Etat* has no competence to review the constitutionality of secondary Community law.[63] And yet, according to the *Commissaire du Gouvernement*, this must be possible, especially because, unlike in the case of treaties and Acts of Parliament, in the French legal order there is no court vested with the competence to test directives against the Constitution upon their implementation by government decrees. It is noteworthy that, in its already mentioned Opinion rendered on 26 September 2002 as the government's legal adviser, the *Conseil d'Etat* asserted that:

[61] Voir Conseil d'Etat 8 July 2002 (Commune de Porta) which falls into line with Conseil d'Etat, Ass. 18 Dec. 1998, (SARL du parc d'activités de Blotzheim et SCI 'Haselaecker').

[62] Voir Conseil d'Etat Section 13 March 1964 (Sieur Vassile); Conseil d'Etat 3 Nov. 1999 (Groupement national de défense des porteurs des titres russes).

[63] The recent judgment of the Conseil d'Etat of 27 July 2006 (Association Avenir de la langue française) did not decide the issue.

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> if a framework decision includes provisions which contravene the Constitution or equivalent principles, or which neglect rights constitutionally enacted or infringe the essential conditions of exercising national sovereignty, it could only be implemented into the internal legal order after an amendment of the Constitution.[64]

The *Conseil d'Etat* thus paved the way for a 'general competence to test secondary Community law against the Constitution.'[65]

As we have seen from the *Conseil constitutionel's* case-law, a competence emerges which is restricted by the 'screen-directive' theory (*théorie de la directive écran*). Thus, when the Act referred to the *Conseil constitutionnel* simply draws the consequences of unconditionally and precisely phrased provisions of the directive, the *Conseil* gives up its testing competence for the benefit of the Community court. The constitutional court only recovers its competence to test the Act implementing a directive if the French constitutional identity is at stake. In its *Arcelor* judgment, the *Conseil d'Etat's* case-law was consistent with that of the *Conseil constitutionnel*.

According to the highest administrative court, the review should adhere to the following pattern. First, two hypotheses must be distinguished. If the directive does not include any unconditionally and precisely phrased provisions, i.e., if it gives the member states discretion, it appears that the review of the implementing decree performed by the *Conseil d'Etat* will not be affected at all. The situation is different when the directive does include unconditionally and precisely phrased provisions. The *Conseil d'Etat* states that:

> in view of the provisions of Article 88-1 of the Constitution, […] from which follows a constitutional duty to implement directives, the review of decrees which perform this implementation directly, must be exercised according to distinctive methods when unconditionally and precisely phrased provisions are implemented.[66]

It should be noted that this criterion of unconditionally and precisely phrased provisions is directly borrowed from the *Conseil constitutionnel*.

[64] 'Une décision cadre ne saurait, si elle comporte des dispositions contraires à la Constitution ou à des principes de valeur constitutionnelle, mettant en cause des droits constitutionnellement garantis ou portant atteinte aux conditions essentielles d'exercice de la souveraineté nationale, être transposée dans l'ordre juridique interne qu'après modification de la Constitution.'

[65] Dupéré, *supra* n. 25, at p. 151.

[66] 'eu égard aux dispositions de l'article 88-1 de la Constitution, […] dont découle une obligation constitutionnelle de transposition des directives, le contrôle de constitutionnalité des actes réglementaires assurant directement cette transposition est appelé à s'exercer selon des modalités particulières dans le cas où sont transposées des dispositions précises et inconditionnelles.' In his opinion, the *Commissaire du Gouvernement* Guyomar incidentally noted that a decree implementing a Community regulation would be subject to the same regime.

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When discussing constitutional case-law, we have seen that the presence of unconditionally and precisely phrased provisions in the directive affects the *Conseil constitutionnel's* competence (except of course when France's constitutional identity is at stake). The fact that the challenged Act only draws the necessary consequences from the directive makes complaints against this Act's violation of the Constitution inoperative.[67] This seems logical because, when member states are faced with those unconditionally and precisely phrased provisions, their freedom of action disappears. Since the content of the decree exactly follows the implemented directive, as it should, the legal discourse, under the pretext of relating to the internal legality of the internal decree, actually concerns the substance of the Community act.

In such a case of perfect and necessary accordance between the implementing decree and secondary Community law, the *Conseil d'Etat*, following the constitutional case-law, stated that the review 'requires distinctive methods.' What are those methods? The *Conseil d'Etat* indicated that:

> it is up to the administrative court, when a complaint is filed alleging the disregard of constitutional provisions or principles, to examine whether a rule or general principle of Community law exists, which, given its nature and its scope as interpreted in the present state of the Community court's case law, guarantees, by its enforcement, that the cited constitutional provisions or principles are respected effectively.[68]

In case of an affirmative answer, i.e., if a rule or general principle of Community law is at least as protective as the constitutional provision invoked, the *Conseil d'Etat* indicated that:

> the administrative court must, in order to ensure the constitutionality of the decree, examine whether the implemented directive is in accordance with this rule or principle of Community law.[69]

According to *Commissaire du Gouvernement* Guyomar, the administrative court thus will have to examine whether this rule or general principle of Commu-

[67] *See* CC 10 June 2004, 2004-496 DC; CC 1 July 2004, 2004-497 DC, para. 39; CC 29 July 2004, 2004-498 DC, para. 7; CC 29 July 2004, 2004-499 DC, para. 8.

[68] 'il appartient au juge administratif, saisi d'un moyen tiré de la méconnaissance d'une disposition ou d'un principe de valeur constitutionnelle, de rechercher s'il existe une règle ou un principe général du droit communautaire qui, eu égard à sa nature et à sa portée, tel qu'il est interprété en l'état actuel de la jurisprudence du juge communautaire, garantit par son application l'effectivité du respect de la disposition ou du principe constitutionnel invoqué.'

[69] 'il y a lieu pour le juge administratif, afin de s'assurer de la constitutionnalité du décret, de rechercher si la directive que ce décret transpose est conforme à cette règle ou à ce principe général du droit communautaire.'

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nity law is well respected by the directive, which is implemented by the decree. This:

> switch into the Community legal system involves that the complaint will be requalified. Where only constitutional law is invoked, the administrative court will, after having made sure that the protection is equivalent, proceed to a kind of 'substitution of the legal foundation' of the complaint.[70]

This complaint will then be examined under the conditions enacted by Article 234 CE, with due regard to the Court of Justice's *Foto-Frost* case-law. Thus, when there is no serious doubt about the validity of the directive, the administrative court will be competent to dismiss the complaint without recourse to the preliminary procedure. However, if the validity of the directive seems doubtful, it would have to refer the matter to the Court of Justice.

One can understand that when it is performing this 'transfer' of the *bloc de constitutionnalité* into the Community legal order, the administrative court actually relinquishes the main part of its competence to test implementing decrees. The outcome of this is that the *Conseil d'Etat* reinforces the 'screen-directive' theory: the existence of a directive containing unconditionally and precisely phrased provisions is an obstacle to testing the implementing decrees against the Constitution. Conversely, if no rule or general principle of Community law equivalent to the constitutional guarantee exists, the transfer will not be performed and the court will indirectly test the directive against the constitutional rule or principle. If the complaint is justified, the administrative court will not hesitate to quash the implementing decree.

Therefore, the screen formed by the directive between the constitutional provisions and the implementing decree disappears when there is no equivalent protection in Community law. The *Conseil d'Etat* then recovers its competence to test the decree against the Constitution, even if that actually leads to testing the implemented directive itself. The *Conseil d'Etat* here is reserving the right to review Community legislation, thus following the same reasoning as the *Conseil constitutionnel*. However, the *Conseil d'Etat* did not choose to resort to the 'obscure'[71] concept of *règles et principes inhérents à l'identité constitutionnelle de la France*. Like the *Conseil constitutionnel* in 2004, it used a negative definition of the reservation.

The approach adopted in the *Arcelor* case enables one to fully understand the borders of the criterion: an equal level of protection. It emerges from the judg-

[70] *See* the pleadings of the *Commissaire du Gouvernement* Guyomar: 'le basculement dans l'ordre juridique communautaire se traduira par la requalification du moyen. Là où seul le droit constitutionnel était invoqué, le juge administratif procédera, après s'être assuré de l'équivalence des protections, à une forme de "substitution de base légale" du moyen.'

[71] Simon, *supra* n. 40, at p. 2.

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ment that the examination by the administrative court of the question of whether the reservation applies has to pass through two stages. Firstly, it has to examine whether a rule or principle equivalent to the constitutional rule or principle exists in the Community legal order. This involves an investigation into the specific nature of the cited constitutional norm. If no equivalent rule or principle can be found, the operation stops and the review against the specific constitutional provision can be performed normally. If however such an equivalent rule or principle exists in Community law, the administrative court moves on to the second stage: examining *in concreto* whether the rule or principle of Community law does have a scope which effectively guarantees that the cited constitutional principle or rule is well-respected. Thus, the *Conseil d'Etat* has competence not only when the invoked constitutional provision itself is specific to France, but also when it is a 'common European principle' with a *scope* specific to France. In practice, it does not seem easy to find such rules or principles. At the most, some rules or principles to which the French judges have given a specific interpretation seem to be able to trigger the constitutional reservation, as for instance, the principle that the State is secular (*laïcité*, Article 1 of the Constitution) and the principle of equal access to public jobs.[72]

By giving preference to the concept of equivalent protection instead of that of constitutional identity, the highest administrative court has chosen a criterion which is more tailored to its judicial function. As the *Commissaire du Gouvernement* noted, it is not up to the *Conseil d'Etat* to define the French constitutional identity. This pragmatic choice nevertheless influences the scope of the reservation of constitutionality, which seems narrower than that currently used by the *Conseil constitutionnel*.

The highest administrative court underlined that the principles stated in *Arcelor* only apply in that specific case, which concerned the review of the constitutionality of an autonomous government decree implementing a directive. Therefore, two main questions remain unanswered. The first concerns the scope of the breach in (the theory of) the constitutional immunity of international treaties. The second concerns the *Conseil d'Etat*'s attitude in the presence of an Act of Parliament implementing a directive, or of an Act of Parliament standing between the decree and the directive.[73]

According to the *Commissaire du Gouvernement*, the review of secondary community law's constitutionality via decrees implementing it is essentially justified by an essential rule: review should be possible,[74] although only by one court.

[72] Genevois, *supra* n. 34.

[73] *See* F. Lenica and J. Boucher, 'Chronique générale de jurisprudence administrative française', *Actualité Juridique Droit Administratif* (19 March 2007) p. 577 at p. 589, at p. 582-583.

[74] *See* P. Cassia, 'Principe constitutionnel d'égalité: renvoi à la CJCE pour difficulté sérieuse', 12 *La Semaine Juridique – Edition générale* (21 March 2007) p. 68 at p. 70.

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Neither in the context of Article 54 of the Constitution nor in that of Article 61 is the *Conseil constitutionnel* competent to review secondary Community law. The lack of competence of the *Conseil constitutionnel* is thus what seems to found the competence of the *Conseil d'Etat.* Therefore, the answer to the first question seems to be that the exception to the theory of the constitutional immunity of treaties is limited to acts implementing directives and other secondary Union acts (regulations and framework decisions), but is not extended to international treaties *per se*.[75]

As to the second question, the same reasoning implies that if the *Conseil d'Etat* is confronted with the presence of an Act of Parliament, it will be prevented from performing a constitutionality test.[76] The highest administrative court, according to well-established case-law, considers itself not competent to test an Act of Parliament against the Constitution.[77] Given that:

> Article 61 of the Constitution puts the *Conseil constitutionnel* in charge of testing the Act against the Constitution, and that this review must be performed after the vote of the Act and before its promulgation,

the *Conseil d'Etat* has stated that:

> the methods thus adopted exclude any test of the Act against the Constitution at the stage of its enforcement.[78]

If an Act of Parliament is standing between the challenged decree and the implemented directive, the *Conseil d'Etat*, according to the theory of 'screen-Act of Parliament' (*théorie de la loi écran*), should subsequently also reject its competence to perform the review.

Nevertheless, we think that if the *Conseil d'Etat* is confronted with the question of the compatibility between an Act of Parliament, the purpose of which is to implement a directive against constitutional rules or principles that can (also) be found in Community law, it will not refuse to requalify the complaint in view of the aforementioned conditions (*see supra* after n. 69).[79]

[75] *See* F. Lenica and J. Boucher, *supra* n. 73, at p. 582.
[76] *See also* P. Cassia, *supra* n. 74.
[77] Conseil d'Etat Section 6 Nov. 1936 (Sieur Arrighi).
[78] Conseil d'Etat 5 Jan. 2005 (Melle Deprez et Baillard): 'les modalités ainsi adoptées excluent un contrôle de constitutionnalité de la loi au stade de son application.'
[79] *See* Lenica and Boucher, *supra* n. 73, at p. 582-583.

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The ranking of community law in the hierarchy of norms

The relationship between national law and international law has always been grasped in the Kelsenian logic, which hinges on a normative hierarchy. One can thus understand the importance of the issue of how the national courts receive the principle of primacy of Community law as well as the closely related issue of their competence to test Community law against the Constitution. The answers given to those questions are likely to challenge the traditional hierarchy of norms in which the Constitution is at the top of the internal legal order.

In this regard, we can assert that the recent case-law of both the *Conseil constitutionnel* and the *Conseil d'Etat* contributes to reinforcing the importance of the Community legal system. The two national courts recognise the specificity of Community law as compared to international law. Moreover, there is no doubt that they strengthen the European Communities by drawing the necessary conclusions from France's commitments and of the necessity to guarantee consistency between the Community legal order and the national legal order.[80] On the other hand, the aforementioned case-law entails that both the constitutional court and the highest administrative court give up a considerable part of their power to test national rules against the Constitution, to the benefit of the Court of Justice. Concerning the *Conseil constitutionnel*, we can moreover notice that it does not get much in return when it tests Acts against directives being implemented: this testing remains of a summary nature since the *Conseil*, for practical reasons, restricts itself to only quashing legislative provisions which are manifestly incompatible with the directive. Such a standpoint is no doubt likely to weaken the constitutional rules' efficacy. And one naturally wonders whether the relative positions of the Constitution and Community law *in fine* might not be changed. Finally, it is remarkable that the *Conseil constitutionnel*, by using Community directives as a reference for the testing of implementing Acts, has furthered the ascendancy of Community law over the French constitutional law, even though those directives are not enshrined in the *bloc de constitutionnalité*.

All those considerations explain why both the *Conseil constitutionnel's* recent case-law and the *Conseil d'Etat's* judgment of 8 February 2007 have been interpreted as implying Community law's absolute precedence over national law, even national law of a constitutional nature.[81] A more extensive analysis of the decisions, however, leads to the opposite conclusion.[82] First, both courts base the

[80] *See* B. Mathieu, note sous C.C., 10 June 2004, *Revue Dalloz,* at p. 1237.

[81] Especially in *Le Monde* and *Le Figaro.*

[82] J.-P. Camby, 'Le droit communautaire est-il soluble dans la Constitution ?', 4 *Revue du Droit Public et de la science politique* (2004) p. 878 at p. 888; P. Cassia, 'Le véritable sens de la décision n°2004-496 du Conseil constitutionnel', 26 *Actualité Juridique Droit Administratif* (2004) p. 1385; C. Maugüe, case note on the decision of 10 June 2004, 28 *Le courrier juridique des finances et de*

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duty to implement secondary Community law, and more generally the primacy of Community law *vis-à-vis* national law, on Article 88-1 of the Constitution. Secondly, they both reserve the right to set aside this precedence and to review secondary Community law (indirectly) against specific constitutional provisions. Indeed, although they both recognise in several ways the specificity of Community law, neither the *Conseil constitutionnel* nor the *Conseil d'Etat* base this on the autonomous legal order that has been proclaimed by the Court of Justice. According to the Court of Justice, primary and secondary Community law, on their own strength, and independent of the member states' constitutions, are integrated in 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.[83]

Unquestionably, the reasoning of the *Conseil constitutionnel* and that of the *Conseil d'Etat* emphasises the principle of the supremacy of the Constitution *vis-à-vis* Community law. They consider that the constituent power has incorporated in Article 88-1 of the Constitution the duty to implement directives and, more generally, the existence of the Community legal order integrated into the internal legal order. Thus, it is the Community legal order which is integrated into the national order, and not the other way around. Community law only can be effective in France by virtue of the constituent power's will. The Constitution remains the norm determining the relationship between the legal systems involved and thus has precedence over all other norms. In other words, because they are inscribed in the Constitution, the duty to implement Community law and the principle of its primacy do not alter the place of the Constitution at the top of the hierarchy of norms.

Incidentally, in its judgment of 8 February 2007, the *Conseil d'Etat* also referred to Article 55 of the Constitution, and emphasised that 'the supremacy thus conferred to international agreements cannot override, in the internal order, constitutional principles and provisions.' It has thus chosen to maintain the idea expressed earlier by itself as well as by the *Cour de cassation*, that in the French legal order treaties stand hierarchically under the Constitution.[84] The *Cour de cassation*

l'industrie (July-Aug. 2004) p. 4; Monjal, *supra* n. 52, at p. 16; Roux, *supra* n. 52; M. Delamare, *Commentaire de la décision du Conseil constitutionnel en date du 10 juin 2004*, <www.robert-schuman.org/synth141.htm.>; Verpeaux, *supra* n. 32.

[83] 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.'

[84] *Supra* n. 22. *See also* Conseil d'Etat 3 Dec. 2001, *supra* n. 20.

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on the other hand has always adopted a more open stance, combining both a reference to Article 55 of the Constitution and to the specificity of Community legal order.[85] Actually, the *Cour de cassation* always felt less of a need to recall the constitutional basis.[86] Indeed, in many judgments, it has asserted the primacy of Community law without any reference to Article 55, and so this provision seems now to be only 'a backdrop whose presence is more often indirect and presumed.'[87]

As indicated, both the *Conseil constitutionnel* and the *Conseil d'Etat* reiterated the affirmation of a reservation which allows them to test secondary Community law through the review of its implementing act. As Reestman noticed, that reservation brings the two French courts in line with, for instance, the German *Bundesverfassungsgericht* and the Italian *Corte Costituzionale.*[88] 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 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*.[89] The Italian court reserves the right to review Community law against core values enshrined in the *Costituzione*.[90]

When the reservation was asserted for the first time by the *Conseil constitutionnel* in its decision of 10 June 2004, most scholars considered that the decision should not be interpreted as meaning that Community law hierarchically stands above the Constitution.[91] The reasoning is the following. If the *Conseil constitutionnel* had admitted the primacy of Community law *vis-à-vis* the Constitution, how could it, at the same time, provide for an exemption when an explicit contrary constitutional provision is at stake? A rule of hierarchy which can be departed from is not really such a rule.[92] Eva Bruce noticed that even if one tries to justify

[85] Bruce, *supra* n. 7, at p. 8.

[86] Ibid.

[87] J. Rideau, 'La Cour de cassation et l'article 55 de la Constitution', in *La Cour de cassation et la Constitution de la République*, *Actes du Colloque de Paris, 9-10 décembre 1994*, *Cour de cassation* (PUAM, 1995) p. 236.

[88] Reestman, *supra* n. 31, at p. 308-309.

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

[90] 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, Cambridge University Press 1994) p. 643; 21 April 1989 (Fragd), idem, p. 655; *see also* M. Claes, *The National Courts' Mandate in the European Constitution* (dissertation University of Maastricht 2004) p. 423-426.

[91] *Contra* D. Bailleul, 'Quand le juge ressemble au constituant', *Recueil Dalloz – Sirey* (2004) p. 3090.

[92] Bruce, *supra* n. 7, at p. 4.

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this exemption by pointing out that it is restricted to specific constitutional principles, the reasoning could not stand scrutiny. For that would lead one to consider a portion of the Constitution – the explicit contrary constitutional provisions, or, currently, those regarding France's constitutional identity – as being superior to Community law, and the other – 'normal' constitutional provisions – as being of a lower status.

This reasoning would entail a lower rank of all non-specific constitutional provisions, i.e., which can (also) be found in Community law. For instance, the constitutional principle that the State is secular (Article 1 of the Constitution) would thus be presented as rule superior to the freedom of expression contained in Article 1 of the Declaration of 1789. It has been established for a long time already that there is no hierarchy between the different norms of the *bloc de constitutionnalité*.

That, incidentally, is what results from the *Conseil constitutionnel*'s decision relating to the European Constitutional Treaty. The *Conseil constitutionnel* indeed clearly confirmed 'the existence of the French Constitution and its place at the top of the internal legal order.' Since Article I-6 of European Constitutional Treaty, which proclaims the primacy of Community law *vis-à-vis* national law, does not alter the supremacy of the Constitution, the *Conseil* did not declare it unconstitutional. Moreover, the supremacy of the Constitution is consecrated in stronger terms in the judgment of 27 July 2006 than in that of 10 June 2004. Thus, while in the latter it reads that 'the implementation in national law of Community law results from a duty that can only be obstructed by an explicit contrary constitutional provision', the *Conseil* in its decision of 27 July 2006 stated that 'the implementation of a directive could not neglect rules or principles inherent in France's constitutional identity, unless the constituent power agreed to it.' As said before, in 2004, the boundaries of the reservation ultimately depended on the guarantees to be found in Community law, so a sort of co-operative relationship was being instituted between the constitutional court and the Court of Justice. The concept of constitutional identity used in 2006, however, refers to the fundamental and founding nature of the constitutional provisions at stake. The supremacy of the Constitution is therefore stated in absolute terms, without any reference to Community law: it is not the fact that the Constitution includes rules or principles that cannot be found in Community law which allows the *Conseil constitutionnel* to give them the precedence, but the fact that those provisions are inherent in the constitutional identity. If the *Conseil d'Etat* in its judgment of 8 February 2007 returned to a negative definition of the reservation's boundaries, this is only because it has chosen the criterion most appropriate for its judicial function.

The upshot of all this is that the recent case-law of both the *Conseil constitutionnel* and that of the *Conseil d'Etat* should not be interpreted as meaning that the tradi-

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tional hierarchy between norms is altered. On the contrary, they both reiterate, through a different reasoning, the idea of the supremacy of the Constitution *vis-à-vis* secondary Community law.

Conclusion

Recently, the *Conseil constitutionnel* and the *Conseil d'Etat* have clarified the relationship between French constitutional law and Community law. The courts will refrain from testing the constitutionality of acts implementing unconditionally and precisely phrased provisions of a directive, except when France's constitutional identity is questioned (*Conseil constitutionnel)* or when no equivalent protection is offered at the Community level (*Conseil d'Etat).* Thereby, both French courts ensure respect for Community duties, *inter alia*, by also testing Acts of Parliament against unconditionally and precisely phrased provisions of the directive they purport to implement (*Conseil constitutionnel),* while at the same time reinforcing the supremacy of the Constitution in the French legal order.[93] Nevertheless, not all has been settled.[94] For instance, there remains opposition between the position of these French courts on the one hand, which reiterate the idea of the supremacy of the Constitution, and the principle of the Community law's primacy asserted by the Court of Justice on the other hand. Moreover, the contents and scope of the French courts' case-law remain unclear at points. This is the case for France's constitutional identity, for instance, the new concept used by the *Conseil constitutionnel*. The question also remains of what the *Conseil d'Etat* will do when it is faced with an Act of Parliament contrary to constitutional provisions that are also encountered in Union law. Furthermore, the constitutional courts' restriction of its competence to test Acts of Parliament only against directives they purport to implement (and not against all directives) is questionable. These questions have given a boost to old French constitutional debates, and notably to two among them: the incorporation of external norms in the *bloc de constitutionnalité* (at least the whole of Community law, and why not also international norms regarding human rights); and the abandonment of the theory of the 'screen-Act of Parliament', which would open the door to review (*a posteriori*) of the constitutionality of Acts of Parliament by ordinary French courts, until now the exclusive competence of the *Conseil constitutionnel*.

[93] *See* B. Mathieu, 'Le droit communautaire fait son entrée au Conseil constitutionnel', 167 *Les Petites Affiches* (2006) p. 3 at p. 4.

[94] *See* Cassia, *supra* n. 74, at p. 69; *See* Lenica and Boucher, *supra* n. 73, at p. 582; *See also* M. Gautier and F. Melleray, 'Conseil d'Etat et l'Europe: fin de cycle ou nouvelle ère?', *Droit Administratif* (May 2007) p. 9 at p. 17.

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