



**HAL**  
open science

# The ECJ and the French administrative supreme court : Je t'aime, moi non plus? A Study in Judicial Diplomacy

Araceli Turmo

## ► To cite this version:

Araceli Turmo. The ECJ and the French administrative supreme court : Je t'aime, moi non plus? A Study in Judicial Diplomacy. 2022. hal-03866257

**HAL Id: hal-03866257**

**<https://hal.science/hal-03866257v1>**

Preprint submitted on 22 Nov 2022

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## The ECJ and the French administrative supreme court : *Je t'aime, moi non plus?* A Study in Judicial Diplomacy

Araceli Turmo, associate professor, University of Nantes

The history of the relationship between the Court of Justice of the European Union (ECJ) and the French supreme administrative court, the *Conseil d'État*,<sup>1</sup> is as complex as it is long. It is, simultaneously, highly conflictual yet also an illustration of the ability and willingness of an institution to adapt to a system which represented no less of a revolution for itself than for the supreme courts of other Member States. The first decades of European integration were evidently not well received by the *Conseil* which, with the support of most French scholars specialising in administrative law - albeit not those who specialised in European law - primarily sought to defend its own competences from the imposition of an external influence. The 'defiant nationalism'<sup>2</sup> of the *Conseil d'État* stands in stark contrast with the successive (barring a few exceptions) French Presidents and Governments' European ambitions and the country's political elite's willingness to present France as a leader of European integration. In fact, Lord Denning's famous remark on the incoming tide of Community law<sup>3</sup> and the anxiety he expressed about the powers of the ECJ could very well have been formulated by a member of the *Conseil d'État*.

Yet, one could have expected the relationship between the French administrative supreme court and European integration to be much easier considering. The *Conseil* had significant advantages over many other national courts in adapting to the requirements of this new legal order. Core features of European Community law at the time, such as the style of legal writing, in particular that of judgments (including the use of '*considérants*' in the grounds of decisions), the use of concepts such as general principles of law, or the judicial interpretation of very vague provisions, would have been extremely familiar to French administrative lawyers. They did not, in and of themselves, require them to learn a different way of writing or reading judgments or even to work from translated documents. The influence of French administrative law is felt in numerous aspects of early Community law and perhaps most significantly in procedural law and judicial practice, which made communication between courts easier. The reaction of the *Conseil d'État* was nonetheless just as strong and more overtly conflictual than that of the British Court of Appeal and House of Lords (now Supreme Court), illustrating the depth of the adaptations required by the ECJ's interpretation of the treaties and the principles of direct effect and primacy.

This resistance may be explained partly by a concern, similar to those expressed by other supreme courts such as the House of Lords, over a loss of control on the national legal system. The loss is both that of the court itself, as it finds itself under the authority of another jurisdiction for part of the law it is called upon to apply, and that of the national legal system, as sovereignty is limited for the benefit of the construction of a supranational legal order. In this sense, the sources of the *Conseil d'État*'s discomfort with European Community law were not unique. However, this court's

---

<sup>1</sup> The *Conseil d'État* is exclusively competent for matters which relate to administrative law and the judicial review of non-legislative acts. The 'private law' or 'judiciary' court system in France is headed by the *Cour de cassation* and covers all other areas of the law, including civil, commercial and labour law as well as criminal law. The *Conseil constitutionnel* has an exclusive competence to review the constitutionality of legislative instruments.

<sup>2</sup> '*Nationalisme ombrageux*', phrase employed by Roland Drago, note ss CE ass. 27 juillet 1979, n° 9664, *Syndicat national des fabricants de spiritueux consommés à l'eau*, *Revue de droit public* 1980, p. 216.

<sup>3</sup> *HP Bulmer Ltd v J Bollinger SA* [1974] Ch. 401 at 418; [1974] 3 W.L.R. 202.

resistance to the implementation of this law was particularly strong, especially if one takes into consideration the apparent cultural proximity of this new legal order with French administrative law. Another factor which seems to have played an important role is the *Conseil's* unease with judge-made law, or at least with the explicit recognition of its existence. Implementing EU law as defined in the case law of the European Court of Justice, for example in preliminary rulings, is a form of recognition of the normative power of this institution which the *Conseil d'État* was not willing to accept. Thus, the *Conseil* would sometimes hold on to an alternative view of EU law, so long as it felt that written provisions could be interpreted in that way, and resisted mainly to developments which were introduced through case law, such as the direct effect of directives.

Yet, an initial phase of overt resistance was gradually overcome during the 1990s and 2000s, when the *Conseil d'État* made consistent efforts to catch up to EU law and reach what seemed to be an acceptable compromise between the preservation of its own status and acceptance of the legal transformations brought about by European integration. It is difficult to find legal explanations or other objective factors justifying this change in the attitude of the *Conseil*. The most likely explanation appears to hinge simply on the influence of some of its members, such as Bruno Genevois or Mattias Guyomar (currently the French judge at the European Court of Human Rights), whose attitudes towards European integration and the implementation of EU law were much more favourable. This period led the *Conseil d'État* to adopt positions which were in line with those of the other French supreme court, the *Cour de cassation*, as well as the *Conseil constitutionnel*. The relationship had improved to such an extent that in 2017, its Vice-President Jean-Marc Sauvé proudly remarked on the *Conseil d'État's* active participation in judicial dialogue with the ECJ and wished for 'convergence and concord'<sup>4</sup> between national judges and their European counterparts.

However, recent case law indicates that the conflict is far from resolved and that the French administrative supreme court is still capable of more or less overt acts of rebellion against the limitations which EU law imposes upon it. The return to a more conflictual attitude after a phase of gradual opening is as disappointing as it is disconcerting. The shifting positions of the *Conseil d'État* can certainly not be explained by changes in the behaviour of the European Court of Justice, be it in its rulings specifically related to France or in the general contents of its case law.

This paper will attempt to present an overview of the *Conseil's* relationship with the ECJ through the two issues at the heart of the recent conflicts between them: the normative force of EU law (1) and the preliminary reference procedure (2). It will show how, on both of these aspects, the three phases of hostility, gradual opening and a recent return to resistance may be identified in the case law of the *Conseil d'État* and the writings of its members.

## 1. A Conflictual Relationship with EU Law

The *Conseil d'État's* long-standing refusal to recognise the primacy and direct effect of EU law is a well-known feature of France's relationship with European integration. Although many national supreme courts initially showed a similar resistance to these foundational principles, the *Conseil* was remarkable in its constancy. It also developed a number of stratagems designed to avoid making references or implementing ECJ case law to its full extent, making little effort to conceal their purpose. The *Conseil's* refusal to implement EU law had a powerful impact on French administrative law since the other courts in the administrative judicial system were created very recently<sup>5</sup> and are still subject to significant hierarchical pressures from their supreme court. For this

---

<sup>4</sup> Jean-Marc Sauvé, 'L'autorité du droit de l'Union européenne: le point de vue des juridictions constitutionnelles et suprêmes', speech at the Congress marking the 25th Anniversary of the ERA, Trier, 19 October 2017.

<sup>5</sup> The first instance administrative courts were created in 1954 and the courts of appeal in 1987.

reason, they have always been very reluctant to make preliminary references to the ECJ and consider this to be a prerogative of the *Conseil d'État*, which means that ECJ case law rarely enters French administrative law through lower courts' judgments. The *Conseil* did compromise, however, and seldom expressed an outright refusal to take into account ECJ case law, especially on substantive issues of EU law. The more technical the issue, the more willing it was to implement the case law, but judicial creations related to constitutional principles or procedural law found much greater resistance (A). The implementation of the *Simmenthal*<sup>6</sup> obligations of Member States courts and, more generally, of the principle of primacy remains a contentious issue and the focus of a recent backsliding in the *Conseil*'s attitude towards claims based on EU law (B).

#### A. The difficult recognition of the normative value of ECJ case law

Much of the *Conseil d'État*'s resistance to certain aspects of ECJ case law can be understood as an expression of a resistance against any clear acknowledgement of the existence of judge-made law. Like other French supreme courts, the *Conseil d'État* must abide by the prohibition of *arrêts de règlement* ('regulatory judgments') and the fear of a 'government of judges'. Paradoxically, this court operates in a portion of French law which is almost entirely judge-made and its judgments are, in practice, treated as the sources of administrative law which lower courts and other institutions are expected to follow, and law students must memorise. The *Conseil* nevertheless shares with other French institutions an instinctive rejection of the idea of judicial precedents as a source of the law. The persistence of the traditional Montesquieu-inspired imperative that judges should merely be 'the mouth of the law' extends to a reluctance to accept the case law of European courts as a body of precedents which is binding on domestic courts. The difficult and self-contradictory relationship of the *Conseil d'État* with judge-made law has led to an inability to develop a comprehensive, theoretical understanding of the nature and normative power of judicial precedents. Whereas in *Common law* systems, jurisprudence evolved over time in a way which was capable of understanding and analysing the way in which judges create the law,<sup>7</sup> French legal theory has never really taken this step and thus a judge-made legal system coexists with a theoretical framework which, to a significant extent, continues to refuse to recognise that such a thing can exist and does not provide concepts capable of explaining it beyond ill-defined notions of '*jurisprudence*'.<sup>8</sup> The concept of general principles of law is routinely dissociated from 'jurisprudential sources' even when these are recognised, and many authors still insist that these principles are not created<sup>9</sup> but '*dégagés*' (released) by judges, as if they pre-existed the judgments which first formulated them in an ether of 'collective consciousness' or legal tradition.<sup>10</sup> It is not surprising, therefore, that the *Conseil* found it difficult to recognise the existence of such a system within the EU legal order and to include it in its own understanding of the law. One consequence was that the adoption of a position according to which anything in ECJ case law which could not be deduced from the written provisions, as interpreted by the *Conseil*, could be dismissed as going beyond what French judges were required to implement under the EU Treaties.

---

<sup>6</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] EU:C:1978:49.

<sup>7</sup> See Lord Radcliffe's comment that: 'there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?', in his book *Not in Feather Beds*, (Hamish Hamilton, 1968) 216.

<sup>8</sup> See the excellent analysis by Frédéric Zénati, *La jurisprudence* (Dalloz, 1991).

<sup>9</sup> Certain authors have, however, started explicitly recognising that general principles of law are in fact created by judges: Pierre de Montalivet, 'Principes généraux du droit', *Jurisclasseur Administratif*, Fasc. 38, 2020, esp. paras 1-45.

<sup>10</sup> See, for example, the chapter on the sources of law in a widely used recent textbook: Gilles Lebreton, *Droit administratif général* (11e éd., Dalloz, 2021) 65-74.

The *Conseil d'État*'s difficulties in dealing with ECJ case law illustrate these theoretical lacunae, for example in the persistence of a confusion between *res judicata* and the precedential or normative value of a ruling. For some time, the *Conseil* refused to implement aspects of preliminary rulings which it felt went beyond the scope of the questions referred and justified this by stating that such elements were not *res judicata*.<sup>11</sup> Although this case law has now been overruled,<sup>12</sup> it indicated a refusal to consider the authority of such judgments as anything other than *res judicata*, a purely procedural force which should be entirely distinct from their normative impact. One must bear in mind that the concept of *autorité de la chose interprétée* was invented by French scholars precisely in order to present an alternative to both *res judicata* and an actual recognition of judge-made law,<sup>13</sup> through a concept which confused the two in the context of preliminary rulings.<sup>14</sup>

Similarly, the French administrative courts' long refusal to grant Directives direct effect was seen as justifiable on the basis of the nature of these instruments, as set out in the Treaties, regardless of the ECJ's interpretation. Although the *Conseil d'État* accepted the direct effect of regulations, the *Van Duyn*<sup>15</sup> rule on directives was rejected for decades. In 1978, the *Cohn-Bendit* judgment<sup>16</sup> explicitly refused to apply it, against the opinion<sup>17</sup> of the *Rapporteur public*.<sup>18</sup> It took a long time for the *Conseil* to gradually concede exceptions to this rule and, at last, implement ECJ case law in 2009.<sup>19</sup> The *Conseil* also waited sixteen years to implement *Francovich*<sup>20</sup> or, at any rate, an equivalent principle into French law,<sup>21</sup> before creating a rule which allows *Köbler*<sup>22</sup> liability claims a year later.<sup>23</sup> Here, too, the purely judge-made character of the liability principle was probably a significant factor in this resistance. Conversely, the integration of these rules in the 2000s showed a growing acceptance of the normative powers of the ECJ since aspects of EU law which were not based on the interpretation of specific Treaty provisions were becoming accepted as components of the legal order which must be implemented in France.

---

<sup>11</sup> CE sect. 26 July 1985, *ONIC c/ la Société des Mäseries de Beauce*, Req. no. 42204.

<sup>12</sup> CE Ass. 11 December 2006, *arrêt dit des échalotes*, Req. no. 234560.

<sup>13</sup> Jean Boulouis, 'À propos de la fonction normative de la jurisprudence. Remarques sur l'œuvre jurisprudentielle de la Cour de justice des Communautés européennes', in *Mélanges offerts à Marcel Waline. Le juge et le droit public*, t. 1 (LGDJ, 1974)149-162.

<sup>14</sup> There is no longer a consensus on this aspect as the concept is now often understood as a generic term for the normative effects of the case law of the ECJ and other institutions such as the European Court of Human Rights or the French *Conseil constitutionnel*. A particularly influential work in this regard has been that of Joël Andriantsimbazovina, *L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français* (LGDJ, 1998).

<sup>15</sup> Case 41/74, *Van Duyn v Home Office* [1974].

<sup>16</sup> CE Ass. 22 December 1978, *Cohn-Bendit*, Req. no. 11604.

<sup>17</sup> Bruno Genevois in his *Conclusions* in the *Cohn-Bendit* case, (1979) *Actualité Juridique Droit Administratif* 155-161, p. 161.

<sup>18</sup> The *rapporteur public*'s role before the *Conseil d'État* is similar to that of the advocate general in the Court of Justice. They are not *conseillers d'État* and do not rule on the cases that are brought to the *Conseil*, but are associated to the chambers and independently present *Conclusions* during the public hearing, in which they present the facts of the case, relevant legal provisions and precedents, and the way in which they suggest the *Conseil* should decide. The judges can freely decide whether or not to follow the *rapporteur*'s *conclusions*. The *conclusions* are sometimes, though not always, published together with the ruling. They tend to be rather long and contain a much more detailed analysis of the factual and legal issues raised by a case than the actual ruling of the *Conseil*. For these reasons, although the *Conclusions* have no binding legal force, they are widely read and understood as a guide to the reasoning that was followed by the *Conseil* when it follows them.

<sup>19</sup> CE Ass, 30 October 2009, *Perreux*, Req. no. 298348.

<sup>20</sup> Joined Cases 6 and 9/90, *Francovich* [1991].

<sup>21</sup> CE Ass, 8 October 2007 *Gardedieu*, Req. no. 279522.

<sup>22</sup> Case C-224/01, *Köbler* [2003].

<sup>23</sup> CE 18 June 2008, *Gestas*, Req. no. 295831.

The *Conseil*, like part of French legal scholarship, also finds it difficult to recognise that ECJ rulings other than preliminary references may have normative value. While the ECJ itself draws no such distinction and cites its own judgments regardless of the specific procedure which led to them, the *Conseil d'État* still perceives its relationship with ECJ case law as primarily one of interactions with the Court through preliminary references and, to a limited extent, a recognition of the binding force of rulings made following references by other courts. Although the *Conseil* does occasionally cite ECJ case law in the grounds of its decisions, citations being more frequent in the *Conclusions* written by *Rapporteurs publics*, citations refer to preliminary rulings, as sources of an authoritative interpretation of EU law.<sup>24</sup> As is the case within the French legal system, such references do not indicate an acceptance of the case law as a true source of the law. It remains much easier for the *Conseil d'État* to accept the normative force of an interpretation of a Treaty provision contained in an ECJ judgment than to consider itself bound by constitutional norms of EU law established by ECJ case law.

## B. An Ongoing Resistance to the Primacy of EU Law in Judicial Review

Article 55 of the French Constitution establishes the primacy of international treaties ratified by France over national law, including legislation. The primacy of EU law should therefore have been the result of a straightforward application of the French Constitution in all respects, except the difficult issue of the relationship between EU and constitutional norms. However, the *Conseil d'État* initially refused to recognise the primacy of European Community law over more recent legislation, thus creating the infamous 'legislative screen' which prevented the judicial review of administrative and regulatory acts under European Community law when a more recent statute applied.<sup>25</sup> This case law was introduced in 1968 and, despite its clear incompatibility with the Constitution itself, was only overruled twenty years later, in the *Nicolo* case,<sup>26</sup> when the *Conseil* first agreed to review the compatibility of a more recent national statute with EEC Treaty provisions. Primacy over national legislation was accepted much sooner by the *Cour de cassation*, the other French supreme court.<sup>27</sup> Even after 1989, the issue of primacy was not settled because *Nicolo* only recognised the primacy of Treaty provisions and later case law was required to introduce into French administrative law the primacy of different types of secondary law over national legislation<sup>28</sup> and, much later, that of general principles of EU law.<sup>29</sup> Primacy over the French Constitution is, of course, a much more difficult issue and it has not been accepted by either the *Conseil d'État* or the *Conseil constitutionnel*. However, both have found compromise positions which mean that, in principle, they abstain from carrying out a constitutionality review of provisions which are mere implementations of EU law, so long as the constitutional norm which forms the basis for the action has an equivalent in EU law. The year 2021 nevertheless marked a significant step back from the previous case law. In 2007, in *Arcelor*,<sup>30</sup> the *Conseil d'État* ruled that it would not review a national provision which was identical to a

---

<sup>24</sup> C. VOCANSON, *Le Conseil d'État français et le renvoi préjudiciel devant la Cour de justice de l'Union européenne* (Dalloz, 2014), pp 186-188.

<sup>25</sup> CE Sect., 1 March 1968, *Syndicat général des Semoules*, Req. no. 62814.

<sup>26</sup> CE Ass., 20 October 1989 *Nicolo*, Req. no. 108243.

<sup>27</sup> CCass 24 May 1975, *Jacques Vabre*, no. 73-13-556.

<sup>28</sup> First, the rule was extended to regulations (CE, 24 September 1990, *Boisdet*, Req. no. 58 657), then to directives (CE, Ass. 28 February 1992, *S.A. Rothmans International France et S.A. Philip Morris France*, Req. no. 56 776).

<sup>29</sup> CE, 7 July 2006, *Société Poweo*, n° 289012 ; CE, 27 June 2008, *Société d'exploitation des sources Roxane*, n° 276848.

<sup>30</sup> CE Ass., 8 February 2007, *Arcelor*, Req. no. 287110.

provision of EU secondary law, so long as the constitutional norm which has allegedly been violated is also protected, to an equivalent standard, in EU law. This was understood to be a guarantee that the highest level of protection of fundamental rights would prevail: if EU law has an equivalent or higher standard for the right being relied upon, the review should take place at the EU level, if it does not, the national provision will be reviewed on the basis of the constitutional standard. The *Arcelor* compromise has been analysed as the French administrative law equivalent of *Solange*<sup>31</sup> or similar exceptions to primacy introduced by other constitutional and supreme courts. Although framed in different ways, these lines of case law were primarily justified as means to enforce a better protection of fundamental rights when EU law is seen as offering insufficient guarantees.<sup>32</sup> *Arcelor* was supplemented by the case law of the *Conseil constitutionnel* which also decided not to carry out constitutional review of national legislation implementing EU secondary law unless a principle inherent to France's constitutional identity was at issue.<sup>33</sup>

*Arcelor* was seen as part of the *Conseil d'État*'s shift towards accepting European integration in the 2000s, a mark of good faith towards the ECJ. The judgment clearly signalled a willingness to work with the constitutional case law of the EU Courts rather than resist it or, as the *Conseil* had often done, ignore it. However, a new exception to primacy was introduced in the *French Data Network* judgment in April 2021.<sup>34</sup> This was the final decision in a case in which the *Conseil* had referred questions to the ECJ, which had led to the *La Quadrature du Net* judgment.<sup>35</sup> In its preliminary ruling, the ECJ set standards for the gathering and treatment of personal data by police and intelligence forces with which the *Conseil* was clearly not satisfied. The *Conseil* seized an opportunity to introduce a new exception, under the guise of an application of the *Arcelor* exception which it in fact reversed.<sup>36</sup> When reviewing provisions of national law that are in the scope of EU law, the *Conseil* will still, as a priority, check whether the provisions are compatible with EU law and, if the EU rule is challenged, seek to determine whether the EU provision is compatible with higher EU norms such as fundamental rights. However, in a second step, it will decide whether upholding these European standards is compatible with national constitutional norms and, where it is not, it will uphold these and therefore preserve a provision which may be incompatible with EU law. In practice, this means that any type of constitutional requirement may be relied upon to maintain a provision of national law which is incompatible with EU law, including, as in this case, in order to enforce a lower standard of fundamental rights protection.<sup>37</sup>

The grounds of the judgment are characteristically lacking in a precise reasoning to justify this new exception to primacy in the review of national administrative and regulatory acts. The *Conseil* does make a reference to constitutional identity, yet there is no indication that the constitutional values and objectives cited here, which are related to national security, are specific to French constitutional

---

<sup>31</sup> BVerfG 37, 29 May 1974, *Solange I*; BVerfG 73, 22 October 1986, *Solange II*.

<sup>32</sup> See, for example, the analysis of the *Arcelor* judgment presented in reference textbooks such as Jean-Paul Jacqu , *Droit institutionnel de l'Union europ enne*, 9e  d. (Dalloz, 2018) 641. See also: Paul Cassia, 'Le droit communautaire dans et sous la constitution fran aise', (2007) *Revue trimestrielle de droit europ en* 378–415; and Anne Levade, 'Le Palais-Royal aux prises avec la constitutionnalit  des actes de transposition des directives communautaires', (2007) *Revue fran aise de droit administratif* 564–577.

<sup>33</sup> CC, 30 November 2006, *Loi relative au secteur de l' nergie*, no. 2006-543 DC, para 6.

<sup>34</sup> CE Ass., 21 April 2021, *French Data Network and others*, Req. no. 393099.

<sup>35</sup> Joined Cases C-511, 512 & 520/18, *La Quadrature du Net and others* [2020]. See Iain Cameron, 'Metadata retention and national security: *Privacy International* and *La Quadrature du Net*', (2021) *Common Market Law Review* 58, 1433–1472.

<sup>36</sup> Cl ment Malverti and Cyrille Beaufils, 'L'instinct de conservation' (2021) *L'Actualit  Juridique Droit Administratif* 1194–1212, at 1204.

<sup>37</sup> Anastasia Iliopoulou, 'La conservation g n ralis e des donn es de connexion valid e, le droit au d saccord avec la Cour de justice revendiqu ' (2021) *La semaine juridique:  dition g n rale*, no. 24, 1152–1158.

identity.<sup>38</sup> Rather, the judgment and, to the extent that one can assume they were followed, the *Conclusions* of the *Rapporteur public*,<sup>39</sup> indicate that the *ratio* is based on the idea that EU law and, more specifically, the ECJ, is inherently incapable of ensuring adequate protection of these objectives. Because the constitutional requirements relied upon by the Government, such as the protection of national security or the fight against terrorism, are related to competences that remain mainly under the control of the Member States, the *Conseil d'État* was satisfied that they could not be similarly protected at EU level. It could therefore dismiss the balance set by the ECJ between such concerns and fundamental rights, and treat the *La Quadrature du Net* judgment as merely establishing a high standard for the protection of personal data, which must be balanced with the French understanding of the security objectives at issue in favour of a more securitarian agenda.<sup>40</sup>

The *Arcelor* exception is therefore not only reversed but also significantly expanded, since the *Conseil* did not deem it necessary to prove in what way the level of protection of public security established in ECJ case law was inferior to that which is guaranteed under French constitutional law. One must note that the *Conseil d'État* evidently searched for a compromise position between the standard set by the ECJ and the position of the French Government which had, appallingly, asked the *Conseil* to rule that the preliminary ruling was *ultra vires*, following the lead of the German Federal Constitutional Court.<sup>41</sup> If the *Conclusions* of the *Rapporteur public* and the grounds of the judgment are to be believed, however, the decision not to uphold the Government's claim was not based on a recognition of the ECJ's competence to decide the issue or on an acceptance of EU law primacy but on a somewhat awkward reasoning which hinges upon the idea that the *Conseil* could in any event refuse to follow the ECJ's case law on any given issue, especially if a constitutional norm was at stake. Thus, the core justification for this new rule is that the primacy of EU law is not really recognised and that the *Conseil* was always free to decide whether it wanted to follow the standards set by the ECJ.<sup>42</sup>

The impact which this decision could have on the overall relationship between the *Conseil* and EU law remains to be determined. However, what is clear is that this judgment marks a significant shift away from the compromises found in the decade of the 2000s. The French administrative supreme court not only chose to refuse to implement EU standards on the protection of personal data, but it did so through an explicit rebellion against the EU's attempt to set the appropriate balance between fundamental rights and public security and an affirmation of the *Conseil's* ability, as a national court, to reject ECJ case law in favour of a more securitarian national viewpoint. In *French Data Network*, the impact of this new exception was limited in large part because the *Conseil d'État* made sure to construe the ECJ judgment in *La Quadrature du Net* in a manner which meant most of the domestic provisions were compatible. This construction was highly questionable at the time, as

---

<sup>38</sup> Denys Simon, 'Retour des monologues juridictionnels croisés? – A propos de l'arrêt du Conseil d'État dans l'affaire 'French Data'', (2021) *Europe* 31, étude 3.

<sup>39</sup> Conclusions A. Lallet ss CE Ass, 21 April 2021.

<sup>40</sup> Thibault Douville and Hélène Gaudin, 'Un arrêt sous le signe de l'exceptionnel', (2021) *Recueil Dalloz* 1268.

<sup>41</sup> BVerfG Cases 2 BvR 859/15 and others of 5 May 2020. See, *inter alia*, Ana Bobic and Mark Dawson, 'National courts making sense of the 'incomprehensible': The *PSPP* judgment of the German Federal Constitutional Court', (2020) *Common Market Law Review* 57, 1953–1998; Pablo Martín Rodríguez, 'Y sonaron las trompetas a las puertas de Jericó ... en forma de sentencia del Bundesverfassungsgericht', (2020) *Revista General de Derecho Europeo* 52, RI §423031; Sylvia Galetta and Jacques Ziller, 'Les violations flagrantes et délibérées du droit de l'Union par l'arrêt 'inintelligible' et 'arbitraire' du Bundesverfassungsgericht dans l'affaire *Weiss*', (2020) *Revue trimestrielle de droit européen* 56, 855–887.

<sup>42</sup> Conclusions A. Lallet ss CE Ass., *French Data Network*, pp 25-28.



evidenced in particular by the contemporaneous decision of the Belgian *Cour constitutionnelle*<sup>43</sup> which found that a very similar Belgian set of norms was contrary to the standard set by the ECJ. The ECJ has since indirectly confirmed that the *Conseil d'État*'s interpretation of *La Quadrature du Net* was indeed contrary to EU law.<sup>44</sup>

The introduction and framing of this 'reverse *Arcelor*' exception was widely criticised among French European law scholars.<sup>45</sup> A more recent decision has nevertheless confirmed that French administrative law now has a significantly broader exception to the implementation of EU law in the context of judicial review. On 17 December 2021,<sup>46</sup> the *Conseil* ruled on an action brought by a *gendarme* who challenged the Minister of the Interior's refusal to take measures implementing the Working Time Directive<sup>47</sup> with regard to the *gendarmerie*. The claimant in this case was a deputy officer in the *gendarmerie départementale*, which carries out administrative and criminal police work across the French territory, particularly in rural areas, but does have specific duties due to its status as part of the military. A recent ECJ judgment following a reference from a Slovenian court seemed to indicate that EU law was on his side and that only activities which are highly specific to the military may be considered outside the scope of the Directive.<sup>48</sup> The French Government had vehemently criticised this judgment.<sup>49</sup> In the proceedings before the *Conseil d'État*, it argued that the claim should be set aside on the basis of the constitutional requirements of the 'free disposal of the armed forces'<sup>50</sup> and of safeguarding the fundamental interests of the nation. The *Conseil* ruled that the national provisions at issue were compatible with the Directive, however it seized this opportunity to restate the new, much broader exception to the primacy of EU law that was introduced in *French Data Network*. Indeed, the press release explicitly stated that the *only* reason why the constitutional exception was not used was that the *Conseil* found no incompatibility with EU law.<sup>51</sup>

---

<sup>43</sup> *Cour constitutionnelle*, judgment No. 57/21, *Ordre des barreaux francophones et germanophone e.a.*, 22 April 2021. On the contrast between this judgment and that of the *Conseil d'État* and a more general analysis of the European and domestic case laws on national security and data retention, see *inter alia*: Marcin Rojszczak, 'National Security and Retention of Telecommunications Data in Light of Recent Case Law of the European Courts' (2021) *European Constitutional Law Review* 1-29.

<sup>44</sup> Case C-140/20, *G.D. v The Commissioner of the Garda Síochána and Others* [2022].

<sup>45</sup> See Anastasia Iliopoulou, *op. cit.*; Denys Simon, *op. cit.*; Edouard Dubout, 'Le Conseil d'État, gardien de la sécurité' (2021) *Revue des droits et libertés fondamentaux*, chron. 18; Loïc Azoulai and Dominique Ritleng, 'L'État, c'est moi'. Le Conseil d'État, la sécurité et la conservation des données', (2021) *Revue trimestrielle de droit européen* 349-374; Araceli Turmo, 'National security as an exception to EU data protection standards: The judgment of the *Conseil d'État* in *French Data Network and others* 21 April 2021, CE Ass., Req. No. 393099' (2022) *Common Market Law Review* 59, 203-222.

<sup>46</sup> CE, Ass., 17 December 2021, *M. G... Q...*, Req. no. 437125.

<sup>47</sup> Directive 2003/88 of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

<sup>48</sup> Case C-742/19, *B. K. v Republika Slovenija (Ministrstvo za obrambo)* [2021].

<sup>49</sup> See the interview of the spokesperson for the Ministry of the Armed Forces, Hervé Grandjean, published by *Le Figaro* three days later: <https://www.lefigaro.fr/politique/temps-de-travail-des-militaires-florence-parly-s-eleve-avec-force-contre-cette-decision-de-la-cour-de-justice-europeenne-20210718>.

<sup>50</sup> The free disposal of the armed forces was recognised as a constitutional principle by the *Conseil constitutionnel* in its decisions QPC 28 November 2014, *M. Dominique de L.* and QPC 27 February 2015, *M. Pierre T.*

<sup>51</sup> 'Si le Conseil d'Etat n'a pas eu besoin d'opposer cette exigence constitutionnelle au cas présent, c'est uniquement parce qu'il a constaté que l'organisation du temps de travail dans la gendarmerie départementale ne méconnaissait pas les dispositions de la directive'. The press release is available at: <https://www.conseil-etat.fr/actualites/directive-europeenne-sur-le-temps-de-travail-le-conseil-d-etat-rejette-la-requete-d-un-gendarme-qui-contestait-l-organisation-du-temps-de-travail>).

In a somewhat contradictory passage, the administrative supreme court cites Article 88-1 of the Constitution as well as the principles of primacy, unity and effectiveness of EU law, then holds that Article 4(2) TEU, as interpreted by the ECJ, is not sufficient to create, in EU law, an equivalent level of protection for the constitutional principles relied on by the Government, and restates its two exceptions to primacy.<sup>52</sup> The first is the *Arcelor* rule, now explicitly phrased as applicable to any type of constitutional norm: when an action challenges the constitutionality of a provision which implements EU secondary law, judges must look for an EU equivalent to the constitutional norm at issue, but may carry out a constitutionality review if they do not find one. The second is the new rule: when an action challenges the compatibility of a provision with EU law (or an absence of implementation of EU law as was the case here), and the defence claims that the provision is necessary to ensure the effectiveness of a constitutional requirement, the judges must: 1) decide whether the provision is in fact incompatible with EU law, 2) if it is, look for an EU equivalent to the constitutional norm and, 3) if they cannot find one, ascertain whether enforcing EU law would violate constitutional requirements.<sup>53</sup>

Note that both exceptions apply to any constitutional requirement, not merely to fundamental rights: a confirmation that judges may apply these rules to enforce a *lower* standard of protection for fundamental rights than that which is provided in EU law. In her *Conclusions*, the *Rapporteure publique* restated that the aim should be to make use of these exceptions only in exceptional circumstances, although it is unclear how the judges intend to ensure this. The criteria established in the judgments do not seem sufficiently precise to avoid undue expansions. The *Conclusions* in *French Data Network* and *M. G... Q...* suggest four general guidelines, including a ‘reasonable’ use of the condition of equivalent protection and favouring a ‘conciliatory approach’.<sup>54</sup> Once again, in this case, the way in which the *Conseil d’État* avoided conflict was to resort to its traditional tactics: choosing to construe EU law in a manner which seems compatible with French public law, this time avoiding a preliminary reference so as to make sure that no ECJ judgment would directly contradict it.

The *Conseil constitutionnel* has unfortunately shown its support for the new ‘reverse *Arcelor*’ in October 2021 with a decision which, for the first time, found that a provision derived from EU law affected a principle ‘inherent to the constitutional identity’ of France, and defined the concept as covering any principle, whatever its contents or importance in the French constitutional system, that is not equally protected under EU law.<sup>55</sup> This decision confirms the validity of an approach under which any type of constitutional requirement, not just higher fundamental rights standards, may justify an exception to EU law in French public law. With its chosen definition of a principle ‘inherent to constitutional identity’, the *Conseil constitutionnel* matches the administrative supreme court’s case law by giving the exception to primacy the same scope as that set out in *French Data Network*: a constitutional requirement which is not equally protected under EU law is considered ‘inherent to the constitutional identity’ and can justify setting aside an EU norm. In France, both the judicial review of administrative and regulatory acts, and the review of legislation, now make the implementation of EU law subject to these two expanded exceptions which allow judges to set aside EU standards in favour of any type of constitutional norm. These changes must also be understood in the context of the recent deterioration of the *Conseil d’État*’s relationship with the ECJ through the preliminary reference procedure.

---

<sup>52</sup> Paras 7-8 of the ruling.

<sup>53</sup> Paras 10-11.

<sup>54</sup> Conclusions by Mireille Le Corre, in case *M. G... Q...*, n° 437125, pp 6-7, citing the Conclusions presented by Alexandre Lallet in *French Data Network*, see *supra*.

<sup>55</sup> CC 15 October 2021, *Société Air France [Obligation pour les transporteurs aériens de réacheminer les étrangers auxquels l’entrée en France est refusée]*, no. 2021-940 QPC. The decision did not find that the principle was violated by the legislative provision at issue, but does constitute an important precedent as the first definition and application of the constitutional identity exception in France.

## 2. Hesitant Accommodations with the Preliminary Reference Procedure

The *Conseil d'État* waited until 1970 before it made its first preliminary reference to the ECJ, but this is not an unusual delay if one compares it to other Councils of State.<sup>56</sup> However, other features of the early relationship of the *Conseil* with European Community law indicate a specific resistance to the integration process. First, this resistance has a greater impact than in other Member States due to the highly hierarchical nature of the French administrative court system, in which first instance and appeal courts feel that they are not at liberty to make preliminary references and defer to the *Conseil's* choice in the matter. Second, the ways in which this resistance was expressed were perhaps more explicitly confrontational than in other Member States, a behaviour which gradually evolved into less direct but more insidious avoidance tactics (A). Recent years have reignited a conflict which seemed to have been resolved over the previous decades (B).

### A. A Reluctant Participant in Judicial Dialogue

The *Conseil d'État* may be considered the first national court to enter into an open conflict with the ECJ.<sup>57</sup> The feeling expressed as late as the 1980s, three decades after France ratified the ECSC Treaty, remained that preliminary references were a mechanism which 'dispossessed' national judges of their ability to interpret and implement European law.<sup>58</sup> Although the *Conseil* now sends a reasonably high number of references compared to other supreme courts, this is also a consequence of the high number of cases on which it has to rule, and the initial conflict has never truly been overcome. Most members of the *Conseil* have always felt that, as a supreme court of a Member State, they must be capable of making their own decisions with regard to the application and, to some extent, the interpretation of EU law. They resent the existence of preliminary references as an indication that, in implementing EU law, they are somehow outside the scope of their competences. The impression that a preliminary reference mechanism necessarily means that the area of law at issue is outside the scope of a judge's competences may be understood by reference to the preliminary question mechanism which exists in France between the 'private' and administrative judicial systems. This mechanism is indeed predicated upon the rule that courts in either system are prevented from making their own decisions with regard to the interpretation or application of norms which belong to the other system.<sup>59</sup> The preliminary question is made necessary by the strict separation of competences between the courts. This justification can evidently not be transposed to the mechanism instituted in Article 267 TFEU, which allows cooperation based on the distribution of competences between the ECJ and national courts regarding the interpretation, application and review of EU law. The *Conseil d'État* has jealously guarded its competence to implement and apply the EU Treaties and the law which derives from them and resisted pressures to yield to the status of the ECJ as the supreme court of the EU legal order.

The *Conseil* now makes preliminary references regularly and likes to think of itself as an enthusiastic participant in judicial dialogue. It sometimes recalls that it believes itself to be the source of the concept of '*dialogue des juges*', which appeared in the *Conclusions* written by Bruno

---

<sup>56</sup> Only the Belgian and German supreme administrative courts did so sooner, their Dutch counterparts made its first reference in 1973 and the Italian equivalent in 1991: Claire Vocanson, *op. cit.*, at 20.

<sup>57</sup> *Ibid.*, p. 23.

<sup>58</sup> Conseil d'État, *Droit communautaire et Droit français* (La documentation française, 1982), 278.

<sup>59</sup> On the French preliminary question mechanism between private and administrative courts, see Alix Perrin, 'Questions préjudicielles', *Jurisclasseur Administratif*, Fasc. 1061, 2016.

Genevois in the *Cohn-Bendit* case in 1978.<sup>60</sup> The fact that these *Conclusions* argued in favour of applying ECJ case law and were not followed by the *Conseil* is conveniently ignored.<sup>61</sup> In any case, it is true that the *Conseil's* relationship with the preliminary reference mechanism has significantly improved over time and its members have grown to see it as an opportunity for constructive collaboration. However, it is interesting to note that the *Conseil* has always avoided making references on issues related to the structure of the judicial system of the EU, its duties as a member of this system, or other constitutional matters of EU law such as the relationship between EU and national law.<sup>62</sup> This feature of the *Conseil's* practice stands in stark contrast with those of many other supreme courts, which may, on the contrary, have perceived the mechanism as an opportunity to enter into a dialogue with the ECJ on such difficult issues. The *Taricco* saga, for example, is a perfect illustration of a constructive exchange between a constitutional court and the ECJ on important constitutional topics.<sup>63</sup>

The *Conseil d'État* prefers to send preliminary questions on more technical, substantive matters but avoids issues that may be more sensitive, likely because it feels that it can more easily retain its own, specific view of such matters if it avoids entering into a direct dialogue, which would force it to contend with the ECJ's views. This practice is somewhat contradictory with the simultaneous affirmation that only questions of interpretation that raise 'serious difficulties' are to be referred. Moreover, the *Conseil's* treatment of the preliminary rulings which follow its own references also indicates a reluctance to play by the rules of the Article 267 mechanism. *French Data Network* followed an ECJ ruling in response to a reference sent by the *Conseil*: the French judges chose to adopt an interpretation of this ruling that had the advantage of avoiding a problem of compatibility for most of the provisions at issue, and introduced a new exception to primacy for the rest, making sure that only very minor aspects of French law had to be reviewed, and even so only with a significant delay as the *Conseil* chose to circumvent the ECJ's position that domestic courts could not limit the effects of its own judgments in time.<sup>64</sup> Of course, the first of the *Conseil's* avoidance tactics remains a reluctance to use the preliminary reference mechanism.

## B. An Ongoing Resistance to the Obligation to Refer

Famously, the *acte clair* doctrine was initially created by the *Conseil d'État*<sup>65</sup> as a justification for not making references when it was under an obligation to do so under Article 177 EEC. In another shift typical of the *Conseil's* evolving relationship with the ECJ, this doctrine is now presented as a mark of a productive cooperation with the European Court.<sup>66</sup> Since the ECJ introduced the concept into EU law with *CILFIT*,<sup>67</sup> the *Conseil* may retroactively frame it as a prescient case law, or a useful contribution to EU procedural law which allows a 'reasoned' use of the preliminary

---

<sup>60</sup> Bruno Genevois, *Actualité juridique Droit administratif* 1979, 155-161, at 161, note ss CE ass. 22 décembre 1978, n° 11604, *Ministre de l'Intérieur c. M. Cohn-Bendit*, Rec. p. 524.

<sup>61</sup> Bruno Genevois was arguing in favour of following the ECJ case law on the direct effect of directives, which was famously rejected in this ruling, a position which was only overturned three decades later.

<sup>62</sup> Claire Vocanson, *op. cit.*, p. 21.

<sup>63</sup> See for example : Giovanni Piccirilli, 'The 'Taricco Saga': the Italian Constitutional Court continues its European journey' (2018) 14 *European Constitutional Law Review* 4, 814-833; Clara Rauegger, 'National constitutional rights and the primacy of EU law: M.A.S.' (2018) 55 *Common Market Law Review* 5, 1521-1547; Daniel Sarmiento, 'The Consob Way - Or how the *Corte Costituzionale* Taught Europe (once again) a Masterclass in Constitutional Dispute Settlement', (2021) *EU Law Live Weekend Edition* no. 54, 2-8, esp. p. 6.

<sup>64</sup> See paras 97-98 of the judgment in *French Data Network*.

<sup>65</sup> CE Ass., 19 June 1964, *Société des pétroles Shell-Berre*, Rec. 344.

<sup>66</sup> Jean-Marc Sauvé, *op. cit.*

<sup>67</sup> Case 283/81, *CILFIT* [1982].

reference mechanism. Its publications and the statements of its members seem to indicate that it was unaware until recently that its understanding of the concept was fundamentally incompatible with that which the ECJ had accepted in 1982. Vice-President Sauvé stated a few years ago that, under this doctrine, national judges are only under an obligation to refer ‘when it is necessary’,<sup>68</sup> an approach which allows compliance with the ‘authority’ of EU law as well as with sincere cooperation. Similarly, a report published in 2015 explains that national courts are responsible for the application and interpretation of EU law and that supreme courts have ‘deemed themselves competent’ to interpret EU law and only make references in cases of ‘serious difficulties’.<sup>69</sup> Even under the revised version of the exception set out in *Conorzio Italian Management* in October 2021,<sup>70</sup> it is clear that the ECJ cannot be satisfied with the practice of a national supreme court which consists in referring questions on the interpretation of EU law only in cases of ‘serious difficulties’. Although the *Conseil* never acknowledged this and preferred to operate under the assumption that the ECJ had adopted its version of the *acte clair* exception, the infringement proceedings which followed the *Accor* cases forced the conflict to reemerge. The ECJ ruling in *Accor*<sup>71</sup> was the result of a long judicial saga before the French administrative courts, in which companies *Accor* and *Rhodia* challenged the French rules intended to avoid the double taxation of dividends. The courts of first instance and the court of appeal granted their claims on the basis of EU law without making a reference,<sup>72</sup> but the *Conseil d’État* quashed the appeal judgments and referred a number of questions on Articles 49 and 63 TFEU to the ECJ.<sup>73</sup> After the ECJ ruled that a regime such as that established by the French provisions was incompatible with freedom of movement in the internal market, the *Conseil* ruled on both cases, which also required a decision on the evidentiary requirements applicable to reimbursement claims and the scope of the potential claims for sums paid in advance payments that were contrary to EU law, in particular the treatment of sub-subsidiaries.<sup>74</sup> These issues had not been referred to the ECJ. A similar case had been decided a few weeks earlier in the *Test Claimants* case<sup>75</sup> on British law, however the *Conseil* decided that the French rules at issue were different and, therefore, the ECJ precedent did not apply. The Commission disagreed and, after receiving complaints from the companies affected by the *Conseil*’s judgment, launched infringement proceedings alleging that, as well as violating substantial provisions of the TFEU, the *Conseil* had violated its obligation to refer under Article 267(3) by not making a second reference before handing down its judgment. The ECJ found that there had indeed been an infringement in its judgment of 4 October 2018.<sup>76</sup> From the

---

<sup>68</sup> Jean-Marc Sauvé, *op. cit.*: ‘Le juge national n’est [...] tenu de procédure à un renvoi que lorsque c’est nécessaire’.

<sup>69</sup> CONSEIL D’ÉTAT, *Le juge administratif et le droit de l’Union européenne*, Dossier thématique, 23 September 2015, available on: <https://www.conseil-etat.fr/ressources/etudes-publications/dossiers-thematiques/le-juge-administratif-et-le-droit-de-l-union-europeenne>.

<sup>70</sup> Case C-561/19, *Conorzio Italian Management* [2021]. See also the discussion of the issue in the Opinion delivered by Advocate General Bobek in the case on 15 April 2021, and the note by Morten Broberg and Niels Fenger, ‘If you love somebody set Them Free: On the Court of Justice’s Revision of the *Acte Clair* Doctrine’, (2022)59 *Common Market Law Review* 59 (2022) 3, 711-738.

<sup>71</sup> Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA* [2011].

<sup>72</sup> Tribunal administratif de Versailles 21 décembre 2006, n° 20440, *Société Accor* and n° 404552, *Société Rhodia*; Cour administrative d’appel de Versailles 20 mai 2008, n° 07VE00529, *Ministre c/ Société Rhodia*, and n° 7VE00530, *Ministre c/ Société Accor*.

<sup>73</sup> CE 3 July 2009, n° 317075, *Ministre c/ Société Accor*.

<sup>74</sup> CE 10 December 2012, n° 317074, *Ministre c/ Société Rhodia*, and n° 317075, *Ministre c/ Société Accor*.

<sup>75</sup> Case C-35/11 *Test Claimants in the FII Group Litigation* [2012]. This judgment followed the earlier judgment in Case C-446/04, *Test Claimants in the FII Group Litigation* [2006].

<sup>76</sup> Case C-416/17 *Commission v France* [2018]. On this judgment, see *inter alia*: Stéphane Gervasoni, ‘CJUE et cours suprêmes: repenser les termes du dialogue des juges?’, (2019) *Actualité Juridique Droit Administratif*, 150; Anastasia Iliopoulou-Penot, ‘La sanction des juges suprêmes nationaux pour défaut de renvoi préjudiciel’ (2019) *Revue française de droit administratif*, 139–147; Araceli Turmo, ‘A dialogue of

point of view of EU law, as the ECJ and Advocate General Wathelet<sup>77</sup> explained, the infringement was clear. The *Conseil* could clearly not be certain that its reasoning on sub-subsidiaries would be shared by the Court because there was no case law on the subject and the answer was not evident on the reading of existing provisions. The issue was therefore outside the scope of the *CILFIT* exceptions. The fact that it was unclear whether the *Test Claimants* solution should apply, as evidenced by the Commission's disagreement with the *Conseil*, meant that it was impossible to find that the *Conseil's* interpretation of the law would appear 'equally obvious' to the ECJ.<sup>78</sup> Under the well-established *CILFIT* interpretation of the *acte clair*, the existence of any doubt regarding the interpretation meant that the national court must make a reference. The fact that a reference had already been made in this case was irrelevant since a new question had arisen.

Although the *Commission v France* judgment was significant as the first infringement finding based on a violation of Article 267(3) TFEU, its *ratio* was not surprising to lawyers familiar with EU procedure. The ECJ simply applied its well-established case law and the existence of an infringement is not controversial. Moreover, previous case law on the *Köbler* principle had already established that a decision not to refer could constitute a violation sufficient to give rise to State liability.<sup>79</sup> What is more interesting is that the *Conseil d'État* seems to have been surprised. In the aftermath of its 2009 judgment, a scholar had already noted that the issue of sub-subsidiaries should have been referred.<sup>80</sup> However the *Rapporteur public* in that case had not really dealt with this issue, and the one who wrote the *Conclusions* in the final proceedings clearly felt that the *Conseil* could rule by itself on the scope of the *Test Claimants* precedent.<sup>81</sup> She did not present a convincing justification for this and seemed to rely simply on the *Conseil's* understanding of preliminary references on interpretation as a tool to be used only in difficult cases related to general issues of principle. The very fact that, as the *Rapporteur public* had noted, the *Conseil* had to decide whether or not to *distinguish* the *Test Claimants* precedent from the issue at hand should have been a sufficient signal that there was a genuine question as to the content of the EU norm and that a reference was therefore necessary.<sup>82</sup>

The fact that the *Conseil* did not make a second reference was, in fact, predictably incompatible with EU procedural law but entirely consistent with its own understanding of it. This is clear from the earlier publications quoted above but also from the reaction of the President of the Litigation Section of the *Conseil d'État*, published soon after the ECJ judgment.<sup>83</sup> Mr Combrexelle's paper seems to indicate that he felt the Court had overruled previous case law in finding that there had been an infringement and that the previous consensus was that supreme courts were not limited to 'interpreting the obvious'<sup>84</sup> but were responsible for applying and interpreting EU law, whereas the ECJ was to be consulted with references concerning general questions of principle. This position is reiterated in the French Report on National Courts and the Enforcement of EU Law for the 2020 FIDE Congress,<sup>85</sup> although with a greater awareness that there had been a misunderstanding.

---

unequals – The European Court of Justice reasserts national courts' obligations under Article 267(3) TFEU', (2019) *European Constitutional Law Review* 15, 340–358.

<sup>77</sup> Opinion of Advocate General Wathelet delivered on 25 July 2018, C-416/17, *Commission v France*.

<sup>78</sup> *Commission v France*, para 111.

<sup>79</sup> Case C-160/14, *Ferreira da Silva e Brito e.a.* [2015].

<sup>80</sup> Vincent Daumas, 'Distributions transfrontalières de dividendes : avec avoir... ou pas ?' (2009) *Revue de jurisprudence fiscale*, 715.

<sup>81</sup> *Conclusions N. Escaut* ss CE 10 décembre 2012, para 14.

<sup>82</sup> Opinion of Advocate General Wathelet, para 15.

<sup>83</sup> Jean-Denis Combrexelle, 'Sur l'actualité du 'dialogue des juges'', 2018 *Actualité juridique Droit administratif* 34, p. 1929.

<sup>84</sup> 'L'interprétation de l'évidence'.

<sup>85</sup> Carine Soulay, Report on France, in Michael Dougan, Michal Bobek *et al*, *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order*, FIDE XXIX Congress Publications vol. 1 (Eleven International Publishing, 2020), 203-220.

Carine Soulay, a member of the Conseil d'État, defends the judgments which gave rise to the infringement as illustrations of a widely shared belief that national supreme courts are exempted from the obligation to refer when there is no 'reasonable doubt' on the correct application of EU law in the case at hand.<sup>86</sup> She warns of the possible consequences of forcing the national judge to be the 'interpreter of the obvious',<sup>87</sup> such as an excessive increase in the number of references or an undue lengthening of litigation. Her report seeks to defend the *Conseil's* choice not to refer and argues for what she characterises as a return to the previous case law, a 'reasoned' practice of the preliminary reference mechanism which ensures 'judicial subsidiarity'<sup>88</sup> and eschews the use of infringement proceedings to enforce Article 267. The only possible reading of these publications is that the *Conseil* feels that it had complied with its obligations under Article 267 TFEU, although no EU law specialist would have agreed.

The idea that 'minor' interpretations can be left to national courts or that national supreme courts should have a greater power to interpret EU law is defensible, however it has never been the position of the ECJ. Moreover, it is hardly compatible with the *Conseil d'État's* ongoing refusal to engage with the ECJ, through the preliminary reference mechanism, on structural issues of constitutional importance. More recent rulings such as the one on the *gendarmérie* show that the *Conseil* persists in a general reluctance to engage with the mechanism, especially in matters where it fears that the ECJ will rule in a manner which is incompatible with its own preferences. The *Conseil* ruled that time spent on-call was not to be counted as part of the working time of *gendarmes*, and that there was therefore no violation of the Directive, without relying on any ECJ precedents or any other EU sources. Considering the judgment made a few months earlier in a case regarding a different Member State, one might have expected the *Conseil* to consult the ECJ on this very issue which is, after all, a question of interpretation of the Directive. No justification is given for the absence of a preliminary reference.

The interpretation chosen by the *Conseil d'État* does conveniently avoid a conflict of laws, but this is precisely the type of issue which ought to be referred, especially when a precedent seems to indicate that there is a risk that national law is incompatible with EU law. Once again, the *Conseil d'État* reverts to its traditional practice of avoiding conflicts of law by simply abstaining from entering into judicial dialogue and choosing the interpretation of EU law which best suits its own interests - understood as preserving domestic law from the impact of European integration, even if this goes against the subjective interests of the claimants.

\*\*\*

The *Conseil's* position conveniently justifies avoiding references at both ends of the spectrum: where the issue is deemed to be minor or technical, or where it is too important and could truly call into question its own understanding of its role in the EU judicial system. One must wonder whether the *Conseil's* resistance to the adequate implementation of EU law had led it to mistake its own wishes concerning the distribution of competences within the EU judicial system for a reality. Its reaction to the ECJ judgment in *La Quadrature du Net* may be interpreted as expressing increased defiance following the infringement finding. The *Conseil* openly refused to implement the standards set by the ECJ following a preliminary ruling which it had itself requested. What is certain is that the past few years have shown that the *Conseil's* relationship with the ECJ has not improved as much as it seemed.

Although the decade of the 2000s allowed it to make very significant changes and come to terms with certain elements of EU law, the *Conseil* must once again be counted as one of the supreme courts of the founding Member States which is the most hostile to the EU perspective on preliminary references and the normative force of EU law at the domestic level, if not *the* most

---

<sup>86</sup> *Ibid.*, p. 205.

<sup>87</sup> *Ibid.*, p. 211.

<sup>88</sup> *Ibid.*, p. 220.

hostile. This hostility is rarely expressed in terms of direct confrontations, however the *Conseil*'s persistence in defining its own peculiar version of EU law and pretending that it is merely playing the part that is expected of a 'good pupil' of judicial dialogue is perhaps more insidious. Its members' insistence that they are willing to engage in cooperation with the ECJ is certainly to be welcome as a mark of goodwill but it is clear that, for the time being, the *Conseil* is unwilling to concede any further limitations of its own powers to European integration than it already has, however unsatisfactory the current compromise may seem from the point of view of EU institutions. Considering none of the previous changes in the *Conseil*'s attitudes to European law seem to have been influenced by changes in ECJ case law, it is not clear that the ECJ can do anything to improve the situation. Perhaps we will just have to wait for the composition of the *Conseil* to change once again and for influential pro-European members to reverse its recent jurisprudence.