
JUNE 2013

The French Constitutional Court ("FCC") has for a long time set aside the possibility of requesting a preliminary ruling from the Court of Justice of the European Union ("CJEU"). Such is no longer the case. The CJEU delivered a judgment on May 30th 2013 (Jeremy F. against Prime Minister), interpreting the Framework Decision on the European arrest warrant (articles 695-46 al.4 of the French Criminal Procedure Code). The FCC had requested the CJEU’s interpretation in order to properly answer a Priority Preliminary Ruling on Constitutionality that was issued on April 4th 2013, a few days before the CJEU's decision.

I. The FCC's previous refusal to review the compatibility of French Law with International and EU Law

The specificity of the Priority Preliminary Ruling on Constitutionality in France

As a reminder, the Priority Preliminary Ruling on Constitutionality can be requested before any French judge (except the Criminal Court when adjudicating serious crimes). It gives any person who is involved in legal proceedings before a court the right to argue that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. Thus, the FCC can be petitioned on the request of any judge, and via the Conseil d'Etat (Supreme Court for Administrative matters) or the Cour de cassation (Supreme Court for civil and criminal matters) depending on the subject matter of the case, to rule on the violation of the Constitution by the provision.

The judge before whom the constitutionality issue is raised must determine "without delay" whether the question is "serious". If not, the question is rejected. If it is deemed "serious", the question is submitted to the Conseil d'Etat or the Cour de cassation. These courts must confirm that the contested provision is applicable to the dispute and that it has not already been found constitutional (except if a "change in circumstances" occurred, in which case a new review is possible).

If they consider that the question is "serious" and worth being referred to the FCC, they will then proceed with submitting it to the FCC. The Priority Preliminary Ruling on Constitutionality can also be directly requested during a dispute before the Conseil d'Etat or the Cour de cassation. In any case, these Courts have only three months to decide to forward the question to the FCC.

When asked to deliver a Priority Preliminary Ruling on Constitutionality (only 20% of the PPRC requested are ultimately forwarded to the FCC), the FCC has three months to deliver a ruling on the constitutionality of the contested provision. The timeframes are therefore very short (maximum 6 months in total) in order to prevent delaying tactics and undue delay in the final judgment of the case whose trial is interrupted while the PPRC is being reviewed.

The traditional FCC's reluctance to request preliminary rulings from the CJEU

In the past the FCC seemed to consider that the short time period in which it had to rule on a PPRC prevented it from requesting preliminary rulings from the CJEU. But this issue has been overcome; in its April 4 decision the FCC requested "the implementation of the

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1 CJEU, May 30th 2013, Jérémy F. c/ Premier ministre, C-168/13.
3 Article 695-46 subparagraph 4 « The investigation Chamber, whose ruling isn’t subject to appeal, delivers a judgment within 30 days of receipt of the request, after making sure that it includes all the information requested by article 695-32».
4 Ruling n°2013-314P QPC, April 4th 2013, Absence of legal remedies in case of an extension of the European arrest warrant effects– Preliminary ruling requested from the Court of Justice of the European Union.

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violating a treaty doesn’t necessarily violate the international law – or EU law – by stating that relationship between domestic constitutional law and Constitution”.

FCC showed that it had no intention of establishing any compatibility of French law with international norms, including European Union law (treaties and other sets of norms such as directives and regulations).

In its famous judgment regarding the Abortion Act, the FCC showed that it had no intention of establishing any relationship between domestic constitutional law and international law – or EU law- by stating that “a law violating a treaty doesn’t necessarily violate the Constitution”.

As a consequence, other administrative or judicial jurisdictions felt free, in turn, to rule on the compatibility of French national law with international or EU law.

The Conseil d’Etat has remained steady in this regard. In a PPRC of February 3rd 2012, it confirmed that “a cause of action based on the incompatibility of a French law with France’s international and European commitments cannot be considered as a cause of action for unconstitutionality”.

This very clear cut position has necessarily softened since no jurisdiction, even the constitutional ones, can nowadays ignore the interpenetration between national law and EU law. Thus, the FCC acknowledged the constitutional value of the obligation to incorporate European directives into national law. That means that a national law going against the “unconditional and sufficiently precise” provisions of an EU Directive is unconstitutional.

However, this argument can only be raised when the FCC reviews a legislative act before it is enacted (a priori constitutional review) since it doesn’t directly affect guaranteed rights and freedoms.

II. A new dialogue between the FCC and the CJEU

Human rights as a bridge between French national law and international / EU law

By deciding to request a preliminary ruling from the CJEU the FCC has reached a new and important milestone, implicitly admitting that its assessment on the constitutionality of a national law could mean having to first decide whether the challenged provisions of such law are directly transposed from the European legislation or fall within the discretion accorded to Member States in implementing EU laws.

This case was about a British school teacher that was prosecuted under to English law for child abduction and sentenced to seven years in prison. After being remanded to the British authorities, the latter asked the French authorities about the possibility of bringing criminal charges for sexual intercourse with a minor under the age of 16. The FCC, petitioned via the Cour de cassation, had to first know whether the lack of recourse against a decision to extend an arrest warrant to allegations other than those justifying the defendant’s remand to the authorities of his home country, provided for by the French Code of criminal procedure, violated the defendant’s European right to effective recourse and equality in the eyes of the law.

The judgment delivered by the CJEU on May 30th 2013 therefore has a historic dimension.

First, it proves that it is possible to reconcile the need for dialogue between EU judges and French constitutional courts with the short procedural deadlines faced by the FCC. As noted above, the FCC has only three months to render its decision, while theoretically preliminary proceedings before the CJEU can take up to two years.

The implementation of the emergency procedure provided for by CJEU’s rules provided the right solution. One can also wonder if it wouldn’t be appropriate for the CJEU rules to refer to the deadlines requirements of some domestic courts in order to prevent delays that would undermine such a dialogue.

Second, the CJEU judgment stresses the increasing importance of fundamental rights as a tool for the harmonization of European legislation, regardless of the discretion given to Member States in implementing such legislation domestically.

In the case at hand, the CJEU pointed out that the decision to extend prosecution under a European arrest warrant to other offenses must be taken within 30 days (a short timeframe) according to the EU procedural framework. Although EU Member States may freely decide whether or not to provide a right of

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6 Ruling n°74-54, January 15th 1975, Law on voluntary termination of pregnancy, cons.5.
7 Conseil d’Etat, October 20th 1989, Nicolò, n° 108243
9 PPRC Ruling n°2011-217 of February 3rd 2012, Illegal Entry or Stay in France, cons. 3. The Court only reminded the administrative and judicial jurisdictions of their duty to ensure the France’s international commitments are being respected.

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interlocutory appeal against such a decision, the CJEU nevertheless stressed that Member States’ legislation must respect fundamental rights, whether or not they allow interlocutory appeals, mentioning in particular ‘the right to a second hearing for persons convicted by a court’ and ‘the right to a fair trial’.

**The primacy of Union Law over national Law**

Finally, and most importantly, the CJEU decision provides a dazzling reaffirmation of the primacy of EU law over national law.

This principle was first fully expressed in the famous ‘Simmenthal’ case of March 9th 1978. The domestic judge has the obligation to ensure the full effect of the European legislation, setting aside if necessary any national provision that would be in violation of the European legislation, even if it was adopted subsequently, and without having to request or await its prior removal by the legislature or by any other constitutional procedure.

Regarding EU Law, its primacy is the very basis for the creation of the preliminary ruling procedure provided for by Article 267 of the TFEU. Three years ago, in 2010, the Cour de cassation decided to request a preliminary ruling from the CJEU on the priority nature of the PPRC and its compatibility with the principle of primacy of EU Law. Given the obligation for domestic judges to promptly set aside any national provision violating EU Law, is it possible for a judge to wait six months, until the FCC’s judgment is rendered, to do so?

The CJEU, in its decision of June 22nd 2010 confirmed that the PPRC procedure is compatible with the primacy of EU law as long as domestic courts remain free “to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary (...) and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU Law”.

**To conclude:**

By engaging in a direct dialogue with the CJEU the FCC is following the trend instigated by other constitutional courts in Europe which frequently request preliminary rulings from the CJEU. As luck would have it, three months before delivering the ‘Jeremy’ judgment, the CJEU in the “Melloni against Fiscal” case of February 26th 2013 answered a request for preliminary ruling by the Spanish Constitutional Tribunal regarding the interpretation of the Framework decision on European arrest warrants.

in that case, considering that national legislation should provide for the possibility ‘of convictions rendered in absentia to be open to review in the issuing Member State’ where a defendant is convicted in absentia, the European Court took the opportunity to stress that ‘rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State’.

Does this pave the way to a proper reconciliation between the two legal systems, the European and the constitutional one?

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12 CJEU, March 9th 1978, Simmenthal, aff. 106/77
13 Article 267 of the TFEU: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national Law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.


15 CJUE, February 26th 2013, Stefano Melloni c/ Ministerio Fiscal, aff. C-399/11