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Op-Ed



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At a time when much of the debate on the interaction between the Court of Justice and constitutional courts remains justifiably focused on the aftermath of the *ultra vires* [ruling](#) by the Polish *Trybunał Konstytucyjny* in K 3/21, it may be interesting to take a step back and examine the evolving dialogue of other national institutions with EU law. The French *Conseil constitutionnel*'s decision on the [Air France case](#)¹ is an illustration of the more usual compromise adopted by constitutional courts, within a framework that remains unchanged in its case law since [2006](#). This decision marks the first explicit definition of principles ‘inherent to the constitutional identity’ of France, justifying a constitutional review of provisions derived from an EU instrument, and the first identification of such a principle. It is worth examining this new

step in the *Conseil*'s own ‘reasonable accommodations’² with EU law which, after the *Conseil d'État*'s French *Data Network* decision (see my Op-Ed published [here](#) on 29 April 2021), constitutes the first example of an exception to the primacy of EU law by the *Conseil constitutionnel* justified by the same concept: ‘constitutional identity’. While the reasoning is certainly much more convincing than that presented by their Polish counterparts in K 3/21 and is not a comparable attack on the constitutional core of EU law either in its scope or its aggressiveness, the *Air France* decision may be read in the broader context of the case law of European constitutional courts as a signal of a growing willingness to

¹ Conseil constitutionnel, Decision n° 2021-940 QPC, 15 October 2021, *Société Air France* [Obligation pour les transporteurs aériens de réacheminer les étrangers auxquels l'entrée en France est refusée].

² To borrow the phrase used by B. Bonnet, ‘Les rapports entre droit constitutionnel et droit de l'Union européenne, de l'art de l'accommodement raisonnable’, Titre VII (2019) no. 2.

challenge the authority of EU law over national legal systems.

The *Conseil d'État* (supreme administrative court) had asked the *Conseil constitutionnel* to review the constitutionality of two legislative provisions which establish an obligation for air carriers to return third-country nationals who are refused entry into France. They implement [Directive 2001/51](#), itself based on Article 26 of the [Convention Implementing the Schengen Agreement](#). Air France argued that these provisions violate Article 12 of the Declaration of the Rights of Man and the Citizen of 1789,³ because they delegate the exercise of 'administrative police duties inherent to the exercise of public force'. Additionally, the company argued that the provisions were also contrary to Articles 9⁴ and 13⁵ of the same Declaration and to Article 66 of the French Constitution.⁶ Last, Air France argued that the provisions were unconstitutional due to 'negative incompetence', namely because by not providing for appropriate exceptions to this obligation, the legislator had not exercised its powers to the full and necessary extent.

The *Conseil constitutionnel* notes the link with EU law from the outset (paragraph 9), with a reference to Article 88-1 of the Constitution, which establishes France's membership of the

EU, and restates its previous case law derived from this provision: the implementation of EU secondary law in France cannot run counter to 'a rule or a principle inherent to France's constitutional identity' unless the constituent power consents to it. This case law restricts the *Conseil's* powers of constitutional review to two cases if the provision at issue is an implementation of EU secondary law: where such a rule or principle is affected, or where the provision is in fact the result of a choice of the French legislator exercising its margin of appreciation (in which case constitutional review is without consequence for EU law). In other cases, the *Conseil* considers itself incompetent to review provisions which implement precise and unconditional provisions of a directive or the contents of a regulation, the more appropriate *locus* of judicial review being the Court of Justice, in accordance with the primacy of EU law. In itself, this approach is similar to those of other constitutional courts throughout Europe which, although willing to 'play by the rules' of EU integration, especially when this choice became enshrined in the constitutional text, set EU primacy within acceptable limits.

So far, the *Conseil constitutionnel* had never explicitly identified a 'rule or principle inherent to the constitutional identity' of France that justified constitutional review of a provision

³ 'To guarantee the Rights of Man and of the Citizen a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted'. (All translations are borrowed from the [Website of the French Presidency](#)).

⁴ As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law.

⁵ For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay.

⁶ No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.

derived from EU law. This decision provides the first example, under a very clear application of the rule: since, in this case, the provisions at issue were simply an implementation of precise and unconditional provisions of a directive, the Conseil would not review them unless they called into question such a principle. For the first time, the *Conseil* states a criterion with which such a rule or principle may be identified. This is done by reference to EU law: in essence, it is any rule or principle which is considered part of the rights and liberties guaranteed under the French Constitution but not similarly protected under EU law (paragraph 13). In this case, the *Conseil constitutionnel* found that all of the constitutional norms relied upon by the claimant are protected under EU law except one, the prohibition of any delegation of the exercise of ‘administrative police duties inherent to the exercise of public force’ to private persons derived from Article 12 of the 1789 Declaration (paragraphs 14-15).

True to form, the *Conseil constitutionnel* does not explain or justify this finding. It goes on to review the compatibility of the provisions derived from EU law with this principle. In this instance, the *Conseil* dismisses the claim (paragraph 18) which leads to a finding that the provisions are compatible with the Constitution. However, the fact that it *did* carry out such a review for the first time, and the way in which the scope of the exception is defined, are significant.

From the point of view of EU law, one could argue that this is not necessarily problematic since the area is not fully harmonised and that the Member States are, in principle, allowed to pursue higher levels of protection of fundamental rights under *Åkerberg Fransson* ([C-617/10](#)).

However, one must note that the *Conseil constitutionnel* takes no account of the Court of Justice’s case law on the interaction of EU and national fundamental rights standards. This decision is entirely based on the French constitutional case law, in which the level of harmonisation of an area of EU law is entirely irrelevant to determine the *Conseil*’s ability to review a provision. Thus, although in this case the review produced no problematic results, the rules set by the *Conseil* are capable of producing results which are clearly incompatible with the Court of Justice’s own understanding of primacy with regard to fundamental rights standards.

The *Air France* decision must be read mainly as an attempt to remain within the bounds of the *Conseil constitutionnel*’s compromise with the primacy of EU law, which is not dissimilar to those of other national institutions. However, although it is entirely consistent with previous case law and thus not a significant innovation from the point of view of French law, this decision could be read as a warning sign of the potential of the ‘constitutional identity’ exception. The fact that the notion is defined as *any* rule or principle not equally protected under EU law, with no regard to other criteria such as its importance within French constitutional law, could lead to a significant enlargement of the scope of the exception – in particular when one takes into account the *Conseil*’s creativity in ‘identifying’ principles of varying importance and scope as part of France’s ‘constitutionality block’. The *Conseil* seems to have granted itself significant leeway in setting the impact of the primacy of EU law over its own powers of judicial review. While the concept of a norm

‘inherent to the constitutional identity’ of a country may have seemed a very small exception considering the significant convergence of European legal systems on a number of values and fundamental rights, this decision does demonstrate a potential for expansion which reaffirms the power of national institutions in setting the limits of their choice to EU law primacy. Read in conjunction with the *Conseil d’État*’s recent case law, this decision certainly signals a newfound willingness to rely on constitutional identity as an operative concept to reclaim power for national institutions in the interactions between French law and EU law. This concept is not used as a proxy for an understanding of sovereignty as fundamentally incompatible with EU constitutional law and one must welcome the continued trust shown by the *Conseil constitutionnel* in the equivalency of most fundamental rights standards between the French and EU legal orders. In its willingness to play by the rules of a relatively peaceful coexistence of constitutional supremacy in the national order with EU law primacy, the *Conseil* presents a timely alternative to the Polish decision which has been the focus of this series. However, the growing willingness of constitutional courts to implement the exceptions established in their respective *Solange*-related case laws, although not incompatible with EU membership, does call into question the optimistic outlooks on constitutional pluralism of the 2000s.

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