Special Issue – Preliminary References to the CJEU
Part Five

The Return of the Huron, or Naïve Thoughts on the Handling of Article 267 TFEU by Constitutional Courts when Referring to the Court of Justice

By Pierre-Vincent Astresses[*]

A. Background Information

He was a Huron, but a particular one. Lulled during his childhood by the stories of the public law teacher of his Tribe who had the chance to get a scholarship enabling him to mix with intricacies of the French recourse for misuse of power[1]—a real first!—he had seen some of his friends cross the Ocean.[2]

Some fifty years later, it is difficult to recognize the Huron tribe that Jean Rivero[3] reported to us. For some time now, a political change which would trigger new juridical consequences was latent. Wise Hurons had the ambitious project of creating a Union which would bring together surrounding Tribes. However, it was unthinkable for each of these Tribes to lose all their competences. Thus, the project proposed that only some of them would be transferred for the advantage of a new entity – a guarantor of the general interest. If the political part was accepted on the whole, its juridical counterpart proved to be much more complex by contrast. Some legal experts notably worried about the possible case law gap between Member Tribes, as this would be damaging to the objective of the pursuit of the common interest.

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[1] Jean Rivero, *Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir*, 1 RECUEIL DALLOZ DE DOCTRINE, DE JURISPRUDENCE, ET DE LEGISLATION. CHRONIQUE 37 (1962).

[2] Denys Simon, *Un Huron à Schengen*, 4 EUROPE 1 (2012). In the same way, see Laurence Burgorgue-Larsen, *A Huron at the Kirchberg Plateau or a few naïve thoughts on constitutional identity in the ECJ case law*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION, 275 (Alejandro Sáiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

[3] Jean Rivero (1910-2001) was one of the most prominent French Professors of administrative and constitutional law. In his chronicle, mentioned above and widely known among French legal scholars, he brilliantly stages a fictional dialogue between himself and a Huron for the sake of discussing the French recourse for misuse of power. The falsely naive remarks attributed to the Huron indeed provides a forum for calling into question, or at least raising the issue of, the real effectiveness of this recourse. This method has clearly inspired this present article.

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In all its aspects, European integration was often narrated in the specialized gazettes published in the different Tribes. The creation of a Tribunal with jurisdiction on various matters and a preliminary ruling procedure was envisaged. Did all jurists accept the setting up of a preliminary ruling procedure? Some of them, Guardians of the internal order, were not in favor of the establishment of such a mechanism.

One day, our Huron legal expert, keen reader of a Huron law journal, took note of a seminar to be held in the Old Continent related to the preliminary references made by Constitutional Courts to the European Court of Justice (CJEU). He mentioned it to his colleagues in the surrounding Tribes. The attendance of one of them there was unanimously considered as being indispensable. He volunteered to attend this seminar and flew to Rome.

In Rome *Fiumicino*, where I welcomed him, his first words were: "Bring me, *per favore,*" he added with a smile, "to the seminar dealing with the use of the preliminary ruling procedure by the Constitutional Courts."

"*Volentieri,*" I declared enthusiastically.

"My presence here may seem absurd to you," he started to say. "However, let me explain briefly the reasons to you."

He cited to me with passion the political change which fermented in his faraway lands, and the reluctance provoked by this change. His words were full of wisdom: "Having doubts," he said, "is specifically human. Under these circumstances, it seems to me normal that a judge may rely on the expertise of a specialist before finally settling the issue. How could this attitude hurt?" He had so many questions that he feared that he would not have enough time to find the answers. Finally, he admitted honestly, as only Hurons still could, the huge significance of this seminar, not only for himself, but also and in particular for the future of the project.

"I understand your expectation. Do not worry, I am convinced that you will have enough time to get the answers you need. By the way, how about reducing your legitimate apprehension by sharing some of your questions with me? I will be glad to help you."

"With pleasure," he replied, obviously delighted to begin so quickly such a conversation. "You have to keep in mind," he added, "that my knowledge of your law is significantly lower than yours. I am a novice on the matter, and I apologize in advance for this. What I know is that Article 267 of your Treaty on the Functioning of the European Union (TFEU)[4]

[4] For convenience, we will refer throughout to Article 267 TFEU, even for preliminary references sent to the CJEU prior to the entry into force of the Treaty of Lisbon.

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allows your CJEU to give a preliminary ruling on questions regarding the interpretation and validity of a provision of European Union (EU) law, as well as ex Article 35 of your Treaty on European Union (TEU) for questions dealing with police and judicial cooperation in criminal matters. I also know, according to the third paragraph of Article 267(3) TFEU, that national courts against whose decisions there is no judicial remedy under national law—which include your Constitutional Courts and our Guardians of the internal order—must refer the matter for a preliminary ruling."

"Even if," I began, "most of the Constitutional Courts are still reluctant to address preliminary rulings to the CJEU, it is worth noting that a growing number of them are no longer hesitant about activating the preliminary ruling procedure. Up to now, the constitutional judge of Belgium,[5] the Land of Hesse,[6] Austria,[7] Lithuania,[8] Italy,[9] Spain,[10] France,[11] Germany,[12] Slovenia[13] and Poland[14] have crossed the Kirchberg Rubicon."[15]

"We have a well-known saying that goes: a collection of Courts means an abundance of overviews," he said, thoughtfully.

B. A Kind of Unity Behind an Apparent Diversity

"You would not be surprised, then, if I announced to you that a diversity prevails in the handling of Article 267 TFEU between Constitutional Courts, bearing in mind the legal tradition proper to each Member State. What could surprise you more is that such a

[5] Cour d'arbitrage, 1997, *Fédération belge des chambres syndicales de médecins ASBL v. Gouvernement flamand, Gouvernement de la Communauté française, Conseil des ministres*, Case 6/97.

[6] Staatsgerichtshof des Landes Hessen, 1997, Case 1202.

[7] Verfassungsgerichtshof, 1999, Cases B 2251/97 B 2594/97.

[8] Konstitucinis Teismas, 2007, Case 47/04.

[9] Corte Costituzionale, 2008, Case 102/2008 (Ord. 103/2008).

[10] Tribunal Constitucional, 2011, Case 86/2011.

[11] Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 2013-314P QPC.

[12] Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13.

[13] Ustavno Sodisce, 2014, Case U-I-295/13-132. In view of the current lack of English version or translation, this case will not be considered in more depth in this article. Just a reference of this ruling is given here.

[14] Trybunał Konstytucyjny, 2015, Case K 61/13. In view of the current lack of English version or translation, this case will not be considered in more depth in this article. Just a reference of this ruling is given here.

[15] Only the first preliminary reference made by the relevant Constitutional Court to the ECJ was quoted in the previous footnotes.

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diversity also appears in the case law of a single Constitutional Court. However, such assertions need to be nuanced."

After a short moment of astonishment, he said immediately: "I can understand that the same wording is not found from one Constitutional Court to the next. I can also imagine that the wording can be slightly hesitant when a Constitutional Court refers to the CJEU for the first time. But, when taking into consideration Constitutional Courts which have a kind of preliminary reference tradition towards the CJEU, your remarks intrigue me. Would you insinuate that it is a waste of time to look for a standard formula in all the relevant case law of the *Cour d'arbitrage*, what am I saying... the Belgian Constitutional Court, I beg your pardon for this anachronism,[16] punctuated by no less than twenty-four decisions to submit a reference for a preliminary ruling?[17] That the same observation also applies, for example, to the four decisions of the Austrian Constitutional Court?"

I. The Belgian Constitutional Court's Example on the Handling of Article 267 TFEU

"Do not be so disconcerted. As I told you before, my wordings must be nuanced and clarified. You have mentioned, and rightly so, what can be seen as, let's say a preliminary reference frenzy on the part of the Belgian Constitutional Court. Let's take this Court as an example. It is the European record keeper on the matter, and it is actually possible to ask whether a consistent jurisprudence appears in the way the Belgian constitutional judge handles Article 267 TFEU. The undeniable advantage of the number of Belgian decisions is that an evolution starts to become visible. In the very first two decisions, the wording is roughly the same.[18] The Belgian constitutional judge simply mentions Article 267 TFEU, before announcing that the case should be referred to the CJEU."

"So brief," he sighed, obviously disappointed.

"Do not lose sight of the fact that it was the first time that the Belgian constitutional judge—and more generally that a constitutional judge[19]—referred a preliminary ruling to the CJEU. Practice does make perfect".

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[16] The *Cour d'arbitrage* has been known as the *Cour constitutionnelle belge* (hereafter, Belgian Constitutional Court) since the constitutional revision of 7 May 2007.

[17] The inventory of the decisions to submit a reference for a preliminary ruling of the Constitutional Courts was closed on 20 January 2015.

[18] Cour d'arbitrage, 1997, *Fédération belge des chambres syndicales de médecins ASBL v. Gouvernement flamand, Gouvernement de la Communauté française, Conseil des ministres*, Case 6/97, para. B.10; Cour d'arbitrage, 2003, *Hugo Clerens, b.v.b.a. Valkeniersgilde, v. Gouvernement wallon, Conseil des ministres*, Case 139/2003, para. B.17.

[19] It should be stressed however that, for some Austrian authors, the Austrian Constitutional Court was the first Constitutional Court in Europe to ask the CJEU for a preliminary ruling. *See, e.g.*, Peter Fischer & Alina Lengauer, *The adaptation of the Austrian legal system following EU membership*, 37 COMMON MKT. L. REV. 763, 776 (2000); Heinz Schäffer, *Autriche*, *in* COURS SUPREMES NATIONALES ET COURS SUPREMES EUROPEENNES: CONCURRENCE OU

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"Does the Belgian Constitutional Court become quite perfect?" he asked.

"You will be able to finally judge by yourself," I answered. "To a certain extent, the approach of the Belgian Constitutional Court changed from the third decision.[20] The wording evolved. Admittedly, the perspective is slightly different from the first two cases, since the Belgian constitutional judge did not look for an interpretation of a provision of EU law here, but was confronted with doubts about the validity of such a provision. But never mind. What is important to stress now is that the Belgian constitutional judge went one step further. This case dealt with the implementation into Belgian law of the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States.[21] To feel compelled to bring the matter before the CJEU, the Belgian constitutional judge not only mentioned the relevant Article (i.e., ex Article 35 TEU since the issue deals with police and judicial cooperation in criminal matters), he also highlighted the jurisdiction of the judge of the Kirchberg plateau,[22] justifiably considering that Belgium had accepted it within the provisions on police and judicial cooperation in criminal matters.[23]"

I continued. "The construction process of a standard formula truly appeared from the fourth decision. To handle this evolution in the best way, a distinction is to be made between preliminary rulings on interpretation and those on validity. For the first ones, you need to understand that there is generally a same handling of Article 267 TFEU, although the writing is slightly inconsistent. Here is summarily how the Belgian constitutional judge goes: first, he mentions Article 267(1) TFEU. By doing so, he affirms the jurisdiction of the CJEU to give preliminary rulings on matters within the scope of EU law. Then, in view of the fact that he is a judge against whose decisions there is no judicial remedy under national law, he expressly ranks himself under the auspices of Article 267(3) TFEU. Finally, the

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COLLABORATION? IN MEMORIAM LOUIS FAVOREU, 95, 111 (Julia Iliopoulos-Strangas ed., 2007); Anna Gamper, Francesco Palermo, *The Constitutional Court of Austria: Modern Profiles of an archetype of constitutional review*, 3 J. COMP. L. 64, 79 (2008)). Although any criticisms of what Roland Drago, another prominent French Professor, once called "nationalisme ombrageux" (shady nationalism), should be left aside here (Roland Drago, *Note de jurisprudence*, 1 REVUE DE DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 214, 216 (1980)), it seems difficult to deny the quality of constitutional jurisdiction to the Belgian *Cour d'arbitrage*, even in 1997 (in this sense, see, e.g., Louis Favoreu, *La Cour d'arbitrage vue de l'étranger. Le modèle belge de justice constitutionnelle*, *in* REGARDS CROISES SUR LA COUR D'ARBITRAGE 323, 324 (Robert Andersen et al. eds., 1995). The latter was therefore the first Constitutional Court to use ex Art. 177 EC Treaty.

[20] Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005.

[21] EC Directive 2002/584, 13 June 2002, O.J. 2002 L 190/1.

[22] Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005, paras. B.3.2 and B.11.

[23] Information concerning the date of entry into force of the Treaty of Amsterdam, 1 May 1999, O.J. 1999 L 114/56.

Belgian constitutional judge bears all the consequences that his reasoning entails, considering that he shall refer the case to the CJEU. He specifies that he has to do so only when the conditions laid down by *CILFIT* ruling[24]—that he takes the time to mention explicitly or implicitly, and that, as you probably know it, waive the duty to refer to the CJEU—cannot be met."

"This attitude seems to me to be more reasonable. You drew a distinction in the wording of the Belgian constitutional judge between preliminary references on interpretation and those on validity. You intrigued me: Is the way of handling Article 267 TFEU so different?" he asked.

"It seems that the Belgian constitutional judge is less eloquent when he refers a question on validity to the CJEU. But, do not over-interpret my words, his approach is not totally different. Faced with doubts as to the validity of a provision of EU law, the Belgian constitutional judge refers to the CJEU, specifying that either the judge of the Kirchberg Plateau has sole jurisdiction to rule on the issue of validity or that the Belgian Constitutional Court does not have competence on the matter. Although a preliminary reference is sent in both situations, I am sure you will agree with me that the approach is different. For claiming that the CJEU has sole jurisdiction does not have the same significance as claiming that the Constitutional Court is not competent. It may explain why this last formulation was used only once.[25] In any event, the lack of relevant EU case law explaining the reasons for that situation is deplorable. While the Belgian constitutional judge takes the time to justify his preliminary references on interpretation by mentioning, explicitly or implicitly, that the conditions required by the *CILFIT* ruling are not met to waive his duty to refer to the CJEU, the omission of the reference to the *Foto-Frost* ruling[26] in all of the references for a preliminary ruling on validity is almost inexplicable."

"The way you sound," he tried to summarize, "the Belgian constitutional judge proves to be quite an excellent pedagogue. He seems to handle with exactness the machinery of

[24] Case C–283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415, paras. 10–20. In this ruling, limits to the national courts' of last instance duty to submit a reference are set by the CJEU. National courts of last instance are not obliged to make a reference for a preliminary ruling when they consider that "the question is not relevant," when the "Court [of Justice] ha[s] already dealt with the point of law in question," and when they "established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt."

[25] Cour constitutionnelle belge, 2009, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, Case 103/2009, para. B.5.2.

[26] Case C–314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199, para. 20. In the present case, the Hamburg's Finanzgericht asked the CJEU, *inter alia*, whether a national court is able to review the validity of a decision adopted by the Commission. According to the CJEU, national courts may consider the validity of a Community act, but—and that is the crucial point—they have no jurisdiction to declare that measures taken by Community institutions are invalid. The CJEU has sole jurisdiction to declare such measures invalid.

Article 267 TFEU and ex Article 35 TEU, as well as, generally, the relevant case law allowing him to refer to the CJEU."

"I agree with you," I said. "Let me again point out that a standard formula appears. Only the words change over the decisions to refer to the CJEU. That said, from the twenty-first decision, a standard formula can be seen, and it seems to have fine days ahead. The wording seems to stabilize as follows: 'According to Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Union, as well as on the validity of such provisions. By virtue of the third paragraph, a national court against whose decisions there is no judicial remedy under national law—such as Constitutional Court ones—shall bring the matter before the Court of Justice. If any doubts exist about the interpretation or validity of an EU law provision which is of particular importance for the pending case before this court, the latter shall refer a preliminary reference to the Court of Justice, even on its own, without prior request expressed by the parties.'"[27]

II. An Attitude Shared by the Austrian, Land of Hesse, Italian, and Spanish Constitutional Judges, and the Consequent Emergence of a Minimum Common Basis

"Is this attitude shared by the other Constitutional Courts?" he asked.

"Such a handling tends to be found among the decisions to refer to the CJEU of some other Constitutional Courts..."

"So some similarities exist!" he said with glee.

"That is true," I went on to say. "In this respect, it is worth noting that the behavior observed of the Austrian constitutional judge in his decisions to refer to the CJEU is approaching that of the Belgian constitutional judge. A wave of teaching emerges from his first decision. In his three decisions to refer a preliminary ruling on interpretation, the Austrian constitutional judge shows that he is a judge against whose decisions there is no judicial remedy under national law. Therefore, by ranking itself under the auspices of Article 267(3) TFEU, the *Verfassungsgerichtshof* (Austrian Constitutional Court) highlights that it shall refer to the CJEU, clarifying at the same time that such a duty cannot be said to

[27] "L'article 267 du Traité sur le fonctionnement de l'Union européenne rend la Cour de justice compétente pour statuer, à titre préjudiciel, aussi bien sur l'interprétation des actes des institutions de l'Union que sur la validité de ces actes. En vertu de son troisième alinéa, une juridiction nationale est tenue de saisir la Cour de justice si ses decisions—comme celles de la Cour constitutionnelle—ne sont pas susceptibles d'un recours juridictionnel de droit interne. En cas de doute quant à l'interprétation ou la validité d'une disposition du droit de l'Union qui présente une importance pour la solution d'un litige pendant devant cette juridiction, celle-ci doit interroger la Cour de justice à titre préjudiciel, y compris d'office, sans qu'aucune partie ne l'ait demandé." (Author's translation.)

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exist if the conditions of exemption laid down in the *CILFIT* ruling are met.[28] Some similarities again appear when the Austrian constitutional judge refers a preliminary ruling on validity to the CJEU.[29] He actually starts to announce that he will bring to the judge of the Kirchberg Plateau cases in which he faces doubts about the validity of an EU law provision. Having cited Article 267(3) TFEU, he refers to the CJEU, but without taking the time to justify his attitude in view of the inherent requirements of the *Foto-Frost* ruling."

The Huron was listening quite carefully. I continued: "The Spanish and Land of Hesse constitutional judges have equally in common the affirmation of the jurisdiction of the CJEU to give preliminary rulings, more explicitly for the Land of Hesse constitutional judge[30] than for the Spanish one."[31]

"Do both of them mention Article 267(3) TFEU?" he asked.

"Let me answer by distinguishing again between the explicit and the implicit. The constitutional judge of the Land of Hesse explicitly ranks himself under the auspices Article 267(3) TFEU.[32] The attitude of the Spanish constitutional judge is somewhat different, notwithstanding that he considers himself to be a judge of last instance.[33] It is therefore possible to assume that the spirit of Article 267(3) TFEU is hiding behind the wording."

"Is the Spanish constitutional judge an *aficionado* of the implicit style?"

"Please know that, contrary to the Land of Hesse constitutional judge, and in accordance with the behavior of the Belgian and Austrian constitutional judge, the *Tribunal Constitucional* (Spanish Constitutional Court) expressly mentions the *CILFIT* ruling.[34] I am ending with the two decisions to refer to the CJEU of the *Corte Costituzionale* (Italian Constitutional Court). In its first preliminary ruling, it is worth noting that the *Sentenza* is much more instructive than the *Ordinanza*.[35] The latter only mentions Article 267(3) TFEU, without explicitly making reference to the jurisdiction of the CJEU, nor to the *CILFIT* ruling.

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[28] Verfassungsgerichtshof, 1999, Cases B 2251/97 B 2594/97, para. IV.2 ; Verfassungsgerichtshof, 2000, Cases KR 1-6/00 KR 8/00, para. III ; Verfassungsgerichtshof, 2001, Case W I–14/99, para. III.

[29] Verfassungsgerichtshof, 2012, Case G 47/12, paras. 26–30.

[30] Staatsgerichtshof des Landes Hessen, 1997, Case 1202, para. II.B.

[31] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

[32] Staatsgerichtshof des Landes Hessen, 1997, Case 1202, para. III.B.

[33] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

[34] *Id.* at para. II.4.d).

[35] Corte Costituzionale, 2008, Case (Ordinanza) 103/2008.

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By contrast, the *Sentenza* resembled the Belgian attitude. The Italian constitutional judge here affirms the jurisdiction of the CJEU, quoting Article 267(1) TFEU. The same applies to Article 267(3) TFEU, for which the constitutional judge explains that *la Consulta* (another way to name the Italian Constitutional Court) is a court of last instance when seized directly.[36] The breaking up of the relevant elements inherent in the handling of Article 267 TFEU as well as the lack of continuity of such an attitude in the second preliminary ruling[37] are to be regretted."

"If I do not misunderstand you," the Huron tried to summarize, "there would be a common basis formed by the quotation of the third paragraph of Article 267 TFEU."

"Things can be seen like this, indeed. Some constitutional judges occasionally add other elements to that basis, to confirm the jurisdiction of the CJEU, or to mention the *CILFIT* ruling in order to justify the decision to refer a preliminary reference on interpretation. Some other behaviors are a little more atypical. In this way, take for example, the Spanish constitutional judge who does not hesitate to mention the *Foto-Frost* ruling.[38] Take finally again the example of the Spanish constitutional judge, as well as the Italian one. They brilliantly explain in their respective formulations that the *Tribunal Constitucional* and the *Corte Costituzionale* are well and truly "courts" in the sense of the autonomous concept of Community law as interpreted by the CJEU. The Spanish constitutional judge, contrary to the Italian one,[39] mentions expressly[40] the *Vaassen-Göbbels* ruling.[41] Above all, let me give you this advice: a kind of unity is hiding behind an apparent diversity."

C. Time for Distinctions: About the Lithuanian, German, and French Constitutional Judges' Preliminary References

Following a few seconds of reflection, I heard him say: "Until now, you have mentioned the Belgian, Land of Hesse, Austrian, Italian, and Spanish Constitutional Courts, without saying a word about the decisions to submit a reference for a preliminary ruling of the Lithuanian, French, and German constitutional judges."

"Things are a bit more complex...," I said.

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[36] Corte Costituzionale, 2008, Case (Sentenza) 102/2008, para. 8.2.8.3.

[37] Corte Costituzionale, 2013, Case (Ordinanza) 207/2013.

[38] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

[39] Corte Costituzionale, 2008, Case 102/2008, para. 8.2.8.3; Corte Costituzionale, 2013, Case 207/2013.

[40] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.e).

[41] Case C–61/65, Vaassen-Goebbels v. Beambtenfonds Mijnbedrijf, 1965 E.C.R. 377.

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"Was it so purely voluntary on your part?" he stopped me.

I. Making Use of the Correct Article for a Reference for a Preliminary Ruling

"At the start of our conversation, you distinguished between preliminary rulings sent to the CJEU on the grounds of Article 267 TFEU, and those which are sent on the grounds of ex Article 35 TEU. As you know, the latter deals with provisions on police and judicial cooperation in criminal matters. The Framework Decision on the European Arrest Warrant has been the subject of many preliminary rulings, on interpretation or on the validity of some of its provisions. This means that..."

"That it is up to the referring court to place itself on the grounds of ex Article 35 TEU when sending a preliminary ruling to the CJEU on such a matter," he concluded.

"Exactly," I confirmed. "The Belgian, Spanish, and French constitutional judges have sent some preliminary questions on this matter. Twice, faced with doubts about interpretation and validity of some provisions of the European Arrest Warrant, the Belgian constitutional judge correctly refers to the CJEU on the grounds of ex Article 35 TEU.[42]"

"Faced with such a situation, the Spanish constitutional judge acted more originally. His preliminary reference is composed indeed of three questions. The first two concern a request on interpretation and on the validity of some provisions of the aforementioned Framework decision. The third one concerns a request for an interpretation of the EU Charter of Fundamental Rights. He observed very rightly that the two first questions are still within the scope of ex Article 35 TEU,[43] in view of the first paragraph of Article 10 of Protocol no. 36 of the Lisbon Treaty on transitional provisions.[44] However, and despite this recognition, he made the choice to refer to the CJEU on the grounds of Article 267 TFEU,[45] in all probability because of the nature of the third question. In some way then, the attitude of the French constitutional judge is slightly different. Soliciting only a request for an interpretation of a provision of the Framework decision, he referred to the CJEU on the grounds of Article 267 TFEU..."[46]

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[42] Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005; Cour constitutionnelle belge, 2009, *Exécution d'un mandat d'arrêt européen émis à l'encontre de I.B.*, Case 128/2009.

[43] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.a).

[44] Protocol (no. 36) on transitional provisions, 9 May 2008, O.J. 2008 C 115/322.

[45] Tribunal Constitucional, 2011, Case 86/2011, para. II.4.a).

[46] Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 2013–314P QPC, para. 7.

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"Since the Spanish constitutional judge has also referred to the CJEU on the grounds of Article 267 TFEU, why does such an attitude differ from the Spanish one?" he asked.

"Although the Spanish constitutional judge used Article 267 TFEU, he was fully aware that, by contrast to his third question, the first two questions came under the provision of ex Article 35 TEU. If you care to take a look at the documentary record made for the decision by the competent services of the French Constitutional Council, you will note that the first paragraph of Article 10 of the aforementioned Protocol is quoted *in extenso*. What is more, the relevant part is put in bold![47] When referring to the wording of the decision of the French constitutional judge, and noting that only one question on interpretation of the Framework decision was solicited, it is striking that he referred to the CJEU on the grounds of Article 267 TFEU. Such behavior is difficult to explain. It is significant to note that this mistake has been highlighted in some specialized gazettes."[48]

"I understand a little more now why you have drawn a distinction within the group of Constitutional Courts which have made references to the CJEU."

II. Omission of Quotation of the Third Paragraph of Article 267 TFEU

"Be careful; this may not be the key issue," I pointed out to him. "It is clear indeed that the basis that we were talking about previously formed by the quotation Article 267(3) TFEU is not replicated in the formulation of the Lithuanian, French, and German constitutional judges."

"What exactly do you mean by that?" he asked.

"Keeping in mind the formulation of the other Constitutional Courts, I want to share with you that the one adopted by these Constitutional Courts is in some ways unusual."

"How is it possible?" he asked, worriedly.

"Let's start with the German Constitutional Court. In the decision to refer to the CJEU, the German constitutional judge mentions Article 267 TFEU, but only its first paragraph, and in a more original way, the second point of the third paragraph of Article 19 TEU.[49] Article

[47] Documentary record of the Constitutional Council on Case 2013–314P QPC 74–75, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013314PQPCdoc.pdf.

[48] Anne Levade, *Premier arrêt sur renvoi préjudiciel du Conseil constitutionnel: ce que la Cour de justice dit... et ne dit pas*, 2 CONSTS. 189, 191 (2013). In the same way, see Marie-Eve Morin, *Extension du mandat d'arrêt européen: trois juridictions pour une abrogation*, 96 REVUE FRANCAISE DE DROIT CONSTITUTIONNEL 992, 995 (2013).

[49] Pursuant to Article 19(3) TEU, "The Court of Justice of the European Union shall, in accordance with the Treaties: [...] (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions." This quote is rather original since,

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267(3) TFEU is nonetheless quoted later in the decision.[50] However, this point deals with the common practice of the preliminary ruling procedure, without this constituting here the grounds for the reference to the CJEU. The attitude of the Lithuanian Constitutional Court is different. It mentions Article 267 TFEU in so far as it gives jurisdiction to give preliminary rulings on interpretation of EU law provisions.[51] However, note that there is no reference to the *CILFIT* ruling, and above all, no quotation of Article 267(3) TFEU."

"The handling of Article 267 TFEU is actually restrictive," he conceded. "What about the attitude of the Constitutional Council?"

"The same applies to it. That is to say, the strict minimum. The French constitutional judge only mentions Article 267 TFEU, according to which the CJEU has sole jurisdiction to give preliminary rulings on interpretation, without any further details."

D. Thoughts on a Possible French Constitutional Council's Special Position Towards the Other Constitutional Courts

"Are decisions of the Constitutional Council not traditionally known for their conciseness?" he pointed out to me.

"I am sorry, but let me stop you there. Here, the shallow formulation of the French constitutional judge is thought and intentional."

"Why do we have such differences in the handling of Article 267 TFEU between these Courts and the others? Are there any justifications?"

"Considering the deliberated perfunctory formulation of the French constitutional judge, let me rather see an opposition, not just as to style but also as to belief, between the Constitutional Council and the other Constitutional Courts."

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on the one hand, such reference to this Article is not seen in the other Constitutional Courts' decisions to refer and, on the other hand, it has not only quite the same wording, but also the same scope and spirit as of Article 267 TFEU. The German Constitutional Court clearly stressed the jurisdiction of the CJEU on the matter. One could possibly wonder about the potential reasons of this duplication: was it in order to strengthen the impression of the Constitutional Court's wish to cooperate with the CJEU? Looking more closely, it is striking that there is not much talk of cooperation (in this sense, see Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 EUR. CONST. L. REV. 2, 263 (2014); see also the various contributions in the German Law Journal's Special Issue on the OMT decision of the German Federal Constitutional Court in 15 GERMAN L. J. 2, 107 (2014)).

[50] Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13, para. 27.

[51] Konstitucinis Teismas, 2007, Case 47/04, para. III.7.

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"Is a strong distinction to be made within the group of Constitutional Courts which referred to the CJEU?" he asked.

"At first sight it would appear so," I answered. "In other words, a new *summa divisio* within the latter group would be added to the now common *summa divisio* distinguishing between Constitutional Courts which have not yet crossed the Kirchberg Rubicon and those which have already crossed it."

"What would cause that?" he asked.

"The way in which the Constitutional Courts want to build their relations with the CJEU is not unique."[52]

"How does this influence the handling of Article 267 TFEU by the Constitutional Council?"

I. The French Constitutional Council's Motivations Not to Quote the Third Paragraph of Article 267 TFEU

"The reason why the French constitutional judge favors a general invocation of Article 267 TFEU, without mentioning the third paragraph, is that he does not consider himself to be an ordinary judge of EU law. Summarily, he applies the following reasoning: Article 267(3) TFEU is used by national judges who are ordinary judges of EU law. As the Constitutional Council is not one of them, reference to this provision is not found in his formulation."

"What relentless reasoning!" he exclaimed.

"I am merely echoing what has been said by the President of the Constitutional Council,[53] and by the Secretary-General,"[54] I informed him.

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[52] This remark also includes the German Constitutional Court's preliminary reference, in which the notion of the cooperation between courts that is inherent to the preliminary ruling procedure seems to disappear in favor of a certain type of legal "diktat." Franz Christian Mayer, *Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L. J. 111, 119–20 (2014). In what follows however, the debate will mainly focus on the French Constitutional Council's preliminary reference. The aim in this part of the dialogue is to discuss the deliberate lack of reference to Article 267(3) TFEU and its questionable justification that the Constitutional Council would not be an ordinary judge of EU law.

[53] Denys Simon, *Le Conseil constitutionnel et le droit de l'Union européenne. Entretien accordé par Jean-Louis Debré* 7 EUROPE 4, 5 (2013).

[54] Remarks made by M. Guillaume at the conference organized on 4 November 2013 by the European College of Paris and the European Law Center of Paris II on the subject of "Le Conseil Constitutionnel et l'Europe: 55 ans pour apprendre à se connaître."

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"Relentless, however," he continued, "if one wants to consider, as you have just said it, that the French constitutional judge is not an ordinary judge of EU Law. May I also imagine what could have been the reasoning of the other Constitutional Courts?"

"Of course!" I answered.

After a few seconds of reflection, he said: "As the latter quote Article 267(3) TFEU, they considered themselves to be ordinary judges of EU law. I think this is the right way. What do you think about that? Why would the Constitutional Council not be one of them? Is it a vestige of the famous 'French exception'?"

"Such questions need many clarifications," I said.

"That is exactly why I came here," he told me. "Look!" he added, indicating to the heavy traffic. "I am convinced that you will be able to provide me with further details before arriving at the seminar."

II. An Update of the Notion of Ordinary Judge of EU Law and its Practical Outcomes

"You are right. The question regarding whether or not the French Constitutional Council is an ordinary judge of EU law is quite complex. We need to eliminate the false leads in order to arrive at a better understanding. Does the lack of reference to Article 267(3) TFEU prove that the French constitutional judge cannot be considered as such? It is doubtful, to say the least. Let's, however, admit that at the moment, and let's turn instead towards the documentary record made for the decision by the competent services of the Constitutional Council. Once again, the latter is particularly instructive. It is worth noting that, on the one hand, Article 267 TFEU is entirely quoted, hence including the third paragraph, and that, on the other hand, this third paragraph is put in bold![55] The reasoning that you previously qualified as 'relentless' loses its glory as soon as Article 267(3) TFEU is taken into account, even if the latter does not explicitly appear in the decision to refer to the CJEU."

"I understand," he said. "How should we understand that?"

"Above all," I started, "attention must be focused on two fundamental issues. First, please note that the French constitutional judge lives and works under the auspices of the *IVG* ruling on the Voluntary Interruption of Pregnancy Act..."[56]

"What is this?" he asked.

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[55] Documentary record of the Constitutional Council on Case 2013-314P QPC, 74, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013314PQPCdoc.pdf (2013).

[56] Conseil Constitutionnel, 1975, *Loi relative à l'interruption volontaire de la grossesse*, Case 74–54 DC.

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"In this decision, he highlights that he holds jurisdiction to review the compatibility of any legislative provisions with the Constitution, not to review the compatibility of such a disposition with whatever Convention. The French constitutional judge only verifies the constitutionality of laws; arguments relating to EU law cannot be accepted. The review of the compatibility of legislative provisions with EU law is left to the ordinary courts, that is to say the non-constitutional courts."

"Am I to assume that the French constitutional judge does not take EU law into account when he monitors the constitutionality of laws?" he asked.

"Exactly. So with that, it remains to be seen what an ordinary judge of EU law is. Put forward and analyzed by legal academics,[57] this expression has the great advantage of conceptualizing a reality. Due to the decentralized nature of EU law, it is the responsibility of national courts to interpret and to apply it. In such circumstances, all judges would be ordinary judges of EU law. In case of any doubts on interpretation or on the validity of an EU law provision, you know that these courts have at their disposal the preliminary ruling procedure. Without altering this expression which shines and will still shine through the legal doctrine papers, I suggest updating it, in order to appreciate the approach of national courts in terms of reception of EU law."

"In terms of reception?" the Huron repeated thoughtfully.

"As soon as a national judge welcomes EU law, in any way, he should be seen as an ordinary judge of EU law," I told him. "Keep that in mind."

III. A Purely Internal Debate also Limited to France

"But what about the Constitutional Courts which have referred to the CJEU? You do not appear to have answered my question," he responded.

"Do not worry, I am coming to that point. However, it seemed to me absolutely essential to give you this information. Now that is done, we can move on. For some legal academics," I went on, "constitutional judges would not be truly ordinary judges of EU law, because they would not apply EU law."[58]

"Is it not too excessive?" he asked.

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[57] See, notably, AMI BARAV, LA FONCTION COMMUNAUTAIRE DU JUGE NATIONAL (1983). More recently, see OLIVIER DUBOS, LES JURIDICTIONS, JUGE COMMUNAUTAIRE. CONTRIBUTION A L'ETUDE DES TRANSFORMATIONS DE LA FONCTION JURIDICTIONNELLE DANS LES ETATS MEMBRES DE L'UNION EUROPENNE (2001).

[58] DUBOS, *supra* note 57, at 5.

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"I contend that such an assertion should be nuanced. In view of the jurisprudence of the constitutional judges – let me leave out the attitude of the French constitutional judge for the moment –, in particular when they repeatedly take into account EU law to resolve disputes even without referring to the CJEU, to deny that constitutional judges are ordinary judges of EU law seems to me inappropriate today."

"To reinforce your point," he said, "it seems to me appropriate that this concept is consubstantial with the preliminary ruling procedure. When a judge refers to the CJEU, why would he not be considered an ordinary judge of EU law?"

"I agree with you," I answered. "Such a link is also established by the legal doctrine.[59] For legal academics or practitioners who comment on the case law of the Constitutional Courts, this qualification does not really appear to require debate. If you meet M. Bossuyt—the former President of the Dutch linguistic group within the Belgian Constitutional Court—and ask him whether the Belgian constitutional judge is an ordinary judge of EU law, his answer will be immediate and clear: 'Of course!'[60] But do not just take my word for it. The same conclusion is also reached by reading the Belgian Report submitted to the XVIth Congress of the Conference of European Constitutional Courts." [61]

"Is this attitude unique to the Belgian Constitutional Court?" he asked.

"Not at all. There is plenty of literature on some other Constitutional Courts too. Take, for example, the Austrian Report for the XIIth Congress of the Conference of European Constitutional Courts.[62] The Austrian constitutional judge 'can be referred to as a European Union judge' without debate.[63] I can continue along this path: such an assessment concerns also the Spanish,[64] the Italian constitutional judge..." [65]

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[59] *Id.* at 29. In the same way, *see* Eva Bruce-Rabillon, *Question sur la question! Nouvelles déclinaisons du contrôle de la constitutionnalité des lois de transposition*, 23 POLITEIA 89, 121 (2013).

[60] Remarks made by M. Bossuyt at the conference organized on 18 October 2013 by the University of Paris II on the subject of "Les relations entre hautes juridictions: paisibles ou non?".

[61] Belgian Report for the XVIth Congress of the Conference of European Constitutional Courts, 41, http://www.confcoconsteu.org/reports/rep-xvi/LB-Belgique-FR.pdf (2014).

[62] Austrian Report for the XIIth Congress of the Conference of European Constitutional Courts, 31–32, http://www.confcoconsteu.org/reports/rep-xii/Oostenrijk-FR.pdf (2002).

[63] Christoph Grabenwarter, *European fundamental human rights in the case law of the Austrian Constitutional Court*, *in* L'EUROPE DES DROITS FONDAMENTAUX. EN HOMMAGE A ALBERT WEITZEL 59, 69 (Luc Weitzel ed., 2013).

[64] Pedro Tenorio Sanchez, *Tribunal Constitucional y cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea*, 4, http://www.larioja.org/upload/documents/681076_DLL_N_7520-2010.Tribunal_Constitucional.pdf (2010).

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"I am willing to bet that the Constitutional Council will not be part of this list", he said.

"Nothing can be hidden from you," I answered.

"For different reasons, the attitude of the French constitutional judge is as fascinating as the Belgian one. Referring to the CJEU without considering himself to be an ordinary judge of EU law is a tough balancing act."

"For some legal academics, this link remains true. This assumption is not challenged. However, it does not apply to the Constitutional Council."[66]

"Is your CJEU of no assistance in getting a clearer picture?" he asked.

"It is true that if the CJEU gave a special treatment to the Constitutional Council, the discussions would be closed. But nothing in its ruling[67] allows it to move in this direction.[68] The latter considers the French constitutional judge to be an ordinary judge, and it is hard to see that things will become any different."

"Could the Constitutional Council not claim respect for its identity at the EU level?" he asked me.

"Your question echoes a number of current conversations dealing with the notion of constitutional identity. From this perspective, it is necessary to bear in mind that in France, the Constitutional Council has arrogated the jurisdiction[69] to protect this 'relatively mysterious notion'.[70] It is nonetheless worth adding that the full extent of this notion is thus far undefined.[71] That being said, if one follows the analytical framework outlined by

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[65] Laurence Burgorgue-Larsen, *Chronique de jurisprudence européenne comparée (2008)*, 4 RDP 1245, 1274 (2009).

[66] Bruce-Rabillon, *supra* note 59, at 121.

[67] Case C–168/13 PPU, F., (May 30, 2013), http://curia.europa.eu/.

[68] Baptiste Bonnet, *Le paradoxe apparent d'une question prioritaire de constitutionnalité instrument de l'avènement des rapports de systèmes*, 5 RDP 1229, 1235, 1251, 1253 (2013).

[69] Constitutional Council, 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Case 2006–540 DC, para 19.

[70] Edouard Dubout, *"Les règles ou principes inhérents à l'identité constitutionnelle de la France": une supra-constitutionnalité?*, 83 RFDC 451, 453 (2010).

[71] Philippe Blacher, Guillaume Protière, *Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires*, 69 RFDC 123, 134 (2007). According to them, "it is […] difficult to determine the scope of this notion" ("il apparaît […] difficile de déterminer le champ de cette notion"). (Author's translation.)

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the previous Constitutional Council's President[72] and also shared by some authors,[73] then for a principle to be qualified as inherent to French constitutional identity, it should prove to be crucial and distinctive."

"Could the constitutionality review of laws as exercised by the French constitutional judge be part of one of those principles? Could he thereby demand respect for this particular situation before the CJEU?" he asked.

"It is necessary to look at what is actually behind these terms," I answered. "The term 'crucial' indicates that all constitutional provisions cannot be considered as principles inherent to French constitutional identity. Therefore, as François-Xavier Millet has cleverly noted, one has to refer to the 'fundamental [principles] rather than to the peripheral [ones]'.[74] For him, 'strictly speaking, the constitutional identity can be construed as being composed only of a core of fundamental constitutional principles and values which do have a special meaning for the State.'[75] This quality can be attributed to the constitutionality review of laws. As for the term 'distinctive', it could be clearly highlighted if the Constitutional Council's preliminary reference was sent to the CJEU in the national context of an *a priori* constitutionality review. But this is not the case here. However, the distinctive character of the *a posteriori* constitutionality review could be emphasized having regard to the *IVG* ruling I already spoke about before."

"If I ever need an example of a far-fetched argument, here I have it," he said with a smile.

"I agree with you. But it is by this artifice that the Constitutional Council could have claimed a special status. The question, however, is whether such a claim could have been viewed favorably by the CJEU. You probably know that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[76] That being said, however, it is hard to see why the CJEU, whose aim is, I would remind you, to 'ensure that in the interpretation and application of the Treaties the

[72] Pierre Mazeaud, *Voeux du président du Conseil constitutionnel*, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-18/voeux-du-president-du-conseil-constitutionnel-m-pierre-mazeaud-au-president-de-la-republique.51930.html (2005).

[73] Dubout, *supra* note 70, at 456.

[74] FRANÇOIS-XAVIER MILLET, L'UNION EUROPEENE ET L'IDENTITE CONSTITUTIONNELLE DES ETATS MEMBRES 13 (2013).

[75] *Id.* at 14 ("*stricto sensu*, elle [l'identité constitutionnelle] peut être interprétée comme étant seulement constituée d'un noyau dur de principes et valeurs constitutionnels fondamentaux auxquels un Etat marquerait un attachement particulier, de nature identitaire.") (Author's translation).

[76] Art. 4(2) TEU.

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law is observed',[77] would take into account such a questionable claim by drawing a distinction within the group of courts which fall though under the auspices of Article 267 TFEU. It follows, then, that the discussion of whether the French constitutional judge is an ordinary judge of EU law is, on the one hand, purely internal and, on the other hand, also limited to France because no signs of such a controversy appear elsewhere."

IV. The French Constitutional Council as an Ordinary Judge of EU Law

"Are French legal academics unanimous in denying that the French constitutional judge can be an ordinary judge of EU law?" he asked.

"Far from it," I declared.

"Is there a debate among them?"

"Exactly so," I retorted. "You have caught on. For some, the French constitutional judge cannot be considered as such.[78] By contrast, for others, he can be.[79] In this vein, some authors even claim that the Constitutional Council exercises some conventionality review,[80] but we will have the opportunity to come back to this point later. An intermediate position is ultimately occupied by those who state that the French constitutional judge is not really an ordinary judge of EU law."[81]

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[77] Art. 19(1) TEU.

[78] Bruce-Rabillon, *supra* note 59, at 121. According to her, only judges who exercise a conventionality review are considered ordinary judges of EU law. But, "attached to a strict approach of its specialty," which separates him from this kind of review, the French constitutional judge is not one of them so far. In this sense, see also Pascal Puig, *Vers un nouveau "dialogue des juges" constitutionnel et européen*, 3 REVUE TRIMESTRIELLE DE DROIT CIVIL 564, 570 (2013).

[79] Florence Chaltiel, *Constitution et droit européen: le Conseil constitutionnel, juge européen? A propos d'un nouveau type de décision: les décisions en "P"*, 568 REVUE DE L'UNION EUROPEENNE 261, 261 (2013). According to her, "due to the French participation in the EU set out in Title XV of the Constitution and its gradual constitutionalisation, the French constitutional judge is required to check the compatibility of national laws with European law. [...] He has therefore built progressively a judicial policy of *conventionnalité constitutionnelle* or *constitutionnalité conventionnelle*. By using the preliminary ruling mechanism, he continues to work in that direction."

[80] *See* YANN AGUILA, BERNARD STIRN, DROIT PUBLIC FRANCAIS ET EUROPEEN 304–05 (2014); Constance Grewe, *Contrôle de constitutionnalité et contrôle de conventionalité: à la recherche d'une frontière introuvable*, 100 RFDC 961, 968–69 (2014).

[81] Jérôme Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, 3 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 531, 540 (2013). According to him, the Constitutional Council is admittedly a court under the auspices of Article 267 TFEU, but in view of its tightened jurisdiction on EU matters, the chances of a new preliminary ruling are very low.

"All the possible different views are there," he noted. "What conclusions can be drawn from this?"

"The circumstances leading to the first preliminary reference sent by the Constitutional Council need to be firstly recalled. A British teacher, Jérémy F., left England with one of his 15 year old students. He was transferred to the British authorities following his arrest, in Bordeaux, on the basis of a European Arrest Warrant, which was issued against him on grounds relating to child abduction. He was questioned about sexual intercourse with a minor."

"Yet it was not what had motivated the issue of the European Arrest Warrant," he noted.

"It is precisely for this reason, and by virtue of the specialty rule, that an extension of the European Arrest Warrant was asked for by the British authorities. The Investigation Chamber of Bordeaux accepted this request. In such circumstances indeed, according to the fourth paragraph of Article 695–46 of the French Criminal Procedure Code, the Investigation Chamber shall 'rule within one month from the receipt of the request without appeal.' Some serious concerns have emerged in connection with the constitutionality of such a provision, with regard to the principle of equal justice, on the one hand, and the right to an effective legal remedy, on the other hand. By the way, the British teacher filed an appeal in cassation, and raised a so-called *question prioritaire de constitutionnalité*.[82] In accordance with the rules governing the priority of the preliminary reference mechanism on issues of constitutionality, this *question* was referred to the Constitutional Council by the Court of Cassation. Very soon, the French constitutional judge understands the special nature of the ruling submitted to him. The disputed provision indeed followed the transposition of the Framework decision, and notably its Articles 27 and 28 which clarify that the decision to accept or to refuse the extension of the European Arrest Warrant shall be taken no later than thirty days after receipt of the request. According to Article 88-2 of the French Constitution, 'statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.' The French constitutional judge deduced that 'the constituent wanted to break down constitutional barriers that prevents the adoption of legislative provisions which necessarily result from acts adopted by the institutions on the European Union in relation with the European Arrest Warrant.'[83] Consequently, if the absence of

[82] Since the constitutional amendment of 23 July 2008, alongside the traditional *a priori* constitutionality review of laws, an *a posteriori* constitutionality review of laws has been introduced into the French Constitution. Pursuant to the new Art. 61–1, "if, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period". An Organic Law (Organic Law n° 2009–1523 of 10 December 2009 on the application of Article 61-1 of the Constitution) also came to determine the conditions for the application of this Article.

[83] Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 314-2013P QPC, para. 6 ("the constituent legislator intended to remove constitutional barriers precluding the enactment of the legislative provisions that necessarily

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appeal results from the Framework decision, no constitutionality review will be exercised by the French constitutional judge. However, if the absence of appeal does not result from the Framework decision, the latter will exercise a constitutional control, because this provision results from the margin of appreciation left to the national legislator. Hence the dilemma is: does the absence of appeal result from the Framework decision? Having doubts, the French constitutional judge referred to the CJEU."

"I understand better the reason why the French constitutional judge has chosen to handle Article 267 TFEU," he told me. "Having said that, how did he welcome EU law?"

"Before referring to the CJEU, in his preceding work, the French constitutional judge touched on inherent issues connected with EU law," I answered. "At least inadvertently."

"Do you mean that the French constitutional judge is an ordinary judge of EU law who does not know this himself?" he asked me.

"By using a body of evidence, such a conclusion can be reached. What I mean is that the French constitutional judge has been called on to handle tools of EU law. He has had to appreciate that EU law is real for the resolution of the dispute. Thus he has admitted the applicability of the Framework Decision to resolve the dispute. In order to avoid a situation in which the judge of the Kirchberg Plateau declares the action inadmissible – which would have truly been a poking at the Constitutional Council – the French constitutional judge has had to question whether the Constitutional Council is actually, and not only theoretically, a 'court' in the sense of the autonomous concept of Community law as interpreted by the CJEU. What that follows may convince you more: in some ways, the French Constitutional Council had also interpreted the Framework decision. Professor Dominique Rousseau has clearly underlined this attitude: by 'making the choice to interpret the Framework decision as unclear, the Constitutional Council puts himself under the auspices of the preliminary reference procedure.'[84] Note also that he decided to pronounce a stay of proceedings pending the ruling of the CJEU."

"Is such an attitude so atypical?" he asked.

"Not as such," I answered. "However, the fact that no provision in his domestic law allowed him to act like that is much more atypical."[85]

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follow from the acts adopted by the institutions of the European Union relating to the European arrest warrant.") (official translation).

[84] Dominique Rousseau, *L'intégration du Conseil constitutionnel au système juridictionnel européen*, 127 LA GAZETTE DU PALAIS 13, 14 (2013) ("en choisissant d'interpréter la décision-cadre comme imprécise, le Conseil choisit de se mettre en situation de "devoir" saisir la Cour de Luxembourg.") (Author's translation).

[85] *Id.* at 16. In the same way, see Jean Rossetto, *Le mandat d'arrêt européen à l'épreuve du renvoi préjudiciel*, 23 LA SEMAINE JURIDIQUE ADMINISTRATIONS ET COLLECTIVITES TERRITORIALES (JCP A) 29, 32 (2013).

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"What was his motive?" he asked, intrigued.

"No explicit motivation underlies his decision to submit a preliminary reference to the CJEU. To get a better understanding of his attitude, it must be borne in mind that the relevant legal text provides that 'the Constitutional Council shall give its ruling within three months of the referral being made to it.'[86] Notably, in order to respect the time limit, the Constitutional Council requested from the CJEU the granting of the urgent preliminary ruling procedure. Nevertheless, knowing that a delay would be quite inevitable, it decided to pronounce a stay of proceedings, with the immediate consequence of this being a suspension of time pending the ruling of the CJEU. The French constitutional judge was fully aware that the quite constitutional requirement to respect the deadline could not be considered such as to prevent a national court from referring to the CJEU. Therefore, the French constitutional judge had to go beyond that.[87] It is difficult not to see in this procedural adjustment an application of EU law and, in particular, of the *Internationale Handelsgesellschaft*[88]*-Simmenthal*[89]*-Melki and Abdeli*[90] judicial trilogy. Indeed, from this case law, it follows that, on the one hand, a national court must, of its own motion, put any provision of national legislation – and *a fortiori* even a constitutional provision – that conflicts with EU law aside,[91] and, on the other hand, that 'imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question'.[92] Although the latter requirement concerns preliminary rulings on validity, it is worth noting that the same applies to preliminary rulings on interpretation.[93] With this in mind, we can only agree with authors who point out that the French constitutional judge 'cannot simply overlook this kind of warning'[94] and that 'he cannot claim the respect of a national time-limit as an excuse for

[86] Art. 23–10 of the Organic Law n° 2009-1523 of 10 December 2009 on the application of Art. 61-1 of the Constitution ("le Conseil constitutionnel statue dans un délai de trois mois à compter de sa saisine.") (Author's translation).

[87] Denys Simon, *Conventionnalité et constitutionnalité*, 137 POUVOIRS 19, 29 (2011).

[88] Case C–11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125.

[89] Case C–106/77, Amministrazione delle finanze dello Stato v. Simmenthal, 1978 E.C.R. 629.

[90] Joined Cases C–188/10 and C–189/10, Melki and Abdeli, 2010 E.C.R. I–5667.

[91] Case C–11/70, Internationale Handelsgesellschaft, 1970 E.C.R. 1125, para. 3; Case C–106/77, Amministrazione delle finanze dello Stato v. Simmenthal, 1978 E.C.R. 629, para. 21.

[92] Joined Cases C–188/10 and C–189/10, Melki and Abdeli, 2010 E.C.R. I–5667, para 56.

[93] Bruce-Rabillon, *supra* note 59, at 119.

[94] *Id.* at 119.

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not fulfilling its obligations to refer a preliminary ruling on interpretation of a EU act to the Court of Justice.'"[95]

"Why, then, is the French constitutional judge not considered to be an ordinary judge of EU law?" he asked.

"For the purpose of assessing whether he is an ordinary judge of EU law when handling Article 267 TFEU, it is also appropriate to consider how the Constitutional Council takes into account the ruling of the CJEU. In essence, for the judge of the Kirchberg Plateau, the Framework Decision does not prevent appeal. The French constitutional judge deduced that the expression 'without appeal' does not result from the Framework Decision, but from the margin of appreciation left to the national legislator. With the inherent impediment of Article 88-2 of the French Constitution lifted, the French constitutional judge was able to review the compatibility of the disputed provision with the Constitution. Under these circumstances, as some legal academics have pointed out, 'the Constitutional Council is in a rather curious situation: he sends a ruling on interpretation to the Court of Justice […] to review in fact the compatibility of the above provision with the Constitution.'"[96]

"Could this undermine efforts to consider the French constitutional judge as an ordinary judge of EU law?" he asked.

"Not on paper, at least. Here are the reasons. First, it is worth noting that the French constitutional judge was able to review the compatibility of the provision of the French Criminal Procedure Code with the Constitution thanks to the way the CJEU ruled. Then, some legal academics stated that the French constitutional judge had taken no risk referring to the CJEU.[97] Such an assertion needs, however, to be nuanced. On the one hand, many legal academics wondered why no preliminary ruling on the validity of the provision of the European Arrest Warrant had been sent to the CJEU.[98] In his interview with Professor Denys Simon, the President of the Constitutional Council justified this attitude by arguing that the French constitutional judge is not an ordinary judge of EU

[95] Agnès Roblot-Troizier, *Chronique de droits fondamentaux et libertés publiques. Renvoi préjudiciel sur renvoi prioritaire: le droit au recours théâtre d'une collaboration inédite entre juges constitutionnel et européen*, 41 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL, 245, 250 (2013).

[96] Laurent Coutron & Pierre-Yves Gahdoun, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice de l'Union européenne: une innovation aux implications incertaines (à propos de la décision "mandat d'arrêt européen" du Conseil constitutionnel du 4 avril 2013)*, 5 RDP 1207, 1228 (2013).

[97] Roux, *supra* note 81, at 534.

[98] Coutron, Gahdoun , *supra* note 96, at 1223. In the same way, see Denys Simon, *Il y a toujours une première fois. A propos de la décision 2013-314 QPC du Conseil constitutionnel du 4 avril 2013*, 5 EUR. 6, 10 (2013).

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law.[99] However, as he admitted himself, the CJEU does not hesitate to switch the nature of the preliminary rulings. In other words, it is not impossible for the CJEU to turn a preliminary ruling on interpretation into a preliminary ruling on validity.[100] In this context, it would be worth appreciating the attitude of the French constitutional judge. Even without switching the nature of the preliminary reference, the CJEU could have offered an answer which would have been liable to trouble the Constitutional Council. By referring to the CJEU, the latter expected to receive two possible answers: either the CJEU considers that the Framework decision precludes appeal, in which case there is no chance for the French constitutional judge to review the compatibility of the disputed provision with the Constitution with respect to Article 88–2 of the French Constitution, or the CJEU considers that the Framework decision does not constitute an obstacle to appeal, paving the way for a constitutionality review. It seems that the Constitutional Council does not imagine a third possible way, which would consist in considering the appeal as mandatory.[101] In such circumstances, it is worth noting that the position of the Constitutional Council would be uncomfortable to say the least. In the light of such a ruling of the CJEU, the French constitutional judge would find himself in front of an incorrect transposition law."

"What could the attitude of the French constitutional judge have been?" he asked.

"There are two ways of looking at this. Either the Constitutional Council considers that there is no constitutional problem, and leaves the issue to be determined by the Court of Cassation.[102] Or the French constitutional judge puts himself under the auspices of Article 88-1 of the French Constitution, which provides that 'the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.' A constitutional duty to transpose directives into the national legal order stems from this Article. The French constitutional judge could join the French legislator to change the meaning of the disputed provision in conformity with the interpretation provided by the CJEU. By the way, such a provision would be set aside by the French constitutional judge, not because it is incompatible with EU law, but on the grounds of Article 88-1 of the French Constitution. He would easily claimed that this approach results from the constitutional duty to transpose directives, but such an attitude would not fool anyone."

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[99] Simon, *supra* note 53, at 5.

[100] Case C–16/65, Schwarze v. Einfuhr-und Vorratsstelle Getreide, 1965 E.C.R. 877.

[101] Coutron & Gahdoun, *supra* note 96, at 1225.

[102] Pursuant to the rules governing Priority Preliminary rulings on the issue of constitutionality, the Court of Cassation stays proceedings pending delivery of the Constitutional Council's judgment. Assuming that there is no more constitutional cloud as may be the case in the scenario presented, the jurisdiction of the Constitutional Council therefore stops: it is then up to the Court of Cassation to pass judgment on the substance of the case.

"May the review of a provision with whatever Convention be considered as a mortal sin for the French constitutional judge?" he asked.

"Such an attitude has stemmed from the *IVG* ruling, constant since 1975," I answered. "Most legal academics highlight that the first preliminary ruling sent to the CJEU does not question this case law; the French constitutional judge does not review a provision with whatever Convention, even indirectly.[103] However, some voices have argued otherwise.[104] One of them tends to highlight that Constitutional Courts mix review of a provision with the Constitution and with a Convention when they refer to the CJEU; then a distinction is drawn between a *contrôle de conventionnalité direct* and an *indirect* one.[105] The first one appears when the constitutional judge reviews the conformity of a national law with a directive. For its part, the *contrôle de conventionnalité indirect* describes the situation where the interpretation of EU law controls the interpretation of constitutional provisions on fundamental rights."

"May a parallel be drawn between this so-called *contrôle de conventionnalité indirect* and the preliminary ruling sent to the CJEU by the French constitutional judge?" he asked.

"It seems actually that it is the interpretation of EU law which controls the interpretation of constitutional provisions, because it is EU law which is going to point out the margin of appreciation of the French constitutional judge," I said.

"To deny the expression of ordinary judge of EU law to the French constitutional judge is not so obvious," he summed up.

"More than that," I said. "In view of these different elements, qualifying him as such when referring to the CJEU does not seem groundless."

"Like the other Constitutional Courts!" he said, believing that the conversation could thus end.

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[103] Myriam Benlolo Carabot, *Mandat d'arrêt européen (Décision-cadre n° 2002/584/JAI du Conseil): Première question préjudicielle du Conseil constitutionnel à la CJUE*, in Lettre Actualités Droits-Libertés du CREDOF, 2 May 2013, *available at* http://revdh.org/2013/05/02/mandat-darret-europeen-premiere-question-prejudicielle-conseil-constitutionnel/.

[104] Coutron & Gahdoun, *supra* note 96, at 1217. In the same way, see also Cyril Nourissat, *Première question préjudicielle du Conseil constitutionnel à la Cour de justice de l'Union européenne: Live and let die...*, 6 PROCS. 1, 2 (2013).

[105] Catherine Haguenau-Moizard, *Le contrôle de constitutionnalité du droit dérivé de l'Union européenne: la fin d'une exception française?*, *available at* www.law.uj.edu.pl/spf/referaty/Catherine%20Haguenau-Moizard.doc (2010).

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V. A Difference of Degree Between Constitutional Courts Rather Than a Difference of Kind

As we were getting closer to the place where the seminar was to be held, I added: "Let me, however, not entirely share your enthusiasm. Although qualifying the French constitutional judge as an ordinary judge of EU law does not seem so incongruous in such circumstances, by contrast ranking the Constitutional Council at the same level of the other Constitutional Courts is excessive. Rather than a difference of kind between the Constitutional Courts, there would be a difference of degree. Is the Constitutional Council ready to refer a preliminary ruling on the validity of an EU provision to the CJEU? Such a jurisprudential revolution is clearly not currently on his agenda, by contrast to the Belgian,[106] Spanish,[107] Austrian,[108] and German[109] constitutional judges. More broadly, the French constitutional judge is not entrusted with any European mission, such as to fully ensure a uniform application of EU law,[110] unlike the Belgian or the Italian constitutional judge.[111]"

"I am a keen reader of the specialized Huron gazette," he said. "I remember that the first preliminary reference sent to the CJEU by the Italian constitutional judge was made under the jurisdiction held in *via principale*. At that time, expanding this attitude to the jurisdiction he holds in *via incidentale* appeared rather improbable. However, does his second preliminary ruling not prove the contrary? The evolution of the *Corte Costituzionale* may serve as an example to the French Constitutional Council. We have a saying that goes: 'Cutting a flower not make spring ends.'"

"Your word is full of wisdom. May the future prove you right."

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[106] Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005; Cour d'arbitrage, 2005, *Ordre des barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v. Conseil des ministres*, Case 126/2005; Cour constitutionnelle belge, 2009, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, Case 103/2009; Cour constitutionnelle belge, *Exécution d'un mandat d'arrêt européen émis à l'encontre de I.B.*, Case 128/2009; Cour constitutionnelle belge, 2012, *Institut professionnel des agents immobiliers (IPI) v. Geoffrey Englebert, Immo 9 SPRL, Grégory Francotte*, Case 116/2012; Cour constitutionnelle, 2014, Case 165/2014. In these three last rulings, questions on interpretation and on validity were mixed.

[107] Tribunal Constitucional, 2011, Case 86/2011.

[108] Verfassungsgerichtshof, 2012, Case G 47/12.

[109] Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13.

[110] Coutron & Gahdoun, *supra* note 96, at 1222–23.

[111] Corte Costituzionale, 2008, Case 102/2008, para. 8.2.8.3. In the same way, see Karine Roudier, *L'évolution des rapports entre la Cour constitutionnelle italienne et le droit communautaire: le dialogue direct entre les juges finalement instauré*, 21 CIVITAS EUROPA 145, 156–59 (2008).

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