France

The *Conseil d'Etat* Abandons Its *Cohn Bendit* Case-Law; *Conseil d'Etat,* 30 October 2009, *Mme Perreux*

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For over 30 years the French *Conseil d'Etat* has maintained that it is impossible to rely on EC Directives before French administrative courts in a complaint filed against an individual administrative act. This in spite of the Court of Justice's well-known case-law that directives under certain conditions can have direct effect, as was first recognized in *SpA SACE* v. *Finance Minister of the Italian Republic* of 17 December 1970[1] and confirmed by *Van Duyn* v. *Home Office* of 4 December 1974.[2] However, in its famous *Cohn Bendit* judgment of 22 October 1978, the *Conseil d'Etat,* basing itself on a literal reading of at that time Article 189 EEC (currently Article 288 TFEU), refused to align itself to the Court of Justice' position, stating that:

> Directives can not be relied on (…) in support of a complaint against an individual administrative Act.[3]

On 30 October 2009, in *Mme Perreux*, the *Conseil d'Etat* finally gave up this position. In this case, Mrs Perreux alleged that she had been victim of discrimination on account of her activities for the Union of Judicial Authorities (*Syndicat de la Magistrature*), of which she currently is the president. In 2006, she was passed over for a nomination to the *Ecole Nationale de la Magistrature*. Mrs Perreux asked the *Conseil d'Etat* to quash the Decree of 29 August 2006, which nominated another person to the job. In the proceedings, she invoked Article 10 on the reversal of the

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[1] EJC 17 Dec. 1970, Case 33-70, *SpA SACE* v. *Finance Minister of the Italian Republic.*

[2] EJC 4 Dec. 1974, Case 41-74, *Van Duyn* v. *Home Office.*

[3] Conseil d'Etat Ass. 22 Dec. 1978 petition No 11604 (*Ministre de l'Intérieur c/Cohn Bendit*): 'Les directives ne sauraient être invoquées par les ressortissants de ces Etats à l'appui d'un recours dirigé contre un acte administratif individuel.'

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burden of proof of Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[4] This Directive, the implementing period of which ended on 2 December 2003,[5] i.e., before the impugned Decree was issued, was only implemented in France by an Act of Parliament of 27 May 2008. Therefore, the question was tabled of whether Mrs Perreux could invoke the unimplemented Directive against the individual administrative Act she contested. France's highest administrative court, marking the event by giving judgment in its most solemn composition as *Assemblée du contentieux* and following the advice of *Rapporteur Public* Mattias Guyomar,[6] seized the occasion to reverse *Cohn Bendit*:

> Before an administrative court everyone can, in support of a complaint against a non-regulative administrative Act, rely on unconditionally and precisely phrased provisions of directives, when the state did not take, the necessary implementing measures during the period allotted.[7]

At last! That is the thought that immediately came to many people's minds. This turnaround was indeed widely expected by French scholars, of whom a majority described it as predictable and desirable.[8] The *Conseil d'Etat* was probably the only jurisdiction in Europe, including France, which still refused to recognise, under the conditions set by the Court of Justice case-law, that directives can have direct effect.[9] Of course, this fact in itself was not decisive, but the emergence of a

[4] Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* [2000] L 303, 2.12.2000, p. 16 at p. 22. Art. 10 reads: 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

[5] Loi n° 2008-496 du 27 mai 2008 *portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations.*

[6] *See* the *conclusions* of *Rapporteur Public* Mattias Guyomar, *Revue Française de Droit administrative* 6 (2009) p. 1125 or <bruxelles.blogs.liberation.fr/Perreux-Guyomar.pdf>.

[7] Conseil d'Etat Sect. 30 Oct. 2009, petition No 298348 (*Mme Perreux*): 'tout justiciable peut se prévaloir, à l'appui d'un recours dirigé contre un acte administratif non réglementaire, des dispositions précises et inconditionnelles d'une directive, lorsque l'Etat n'a pas pris, dans les délais impartis par celle-ci, les mesures de transposition nécessaires.'

[8] *See* P. Cassia, 'Abandonner la jurisprudence Cohn-Bendit ?', *Actualité Juridique de Droit Administratif* (2006) p. 281, *see also* the pleadings of the *Rapporteur Public* Guyomar, *supra* n. 6, p 24.

[9] Indeed, it is relevant to notice that a large consensus has emerged between European courts which progressively fell in line with the Court of Justice's position and recognised that directives have a vertical ascendant effect. So did the German constitutional court and the respective Supreme courts of Belgian, Spain, Greece and Portugal. States which stand in a dualistic tradition, like Great

European Union-wide jurisprudential consensus is not insignificant and was at least likely to lead the *Conseil d'Etat* to wonder about the perpetuity of its *Cohn Bendit* case-law. Moreover, the foundations of this case-law have eroded over time. Two arguments can be invoked in support of this. First, it should be noted that when the member states, among them France, accepted the Treaty of the European Union and especially the Treaty of Amsterdam, they implicitly agreed with the case-law of the Court of Justice, since they did not modify Article 249 EC (presently Article 288 TFEU) at the same time as they *expressis verbis* specified that (former) third-pillar decisions and framework decisions cannot have direct effect.[10] Second, the judgment of 1978 had become incompatible with the evolution of the French supreme administrative court's own case-law, which is characterised by an increasing openness towards the Community legal order.

This contribution assesses the relevance of *Mme Perreux*. Although the practical consequences of the decision are rather limited due to the development of the *Conseil d'Etat*'s case-law, they are not altogether non-existent. Moreover, the decision has a huge symbolic meaning, since it confirms and reinforces the French supreme administrative court's participation in a wide movement of jurisdictional cooperation and its openness towards Community law.

The practical relevance of *Mme Perreux*

The turnaround performed in *Mme Perreux* seems at first sight radical. And yet, its practical consequences need to be qualified for two reasons. First because the *Cohn Bendit* case-law had progressively lost the main part of its substance to the point of becoming almost a *petitio principii*.[11] Secondly because the recognition of the possibility of the so-called *invocabilité de substitution* of Directives has a limited scope.

The Cohn Bendit case-law had already lost the main part of its substance

Although the *Conseil d'Etat* had never given up the *Cohn Bendit* case-law strictly speaking, it had widely and progressively limited its practical consequences. Thus,

Britain and Italy also go along with this evolution. And even when the comparison is limited to France, it appears that the *Conseil d'Etat* remained isolated. Indeed, the *Cour de cassation* had already admitted that non-implemented directives have a direct ascending effect. Moreover, the directives' ability to have direct effect was recognised by the European Court of Human Rights and also by the *Conseil constitutionnel* which considers that directives can include unconditionally and precisely phrased provisions. *See also* the pleadings of the *Rapporteur Public* Guyomar, *supra* n. 6 p. 15 at p. 17.

[10] Former Art. 34 EU.

[11] F. Raynaud and P. Fombeur, 'Chronique de jurisprudence administrative', *Actualité Juridique de Droit Administratif* (1998) p. 403.

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with ingenuity, the supreme administrative court admitted that provisions of Directives can be relied on before administrative courts under some conditions. In general, three methods can be distinguished, with distinctive grades of justiciability.[12] The first is that the provisions of a Directive are relied on for a 'conforming interpretation' of national norms (*invocabilité d'interprétation)*, whether the challenged national norms purport to implement the Directive[13] or not.[14] The second method is that provisions of a Directive can be relied on in support of a petition for liability and thus to sanction their non-respect by the state (*invocabilité de reparation)*. The third method consists of the possibility of relying on a Directive in order to set aside a national rule which is incompatible with it. This is the more common method. Thus, under *Cohn Bendit*, individuals could not directly invoke the rights allocated to them by a Directive before the national courts in order to achieve the application of this Directive instead of a national rule which would be lacking or in non-compliance with its provisions. But they could achieve the setting-aside of a national act neglecting the Directive. According to French scholars' terminology, the *Conseil d'Etat* admitted the *invocabilité d'exclusion* of Directives (i.e., the possibility to be relied on in order to set aside national law) but refused to recognise their *invocabilité de substitution* (i.e., the possibility to be relied on and applied instead of the national law).[15]

Over the years, the number of cases in which Directives can be relied on via either a direct action or an exception of illegality has gradually grown. The *Conseil d'Etat* first used Directives as reference rules in cases of regulative measures purporting to implement them.[16] This testing of regulative measures against the objectives of the Directive they intend to implement was already announced in *Cohn Bendit*, in which the *Conseil d'Etat* ruled that member states must enforce directives 'under the control of national jurisdictions'.[17] The supreme administrative court subsequently accepted that Directives can be invoked against all regulative measures, whether they intend to implement them or only enter into their field of enforcement.[18] The same counts for regulative acts which purport to enforce an

[12] D. Simon, *Le système juridique communautaire* (2001 Paris PUF), at p. 438.

[13] Conseil d'Etat Sect. 22 Dec. 1989, petition No 86113 (*Ministère des Finances* c. *Cercle militaire mixte de la caserne Mortier*).

[14] Conseil d'Etat 8 Dec. 2000, petition No 204756 (*Commune Breil-sur-Roya*).

[15] Y. Galmot and J.C. Bonichot, 'La CJCE et la transposition des directives en droit national', *Revue Française de Droit Administratif* (1988) p. 1.

[16] Conseil d'Etat 28 Sept. 1984, petition No 28467 (*Confédération nationale des SPA de France*).

[17] *See also* Conseil d'Etat 30 Dec. 1998, petition No 190741 (*Association des neurologues libéraux de langue française*).

[18] *See,* for e.g., Conseil d'Etat 7 décembre 1984, petitions No 41971/41972 (*Fédération française des sociétés de protection de la nature*). The *Conseil d'Etat* rules that national authorities cannot legally adopt regulative provisions which would contravene the objectives of a directive.

Act of Parliament already declared incompatible with the Directive.[19] In the same line, the French court recognised the possibility of relying on a Directive in order to invite the government to adapt or modify a regulative administrative act which is incompatible with it and, if necessary, to support a demand for quashing the government's refusal to do so.[20] Directives can even be relied on in order to keep the administration from neglecting its provisions before the date of implementation has passed.[21]

Besides, the *Conseil d'Etat* has accepted the testing of national rules against the objectives of a directive in cases in which, in procedures against individual acts, the exception of illegality is invoked. Thus, in the *Palazzi* judgment, the *Conseil d'Etat* based its decision to quash an individual administrative act which refused a person the right to stay in France on lack of legal grounds since it was based on a decree of 28 April 1982 that was illegal because it neglected the objectives of a Directive.[22] By accepting in *SA Cabinet Revert et Badelon* that a Directive can also be relied on against Acts of Parliament, the French supreme administrative court gave an immense extension to the effect of not – or not correctly – implemented Directives.[23] Finally, the *Conseil d'Etat* went to the boundaries of the exception of illegality when it admitted in its *Tête* judgment of 1998[24] that no rule, even an unwritten one, can be enforced if it contravenes the objectives of a Directive. In this case, the national rule on which the attacked decision was taken concerned neither an Act of Parliament nor a decree, but followed from case-law. Consequently, the possibility of relying on Directives against national law by way of an exception of illegality in a procedure against an individual act has a very wide scope. It applies whatever the nature of the act of which the compatibility with the Directive has been questioned: regulative administrative acts; Acts of Parliament; the absence of Act of Parliament; and also unwritten rules set by case-law.

The conclusion must be that while the *Conseil d'Etat* held on to *Cohn Bendit*, it mobilised all procedural resources in order to grant as much as internal effect as possible to Directives. Consequently, the practical consequences of *Mme Perreux* are limited. Yet, these practical consequences do exist. Mrs Perreux's case gives a good illustration of this.[25] She invoked Article 10 of the Directive of 27 November 2000 because she wanted a reversal of the burden of proof to be applied in

[19] Conseil d'Etat 24 Feb. 1999, petition No 195354 (*Association de patients de la médecine d'orientation anthroposophique et Autres*).

[20] Conseil d'Etat Ass. 3 Feb. 1989, petition No 74052 (*Alitalia*).

[21] Conseil d'Etat 10 Jan. 2001, petition No 217237 (*France nature environnement*).

[22] Conseil d'Etat 8 July 1991 (*Palazzi*).

[23] Conseil d'Etat Ass. 30 Oct. 1996, petition No 45126 (*SA Cabinet Revert et Badelon*).

[24] Conseil d'Etat Ass. 6 Feb. 1998, petitions No 138777/147424/147425 (*Tête*).

[25] Ibid.

the proceedings. In the absence of an implementing Act of Parliament applicable to the case – the implementing Act of 27 May 2008 had no retroactive effect – a necessary condition for her profiting from the Article was the recognition of the possibility of *invocabilité de substitution*. *Invocabilité d'exclusion* could never have led to the same result. [26]

The recognition that Directives can be invoked against individual administrative acts has a limited scope

It follows from *Mme Perreux* that the *Conseil d'Etat* accepts the *invocabilité de substitution* of Directives under two conditions. Not surprisingly, these conditions are also found in the case-law of the Court of Justice and as such are not problematic.

First, the time for implementation must have lapsed and the state must have partially or totally neglected its duty of implementation. Of course, before giving effect to the Directive under these conditions, the validity of the Directive must be ascertained. Therefore, the administrative court shall in this stage test the compatibility of the Directive with both the bloc of community legality as well as the fundamental rights which are guaranteed by the European Convention on Human Rights and the French Constitution. This can lead to preliminary questions to the Court of Justice.

Secondly, only precisely and unconditionally phrased provisions of a Directive can be applied instead of national law. This latter condition happened not to be fulfilled in *Mme Perreux*, as I will explain later. Moreover, in line with the ECJ's case-law, *Rapporteur Public* Guyomar[27] advises the *Conseil d'Etat* to give these provisions only ascending vertical effect.

The symbolic meaning of *Mme Perreux*

The aforementioned case-law of the *Conseil d'Etat* is part of wider jurisprudential development of opening up to the Community legal order. The *Mme Perreux* judgment is consistent with and reinforces this evolution.

At the beginning of this evolution we find the by now very famous *Nicolo* judgment of 20 October 1989, in which the supreme administrative court recognised its competence to perform a *contrôle de conventionnalité* of Acts of Parliament. Although the *Conseil d'Etat* based this control on Article 55 of the French Constitution – and not on the autonomy of the Community's legal order – the principle of primacy of Community Law was greatly enhanced. But there are also other expressions of this opening up, which has gained momentum especially in recent years.

[26] *See* the pleadings of the *Rapporteur Public* Guyomar, *supra* n. 6 p. 23.
[27] Ibid., *supra* n. 6, p. 25.

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The French court, for instance, uses the preliminary procedure nowadays in a way that is in perfect harmony with the Court of Justice's case-law.[28] In this context, the very recent *Société De Groot en Slot Allium B. V. et autre* judgment should be underlined.[29] In this judgment, the *Conseil d'Etat*, abandoning its *ONIC* judgment,[30] ruled that interpretations of the Treaties as well as secondary community acts given by the Court of Justice during a preliminary procedure must be respected by national courts even if they go beyond the preliminary question(s) asked.

The impact of Community law on the supreme administrative court's case-law is also noticeable in other domains. The *Conseil d'Etat* has recently used Community law to improve the substance of the 'principes généraux du droit'.[31] In its *Societé KPMG* judgment of 24 March 2006,[32] the highest administrative French court established the principle of legal security as a 'principe général du droit'. The French court also adapted its traditional case-law regarding state liability for jurisdictional activities. Although the *Conseil d'Etat* in principle admitted that misconduct by an administrative court can lead to the right of compensation, it excepted cases in which the misconduct ensues from the content of the judgment itself.[33] However, in its *Gestas* judgment of 18 June 2008,[34] the court asserted that the rule shall be bent in the case where an obvious incompatibility can be found between the content of the judgment and a provision of Community law which gives rights to private individuals.[35] These developments find their origin in the Court of Justice's case-law, commencing with its *Köbler* decision of 30 September 2003.[36]

Finally, the recent and already famous *Arcelor* and *Conseil National des barreaux* judgments also testify to the enhanced role of the supreme jurisdiction in interpreting and enforcing European Law.[37]

[28] The *Conseil d'Etat* thus gave a good reception to decisions *CILFIT* of 6 Oct. 1982, *Foto Frost* of 22 Oct. 1987 and *Da Costa* rendered by the Community judge (ECJ 6 Oct. 1982 Case 283-81, *CILFIT*; ECJ 22 Oct. 1987, Case 314-85, *Foto Frost*; ECJ 27 March 1963, Cases 28 at 30-62, *Da Costa*).

[29] Conseil d'Etat Ass. 11 Dec. 2006, petition No 234560 (*De Groot en Slot Allium B. V. et autres*).

[30] Conseil d'Etat Sect. 26 July 1985, petition No 42204 (*ONIC*).

[31] In French administrative law, the 'principes généraux du droit' are principles which do not necessary follow from a written text, but of which the respect is a duty for administrative authorities, its violation being *ultra vires*.

[32] Conseil d'Etat Ass. 24 March 2006, petition No 288460 (*Société KPMG*).

[33] Conseil d'Etat Ass. 29 Dec. 1978, petitions No 96004/96200 (*Darmont*).

[34] Conseil d'Etat 18 June 2008, petition No 295831 (*Gestas*).

[35] Ibid.

[36] ECJ 30 Sept. 2003, Case 124-01, *Köbler*. Nevertheless, the *Gestas* judgment does not decide whether violation of Community law, next to a violation of the Treaties and secondary Community acts, can also consist of the non-respect of the Court of Justice's case-law.

[37] B. Genevois 'L'application du droit communautaire par le Conseil d'État', *Revue française de droit administratif* (2009) p. 201.

In the *Arcelor* judgment, the *Conseil d'Etat* considers that the duty for French authorities to implement Directives is based on a specific constitutional provision, Article 88-1 of the Constitution. It thereby recognises the specificity of Community law as compared to classical international law. Moreover, the court in this judgment clarified the relationship between Community law and French constitutional law when it comes to testing the legality of government decrees implementing Community Directives.[38] This testing could easily lead to the indirect testing of Community legislation against the Constitution. To minimise this danger, the *Conseil d'Etat* in *Arcelor* distinguished two hypotheses. If the Directive does not include unconditionally and precisely phrased provisions, the implementing decree may be tested against the Constitution. The situation is different in the presence of unconditionally and precisely phrased provisions. In that case, if the constitutional provision or principle allegedly violated is (also) protected by a rule or general principle of Community law which in nature and scope is at least as protective, the *Conseil d'Etat* will examine the complaint under the conditions of Article 234 CE (presently Article 267 TFEU), with due regard to the Court of Justice's *Foto Frost* case-law.[39] Conversely, if no rule or general principle of Community law equivalent to the constitutional guarantee exists, the *Conseil d'Etat* will examine the constitutionality of the decree.[40]

In the *Conseil national des barreaux* judgment rendered on 10 April 2008 the *Conseil d'Etat* refined the scheme elaborated in *Arcelor*. The plaintiff pleaded that Articles 6 and 8 of the ECHR as guaranteed by Article 6(2) EU (presently Article 6(1) EU) had been violated by both a directive and national implementing acts. Regarding the testing of the Directive, the *Conseil d'Etat* stated that it is up to the administrative court to dismiss the alleged violation of Article 6(2) EU without recourse to the preliminary procedure when there is no serious doubt about the validity of the directive. Regarding the testing of implementing acts, it stated that the same procedure must be followed if the challenged act actually faithfully copies the directive.[41] Applying this sequence, the *Conseil d'Etat*, subsequently first dismissed the complaint against the Directive itself and then that against the implementing act which faithfully copied the Directive.

[38] *See* C. Charpy, 'The Status of (Secondary) Community Law in the French Legal Order: The Recent Case-law of the *Conseil Constitutionnel* and the *Conseil d'Etat*', *European Constitutional Law Review* 3 (2007) p. 436 at p. 462.

[39] ECJ 22 Oct. 1987, Case 314-85, *Foto Frost*.

[40] Conseil d'Etat Ass. 8 Feb. 2007, petition No 287110 (*Société Arcelor Atlantique et Lorraine et autres*).

[41] Conseil d'Etat Sect. 10 April 2008, petition No 296845 (*Conseil National des barreaux*).

The reasons behind the reversal

The *Mme Perreux* judgment further opens up the *Conseil d'Etat*'s case-law towards the Community legal order. The pivotal consideration is the following:

> Considering that implementing of Community directives in national law, which is an obligation emerging from the ECT, is also a constitutional duty in view of Article 88-1 of the Constitution; that, for both those two reasons, it is up to the national courts, which are the common community courts, to secure the effectiveness of the rights allocated to everyone by this obligation with respect to public authorities; that every one therefore can ask for the quashing regulative provisions which would contravene the objectives defined by directives, and, in order to contest an administrative decision, can invoke, by the way of either a direct action or an exception of illegality, that, once the allotted time has ended, national authorities can neither maintain regulative provisions, nor keep on enforcing written or unwritten rules of national law which would be incompatible with the objectives defined by directives; that moreover, before an administrative court every one, in support of a complaint against a non regulative administrative Act, can rely on unconditionally and precisely phrased provisions of directives, when the state did not take, during the period allotted, the necessary implementing measures.[42]

The *Conseil d'Etat* bases the turn on two considerations: the duty to implement Directives is not only conventional but also constitutional; national courts are the common courts when it comes to the applicability of Community law.

Thirty years ago, the French Supreme Court looked at direct effect of Directives through the lens of the allocation of competences between the Community and the member states. In 1978, by distinguishing Community Directives from Regulations in the light of the former Article 189 EEC, the *Conseil d'Etat* pro-

[42] 'Considérant que la transposition en droit interne des directives communautaires, qui est une obligation résultant du Traité instituant la Communauté européenne, revêt, en outre, en vertu de l'article 88-1 de la Constitution, le caractère d'une obligation constitutionnelle ; que, pour chacun de ces deux motifs, il appartient au juge national, juge de droit commun de l'application du droit communautaire, de garantir l'effectivité des droits que toute personne tient de cette obligation à l'égard des autorités publiques ; que tout justiciable peut en conséquence demander l'annulation des dispositions réglementaires qui seraient contraires aux objectifs définis par les directives et, pour contester une décision administrative, faire valoir, par voie d'action ou par voie d'exception, qu'après l'expiration des délais impartis, les autorités nationales ne peuvent ni laisser subsister des dispositions réglementaires, ni continuer de faire application des règles, écrites ou non écrites, de droit national qui ne seraient pas compatibles avec les objectifs définis par les directives ; qu'en outre, tout justiciable peut se prévaloir, à l'appui d'un recours dirigé contre un acte administratif non réglementaire, des dispositions précises et inconditionnelles d'une directive, lorsque l'Etat n'a pas pris, dans les délais impartis par celle-ci, les mesures de transposition nécessaires.'

tected national sovereignty.[43] This position was justified both in view of the political context and the fear of a 'drift' that could be induced by the Court of Justice's case-law, the boundaries of which were not sharp enough at that time.[44]

In 2009, this approach had become clearly incompatible with the *Conseil d'Etat*'s willingness to act (also) as a community court. From that point of view, the issue of the *invocabilité de substitution* should not (only) be examined in terms of allotment of competences, but also in terms of allocating rights.[45] This has been the Court of Justice's point of view from the beginning.[46] In this view, the recognition of the *invocabilité de substitution* of Directives is a key factor in the legal integration.[47]

In particular the *Conseil d'Etat*'s *Arcelor* judgment already announced the turnaround. In that decision, the *Conseil d'Etat,* following the *Conseil constitutionnel*,[48] stated that the duty to implement Directives in the national legal order stems from Article 88-1 of the French Constitution.[49] Two things should thus be underlined here. First, the fact that the Constitution itself obliges a complete reception of Directives and dispels the fear of erosion of legal sovereignty when recognising the 'direct effect' of Directives. Secondly, it is in this light that the consequences attached to the neglect of the duty to implement a Directive should from then on be defined.[50] In this context, it would have made no sense in *Arcelor* to grant constitutional rank to the duty to implement Directives, and subsequently in *Mme Perreux* to withhold from litigants the right to invoke these.

Moreover, *Mme Perreux* is an illustration of the *Conseil d'Etat*'s participation in a dialogue with the Court of Justice. This dialogue, for *Commissaire du Gouvernement* Genevois thirty years ago pleaded in order to avoid a war between courts,[51] has indeed been successful. It is not unilateral. The aforementioned jurisprudential evolutions, by which the French court weakened and got round the *Cohn Bendit* case-law, are related to evolutions in the case-law of the Court of Justice. At the same time as it reinforced the principle of direct effect of Directives, the Court of

[43] But *see* on that question, Y. Galland, 'L'autolimitation du juge administratif face aux directives communautaires', *Actualité Juridique de Droit Administratif* (2002) p. 725.

[44] *See* Guyomar, *supra* n. 6, p. 19.

[45] Ibid., p. 21.

[46] In the Court of Justice's case-law, this idea stands on the specificity of the Community legal order which measures intend not only for member states but also for their nationals. It can be found in the *Van Gend en Loos* judgment of 5 Feb. 1963. *See* Simon, *Le système juridique communautaire*, *supra* n. 12, at p. 388.

[47] *See* Guyomar, *supra* n. 6, p. 22.

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

[49] Art. 88-1 of the French Constitution reads: 'The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common.'

[50] *See* the pleadings of the *Rapporteur Public* Guyomar, *supra* n. 6, p. 19.

[51] P. Cassia, 'La guerre des juges n'a pas eu lieu', *Revue Française de Droit Administratif* (2002) p. 20.

Justice operated significant jurisprudential evolutions which, according to *Rapporteur Public* Guyomar, meant to redress the reservations expressed by the French supreme administrative court.[52] In other words, the *Conseil d'Etat*'s refusal to follow the Court of Justice led the Community court to define strictly the conditions under which a non-implemented Directive can have direct effect[53] and to deny its horizontal effect.[54] As Y. Galmot and J.C. Bonichot noted, the Court of Justice clearly showed its intention to strictly distinguish the effects which follow from regulations and directives: the possibility of the latter to directly be relied on seems exceptional.[55] The bilateral dialogue therefore helped to reduce the gap between the *Conseil d'Etat* and the Court of Justice,[56] which *Mme Perreux* finally bridged.

Perfect harmony?

Nevertheless, an attentive reading of the *Mme Perreux* judgment has raised doubts about the perfect compatibility between that judgment and the Court of Justice's case-law.

The Court of Justice has progressively required that also norms that are deprived of *invocabilité de substitution* (for instance conditionally and imprecisely phrased provisions of a directive, or provisions of a directive for which implementation time has not lapsed yet) can nevertheless be relied on before national courts in order to set aside a national neglecting rule, to be a used as a norm of reference for the interpretation of a national rule,[57] or in support of recourse of liability.[58] As we have seen, in this respect the *Conseil d'Etat*'s case-law concerning Directives was in perfect accordance with that of the Court of Justice.

In majority, French scholars[59] have concluded from this development that the classical distinction between the norms which have direct effect and those without it, should be replaced by a distinction between norms in view of their degree of *invocabilité*. In this view, every binding community norm is vested with what is called 'soft justiciability' (*invocabilité d'exclusion, invocabilité d'interprétation, invocabilité*

[52] *See* the pleadings of the *Rapporteur Public* Guyomar, *supra* n. 6, p. 13.

[53] ECJ 5 April 1979 Case 148-78, *Ministère Public* v. *Ratti*; ECJ 22 Sept. 1983, *Auer*.

[54] ECJ 26 Feb. 1986 *Marshall*; ECJ 14 July 1994, *Facini Dori*.

[55] Y. Galmot and J.C. Bonichot, 'La CJCE et la transposition des directives en droit national', *Revue Française de Droit Administratif* (1988) p. 1.

[56] Genevois, *supra* n. 37, p. 201.

[57] ECJ 10 April 1984, *Van Colson and Kamann*.

[58] ECJ 19 Nov. 1991, *Francovich c/République Italienne*; ECJ 5 March 1996 *Brasserie du Pêcheur and Factortame III*.

[59] *See* Simon, *supra* n. 12; *see also* O. Dubos 'L'invocabilité d'exclusion des directives: une autonomie enfin conquise', *Revue Française de Droit Administratif* (2003) p. 568.

de reparation). On the other hand, they consider that only community norms have 'direct effect' only if they are unconditionally and precisely phrased and have *invocabilité de substitution*. French scholars thus interpret the Court of Justice's and the *Conseil d'Etat*'s case-law regarding Directives as markedly distinguishing the concepts of direct effect and other forms of *invocabilité* before national courts. In short, they consider that a Directive has 'direct effect' only if the norm has at least the capacity of taking the place of the contrary national act (*invocabilité de substitution)*; in all other cases one could only speak of 'binding effect', or of 'effect' without any qualifier.

In such a context, perfect jurisprudential harmony follows from *Mme Perreux* only if the recognition that Directives can have real direct effect in the sense alluded to above (*invocabilité de substitution*) does not restrict their effectiveness via methods of 'soft justiciability'. And yet, the *Mme Perreux* judgment has raised doubts in this respect[60] since the *Conseil d'Etat*, having refused to recognise that the invoked directive has direct effect (in the sense mentioned) because it does not include unconditionally and precisely phrased provisions, remained silent on other forms of *invocabilité*. Of these, the *invocabilité d'interprétation* is of particular relevance in this case.

In *Mme Perreux*, the *Conseil d'Etat* was induced to define a burden of proof system in the matter of discrimination. As the traditional system was of a praetorian nature, the supreme court enjoyed a large freedom of action. It could have used the method of *invocabilité d'interprétation* to reframe the system by taking inspiration from the Directive. And yet, the French court gave birth to a specific burden of proof system, to be applied temporarily.[61] According to the supreme administrative court, it is first up to the petitioner who complains of having been discriminated against to substantiate the complaint. Subsequently, it is up to the defendant to advance exonerating facts. It is in the light of this contradictory procedure, which if necessary can be complemented by preliminary assignments of proof, that the court has to decide. The system created by the *Conseil d'Etat* in its *Mme Perreux* judgment is substantially different from the system in the Directive, since the burden of proof is not automatically shifted back to the respondent.[62]

So the *Conseil d'Etat* in this case seems to have 'forgotten' its duty to interpret national law in conformity with European law as far as possible. Although the solution adopted by the *Conseil d'Etat* is not directly conflicting Community law,

[60] *See* M. Gautier 'O tempora, o mores … Le Conseil d'Etat et les directives communautaires', 12 *Droit Administratif* (2009) p. 7 at p. 13.

[61] Since the Act of Parliament dated 27 May 2008 will be applied to facts which occur after it came into force.

[62] *See* J. Cavallini, 'Reconnaissance d'un effet direct des directives et preuve des discriminations', 50 *La Semaine Juridique Social* (2009) p. 1569.

its general approach is unclear. One wonders therefore whether the *Conseil d'Etat* still goes along with the Court of Justice when it comes to 'soft justiciability' of Directives.[63] However, one might expect that it will, and at any rate there is a good explanation for its silence on the *invocabilité d'interprétation*.

It appears that at the same time as the *Conseil d'Etat* took Community law into account, it also looked at the *Conseil constitutionnel*'s case-law concerning the rights of defence, which requires that the last power of appraisal be given to the court.[64] In this perspective, *Mme Perreux* reflects that the *Conseil d'Etat* when interpreting must take the Constitution into account, if necessary even to the detriment of giving effect to a Directive. This reflects the hierarchical relationship between Community Directives and the French Constitution. Whatever the form of *invocabilité*, the administrative Supreme Court can only accept it if it does not lead to results contrary to the French Constitution, which is at the top of the internal French normative hierarchy. This is a position which the *Conseil d'Etat* (just as the *Conseil constitutionnel*[65] and the *Cour de cassation*[66]) has always taken: in the internal legal order, the French Constitution hierarchically stands above community law and so also above Directives.[67] This position is also implied in *Arcelor,* a judgment which as we have seen at the same time to reinforced the effect of Community law in the French legal system. In that pivotal decision, the *Conseil d'Etat* based the duty for French authorities to implement Directives on Article 88-1 of Constitution and reserved the right to test secondary Community law when specific French constitutional principles are at stake.[68]

Nevertheless, understandably, the *Conseil d'Etat* in *Mme Perreux*, which purports to put an end to a jurisprudential conflict between two jurisdictions, preferred to keep silent about the foundations of the new burden of proof system.[69] And what should be remarked above all is that the *Conseil d'Etat* was able to combine

[63] *See* Gautier, *supra* n. 60, p. 11.

[64] CC 12 Jan. 2002, 2001-455 DC (Loi de modernisation sociale).

[65] *See* Charpy, *supra* n. 38, at p.458.

[66] Cour de Cassation 2 July 2000, 2000 *Recueil Dalloz*, p. 865 (Mlle Fraisse), with a note by B. Mathieu & M. Verpeaux.

[67] In the *Sarran* judgment the *Conseil d'Etat* stated the supremacy of the Constitution *vis-à-vis* international law, probably including Community law (Conseil d'Etat Ass. 30 Oct. 1998, *Recueil des arrêts du Conseil d'Etat français*, p. 368 (Sarran, Levacher et autres)). A judgment of 3 Dec. 2001 confirmed this; the very general terms in which the decision is phrased this time left no doubt about the lack of recognition of Community law's specificity. (Conseil d'Etat 3 Dec. 2001, *Recueil des arrêts du Conseil d'Etat français,* p. 624 (Syndicat national des industries pharmaceutiques), with the case note of A. Rigaux and D. Simon, 2002 *Europe* p. 6; *see also* Conseil d'Etat 30 July 2003, *Juris-Data* 2003-065803 (*Association Avenir de la langue française*).

[68] *See* Charpy, *supra*, n. 38, p. 458 at p. 462.

[69] *See* Cavallini, *supra* n. 62, p. 1575.

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constitutional rights of the defence with Community rules relative to the burden of proof in matters of discrimination, showing the pivotal role that the administrative court is able and likely to play in the search for a harmonious coexistence between constitutional and community norms, particularly in the field of fundamental rights.

Conclusion

Although the practical consequences of the *Mme Perreux* judgment must be qualified, for symbolic reasons the decision will no doubt be considered as one of the most important rendered by the highest French administrative Court. Even though the judgment was expected or perhaps even necessary in view of the *Conseil d'Etat*'s own case-law, it will be remembered that *Mme Perreux* put an end to the famous *Cohn Bendit* case-law which symbolised a sort of judicial nationalism. Nevertheless, it should not be forgotten that divergences between the Court of Justice and the *Conseil d'Etat*'s case-law still exist.[70] Among them is the non-acceptance of the Court of Justice's claim that Community law has precedence on the basis of the autonomy of the European legal order and moreover even on national constitutional law. In this context one can also refer both to the issue of whether a known violation of Community law must be raised *ex officio* by national courts and to the possibility of the 'juge des référés' (in a suspension of enforcement proceedings) being appraised of the 'conventionnalité' of an Act of Parliament. Some of those divergences, like the one relative to the hierarchical relationships between Community law and the French constitution, seem irresolvable in the present state of respective national and Community legal orders. However, the fact that the *Conseil d'Etat* reinforces both its opening to Community law and its willingness to participate in a good cooperation with the Court of Justice by having a dialogue with it and acting as a community court, leads one to be quite optimistic about the future relationship between the two courts. A war between the courts will not break out and residual insoluble conflicts will probably remain theoretical.

[70] *See* Genevois, *supra* n. 37, p. 212.

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