Special Issue – Preliminary References to the CJEU
Part Two

The First Preliminary Reference of the French Constitutional Court to the CJEU: *Révolution de Palais* or Revolution in French Constitutional Law?

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A. Introduction

A preliminary reference on the part of the Constitutional Council was, in several respects, not to be expected. It was debatable whether it would consider itself as a "court or tribunal" within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU) and, therefore, whether it would refer a case to the European Court of Justice (CJEU) at all. The French constitutional court could also have resorted to the *acte clair* doctrine so as to escape from their obligation to ask for the interpretive guidance of the CJEU. However, the main reason why a reference was not awaited by legal actors lies in the limited jurisdiction of the Constitutional Council. Until the introduction in 2008 of the so-called QPC, that is, *question prioritaire de constitutionnalité*[1] (the Priority Preliminary Reference mechanism on issues of constitutionality), the *Conseil constitutionnel* had a very limited jurisdiction compared to its European counterparts. Its main mission was to assess the conformity of parliamentary bills and treaties with the Constitution and only with the Constitution. Its review could only take place *ex ante*, between the adoption and the promulgation of a text. By opening the way to an *ex post* review of statutes with regard to the rights and freedoms guaranteed by the Constitution, the QPC brought about a major change in the French adjudication system: statutes are no longer immune from constitutional challenge once they are in force. However, treaties and other international or European commitments are no parameters of constitutional review. The *Conseil constitutionnel* made this clear in 1975 and never seriously changed track, despite minor qualifications to the rule. In their seminal *IVG* ruling on the Voluntary Interruption of Pregnancy Act,[2] they held that it was not up to them to review the

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[1] *See* Otto Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective*, 6 EUR. CONST. L. REV. 223–48 (2010); DOMINIQUE ROUSSEAU, LA QUESTION PRIORITAIRE DE CONSTITUTIONALITE (2010); XAVIER MAGNON, QPC, LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE: PRINCIPES GENERAUX, PRATIQUE ET DROIT DU CONTENTIEUX (2013).

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compatibility of bills with treaties, in spite of Article 55 of the Constitution.[3] Consequently, the task of the constitutional judges does not go beyond the assessment of laws with regard to the Constitution. This is the main reason that explains why, on the face of it, the *Conseil constitutionnel* was unlikely to refer a case to the CJEU. Why would it seek the interpretation or ask for the review of a European text if this text is immaterial for it and if the yardstick of its examination is the Constitution and only the Constitution? Yet, it happened. For the first time, the *Conseil* referred a case to the CJEU on 4 April 2013. Although this is undoubtedly a major legal breakthrough, we will see in due course that this is probably more a *révolution de palais* than a true revolution in French constitutional law.

B. The Case

At the beginning of this affair, a British court issued a European Arrest Warrant [EAW] for kidnapping against a male British national, Jeremy F, a secondary school mathematics teacher who had left the country with one of his female students, who was then fifteen and a half years old. He was arrested in France and he agreed to be handed over to the UK judicial authorities, in compliance with Framework Decision 2002/584,[4] but without agreeing to waive[5] the benefits deriving from the rule of specialty, according to which "a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered."[6]

Thus, once delivered to the British authorities, solely on the basis of charges of "kidnapping a minor," Jeremy F could not be brought to trial for any other crimes within the United Kingdom. However, due to the young student's voluntary participation in the escapade, the UK authorities did not have a solid case for the charge in question, and wished to broaden the scope of the investigation and potential charges. Once Jeremy F was repatriated, they called on the investigating judge of the Court of Appeal of Bordeaux to

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[2] *Conseil constitutionnel*, decision 74–54 DC of 15 January 1975, *Voluntary Interruption of Pregnancy Act.*

[3] Article 55 reads, "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."

[4] Council Framework Decision 2002/584/JHA *on the European arrest warrant and the surrender procedures between member states*, amended by Framework Decision 2009/299/JHA of February 26 2009.

[5] Pursuant to Art. 13(1) of the Framework Decision.

[6] Art. 27(2) of the Framework Decision. The CJEU specified that "it is important to check whether the elements of the offence, according to the legal definition of the offence of each Member State, are those for which the person was delivered and if there is sufficient correspondence between the data contained in the arrest warrant and that contained in the subsequent procedural acts." Case C–388/08 PPU, Criminal proceedings against Artur Leymann and Aleksei Pustovarov, 2008 E.C.R. I–08993.

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extend the effects of the surrender decision in order to include the offence of "sexual intercourse with a minor under the age of 16," based on Articles 27(3)(g) and 27(4) of Framework Decision 2002/584.[7]

The French investigating judge accepted the request on 15 January 2013. Jeremy F, having thus been made aware that he was liable to receive a sentence twice as long as that for the previous charge, quickly moved to challenge the legal basis of this extension before the French *Cour de cassation* (the top court in civil and criminal matters), arguing that the UK authorities had gone beyond the limits of the principle of speciality, which imposed strict limits upon their actions.

However, such an appeal is precluded by the wording of Article 695–46, paragraph 4 of the French Code of Criminal Procedure. This article states, "the investigating judge's ruling may not be appealed against." This was why the claimant also asserted his right to a priority preliminary reference on issues of constitutionality (QPC), challenging the compliance of this legal provision with the constitutional principle of equality before the law and with the right to due process.

In addressing this case, the French Court of Cassation was confronted with a complex and intricate legal issue involving the determination of the true author[8] of the contested norm. The fourth paragraph of Article 695–46 is grounded in EU law and was added to the code via the Act of March 9th 2004,[9] which transposed the rules concerning EAWs,[10] namely the framework decision of 13 June 2002 on the EAW. The question is whether the impossibility of an appeal in the case of an extended EAW derives from the framework decision drafted by the EU legislator or was decided by the national legislators who transposed the framework decision, and who, in so doing, used their margin of appreciation in violation of constitutional principles. Depending upon the answer to this question, the norm could be subject to different kinds of control, each triggering its own set of consequences.

In order to give full effect to the EAW, the French authorities effectively granted a sort of "constitutional immunity"[11] to all legal provisions transposing European rules in this area.

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[7] Under British law the offence of "sexual intercourse" refers to a minor for persons aged under sixteen, whereas under French law the offence of sexual assault on a minor is only applicable when the victim is under fifteen.

[8] Henri Labayle & Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF 461 (2013).

[9] Act No. 2004–204 of March 9th 2004, *Official Journal* No. 59 of 10 March 2004, at 4567.

[10] Art. 695–11 to 695–51 of the Code of Criminal Procedure.

[11] Bruce Rabillon, *Question sur la question! Nouvelles déclinaisons du contrôle de la constitutionnalité des lois de transposition*, 23 POLITEIA 99 (2013).

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Since the enactment of the Constitutional Act of 25 March 2003,[12] Article 88–2 of the Constitution reads, "The law sets down the rules concerning European arrest warrants in compliance with legal decisions adopted by the institutions of the European Union". It follows from this constitutional amendment that legal provisions ensuring the application of European law regarding the EAW shall not be considered unconstitutional, even in cases of breach of other constitutional principles, including those amounting to the "*constitutional identity of France*."[13] However, the provisions that do not necessarily derive from EU norms can be challenged through a QPC. In the case of litigation raising the question of the compliance of certain legal provisions relating to EAWs with the Constitution, it is therefore of paramount importance to determine whether any non-conformity with the Constitution is imputable to European law—in which case it is "covered" by Article 88–2 C—or whether it falls within the margin of appreciation granted to national legislators, in which case it may be challenged.

Establishing the genealogy of such norms is not an easy task. Articles 27 and 28 of the framework decision, upon which paragraph 4 of Article 695–46 is based, are silent vis-à-vis the possibilities of appeal that should be offered by national legislation. Both articles specify that "the decision [concerning a request for an extension or for extradition based upon a European Arrest Warrant] will be issued within thirty days of the request."[14] As for Article 695–46 of the Code of Criminal Procedure, paragraph 4, this provision prescribes that the investigating judge in charge of processing such requests issues a "ruling without the possibility of appeal (…) within thirty days." The issue requiring clarification is whether the absence of any possibility of recourse against the ruling of the investigating judge "necessarily flows from the obligations" prescribed by Articles 27 and 28 of the framework decision, requiring the judge to rule within thirty days of the request, or whether it stems from the French legislator's freedom of choice. The framework decision seemed to provide a few hints regarding questions of interpretation, requiring the establishment of a series of (undefined and rather ambiguously-worded) "sufficient safeguards"[15] vis-à-vis the enforcement of EAWs, stating that "the current framework decision is not meant to

[12] The Constitutional Act No. 2003–267 of March 25 2003 (*Official Journal* No. 72 of March 26, 2003 at 5344) was adopted prior to the transposition into French law of the Framework Decision, in order to address the incompatibility identified by the Council of State (Advisory Opinion no. 368282 on 26 September 2002, EDCE 54, no. 2003 at 192), of this secondary piece of legislation with a fundamental principle recognized by the laws of the Republic, "that the state should be allowed to refuse extradition for offences which it considers as political offences or related to political offences."

[13] On this concept and its comparative use, both in EU law and in domestic law, see FRANÇOIS XAVIER MILLET, L'UNION EUROPÉENNE ET L'IDENTITÉ CONSTITUTIONNELLE DES ETATS MEMBRES (2013).

[14] Art. 27(4); Art. 28(3)(c).

[15] "Rulings on the execution of the European arrest warrant must be subject to sufficient controls which means that a judicial authority of the Member State where the person has been arrested will have to take the decision to surrender the person in question." Recital 8 of the Framework Decision.

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prevent a Member State from applying its own constitutional standards regarding the right to a fair trial . . . ."[16] However, in the absence of explicit provisions, the European lawmaker's presumed intention of leaving the regulation of EAWs to the discretion of its Member States would seem insufficient to clarify Articles 27 and 28 in this regard.

The Court of Cassation, obliged as it was to make a ruling, deemed that the choice to bar "all possibilities of appeal" was made by the French lawmaker. By a decision delivered on 19 February 2013,[17] it referred the question of constitutionality to the French Constitutional Court and did not make a reference to the CJEU, as would have been required had the origin of the legal standard been attributed to European lawmakers.

The French *Cour de cassation* ascertained that the QPC met the three criteria foreseen by the organic law of 10 December 2009.[18] The challenged legal provision was "applicable . . . to the procedure," namely the appeal before the Supreme Court; it "[had] not yet been deemed in compliance with the Constitution through a ruling of the Constitutional Court"; and finally, the constitutionality issue "[was] paramount since the provision challenged [was] likely to constitute a breach of the right to an effective appeal and of equality before the law."

C. The Preliminary Reference

The Constitutional Court clearly asserted the constitutional immunity of legislation deriving from the framework decision and decided to refer the case to the CJEU.[19]

First, the Constitutional Court gave an interpretation of Article 88–2 of the Constitution, stating, "[b]y these special provisions, the constituent legislator intended to remove constitutional barriers precluding the enactment of the legislative provisions that necessarily follow from the acts adopted by the institutions of the European Union relating to the European arrest warrant."[20]

The assessment of conformity with the constitution is thus obviated in relation to the legal provisions dealing with the substantive rules relating to EAWs, in conformity with the constitutional immunity of secondary legislation provided for by the French constituent

[16] Recital 12 of the Framework Decision.

[17] Ruling no. 13–80491.

[18] Organic Law no. 2009–1523 on the application of Art. 61–1 of the Constitution.

[19] *Conseil constitutionnel*, decision no. 2013–314P QPC, April 4, 2013, *Jeremy F. [Absence of appeal in case of extension of the effects of the European arrest warrant - preliminary issue to the Court of Justice of the European Union], Official Journal* of April 7, 2013, at 5799.

[20] Recital 5.

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power in 2003. However, such constitutional immunity is *only* applicable to legal norms that "necessarily flow" from the requirements of this provision. The Constitutional Court thus concluded that:

> In consequence, it is for the Constitutional Council when seized in relation to legislative provisions on the European arrest warrant to review the constitutionality of such legislative provisions that result from the exercise by the legislator of the margin of appreciation provided for under Article 34 of the Treaty on European Union, in the version currently in force.[21]

The *Conseil constitutionnel* thus made it clear that the barrier constructed between the legal provisions and the Constitution (that is, the so-called "constitutional immunity") is not absolute, but flexible and dependent upon the lawmaker's discretionary power. It was therefore up to the constitutional court to rule whether, in the case at hand, and considering the particular provisions of the framework decision, the French lawmaker merely exercised his discretion or was constrained by EU law to adopt a specific norm.[22]

The Court therefore examined the terms of Articles 27 and 28 of the framework decision in detail together with the solemn affirmation regarding the respect of fundamental rights referred to in Article 6 TEU.[23] The Court then turned to sketch out the application of its review power vis-à-vis the legislative provisions of the Code of Criminal Procedure:

> It shall be for the Constitutional Court to determine whether the provision of this law text which calls for the investigating judge to "rule without the possibility of appeal and within thirty days" necessarily results from the requirement imposed upon the judicial authorities of the member state, by paragraph 4 of Article 27, and by point c) of paragraph 3 of Article 28 of the framework decision, which calls for a ruling within thirty days from the date on which the request has been received.[24]

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[21] *Id.*

[22] Eva Bruce Rabillon suggests a new "compulsory review" that the Constitutional Court would be required to make in cases involving the laws of the Union. Bruce Rabillon, *supra* note 11, at 99.

[23] Recital 6.

[24] Recital 7.

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The Court then outlined the results of its constitutional review in this case:

> Under the aforementioned terms of the framework decision, an assessment of the possibility of an appeal against the original decision of the court, beyond the period of thirty days, and suspending the execution of the original decision requires that a ruling be provided on the interpretation of the act in question, and that, pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union alone shall have jurisdiction to issue preliminary rulings on such a question, and that, consequently, it is necessary to refer to it and to defer to it the decision concerning the priority issue of constitutionality raised by Mr. F.[25]

The Court found it impossible, under the terms of the framework decision, to exercise its discretion concerning the possibility of an appeal. It considered that the text was not clear enough for it to determine the precise intention of the European lawmakers on this point. Therefore, this issue should be referred to the CJEU for interpretation on the basis of Article 267 TFEU. The ruling of the EU judiciary would determine the possibility for the Constitutional Court to precisely define the scope of its review (or lack thereof) over the contested provisions of the Code of Criminal Procedure. Only if the CJEU were to deem that the exclusion of any appeal within thirty days fell within the discretion of the French legislature would the Constitutional Court be able to address the QPC raised by Jeremy F., under Articles 16 and 6 of the *Déclaration des droits* of 1789. The constitutional review was thus to be suspended until the decision of the CJEU. Like the Italian *Corte costituzionale*, the French Constitutional Court seems to consider the law of the Union as an "interposed norm,"[26] suitable as a "building block of constitutional criteria."[27]

It should be noted that the preliminary reference to the CJEU in this case introduces two significant exceptions to the ordinary procedure before the Constitutional Court, constituting effective *pro futuro* precedents. First, the Constitutional Court defers a decision, pending the judgment of the CJEU. No law governing its competences acknowledges such a deferral. The Constitutional Court does not mention the legal basis for this right to defer a decision, thus suggesting that this represents a solution required by

[25] *Id.*

[26] *See Corte costituzionale*, Rulings no. 7/2004, 166/2004, 406/2005, 129/2006 and 348/2007.

[27] Case C–169/08, Presidente del Consiglio dei Ministri v. Regione Sardegna, 2009 E.C.R. I–10821.

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the very spirit of fair judicial cooperation inherent in the preliminary ruling procedure, the legal basis for which can be found in Article 88-1 of the Constitution.[28]

The second exception concerns the procedural deadlines set for exercising constitutional review: one month for the *a priori* review[29] and three months for *a posteriori* review.[30] Given the brevity of these deadlines, until 4 April 2013, the Court always maintained that it was impossible to call upon the CJEU in cases of *a priori* constitutional review.[31] As regards *a posteriori* review, the Secretary General of the Court had previously specified that the three month deadline "is not sanctioned by the relinquishment of jurisdiction on the part of the Constitutional Court in cases of non-compliance."[32]

In the *Jeremy F.* case, the Constitutional Court therefore considered that it was possible to refer the case to the CJEU within the context of successive judicial review by multiple courts (at national and European level), but, being conscious of the fact that that the average length of a conventional preliminary ruling procedure was incompatible with the procedure of the French Constitutional Court,[33] requested that the CJEU assess the case via the urgent preliminary ruling procedure.[34] The request was justified on the basis of the obligations relating to procedural delays, on the one hand, and the deprivation of liberty of the applicant in the context of the main proceedings, on the other.[35] However, despite

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[28] Jerome Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, REVUE TRIMESTRIELLE DE DROIT EUROPEENNE 531 (2013). According to Xavier Magnon, the jurisprudence of the CJEU also serves as implicit basis for this procedural exception, including *Factortame* (Case C–213/89, Factortame Ltd, 1990 E.C.R. I–2433, para. 23) and *Melki and Abdeli* (Cases C–189/10 & C–188/10, Aziz Melki and Selim Abdeli, 2010 E.C.R. I–5667, para. 56). X. Magnon, *La révolution continue : le Conseil constitutionnel est une juridiction… au sens de l'article 267 du Traité sur le fonctionnement de l'Union européenne*, 96 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 930 (2013/4).

[29] Const. Art. 61, para. 3.

[30] Art. 23–10 of amended ordinance 58–1067 of 7 November 1958 on the organic law on the Constitutional Council.

[31] *Conseil constitutionnel*, decision no. 2006–540 DC of 27 July 2006, para. 20, Rec. 88. Also, decision no. 2006–543 DC of 30 November 2006; decision no. 2010–605 of 12 May 2010, para. 18.

[32] Marc Guillaume, *QPC: textes applicables et premières décisions*, 29 CAHIERS DU CONSEIL CONSTITUTIONNEL 21 (2010).

[33] The latest annual report on the activity of the courts of the Union establishes the average duration for a preliminary ruling, excluding procedural incidents, as being 15.7 months for 2012. Report available at http://curia.europa.eu/jcms/upload/docs/application/pdf/201304/192685_2012_6020_cdj_ra_2012_fr_proof_04.pdf.

[34] Art. 23*bis* of Protocol No. 3 to the TFEU on the status of the CJEU; Art. 104*ter* of the Rules of Procedure of the Court. The last annual report of the Court indicates that the average decision time was 1.9 months in 2012. The risk of procedural distortions is thus lower.

[35] Para. 8.

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being granted access to the emergency procedure by the CJEU, the three month deadline for the ruling was not respected.[36] This did not invalidate the substantive decision of the Constitutional Court. It would seem that the new procedure "P QPC" (Preliminary prior question regarding constitutionality) implies a certain tolerance with regard to deadlines to issue a judgment.

D. The CJEU Preliminary Ruling

The *Jeremy F.* ruling[37] exemplifies the latent tension existing between human rights protection and effectiveness of criminal proceedings across Europe. In its answer, the CJEU proved rather lenient towards both the Constitutional Council and *domestic* protection of human rights.

As usual, the Court started its analysis by recalling the purpose of the EAW. Founded on the salient principle of mutual recognition, it seeks "to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice."[38] Turning to the assessment of the possibility of bringing an appeal with suspensive effect against the decision of the judicial authority, the Court noted that the Framework Decision did not expressly provide for such an appeal. According to the CJEU, this absence was unproblematic under EU law given that the possibility of filing an appeal was not required by the Charter, especially Article 47 guaranteeing the right to an effective remedy. It was sufficient that "the entire surrender procedure between Member States is . . . carried out under judicial supervision."[39] Although this reasoning is not necessarily flawless, as we could have actually conceived of an enhanced right to an effective remedy under the Charter, it is understandable. In reasoning in this way, the CJEU renounced a maximal level of human rights protection, showing that it cannot be a Court that is exclusively concerned with human rights but that rather, it must endeavor to strike a fair balance with other considerations.

This did not, however, prevent the Constitutional Council from ensuring a higher protection of human rights at the national level. The CJEU judged that the Framework Decision did not preclude Member States from providing for an appeal suspending the execution of the decision of the judicial authority consenting to the extension of the EAW.

[36] The *Conseil* received the case on February 27, 2013 and the decision was granted on the merits of the case on 14 June 2013.

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

[38] *Id.* at para. 35.

[39] *Id.* at para. 46.

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> In the absence of further detail in the actual provisions of the Framework Decision, and having regard to Article 34 EU, which leaves the national authorities the choice of form and methods needed to achieve the desired results of Framework Decisions, it must be concluded that the Framework Decision leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues.[40]

According to the Court, the national Parliament has a discretionary power and can freely decide whether it shall lay down the possibility of filing an appeal. Using the words of the Constitutional Council, we can rephrase it as saying that neither the prohibition, nor the imposition, of an appeal is the *necessary consequence* of the Framework Decision. The latter is neutral in this respect. What matters for the Court overall is the correct application of the EU secondary act: "Provided that the application of the Framework Decision is not frustrated, as the second paragraph of recital 12 in the preamble states,[41] it does not prevent a Member State from applying its constitutional rules relating inter alia to respect for the right to a fair trial."[42]

However, in order to limit the adverse effects of such an appeal on effectiveness, the Court introduced a caveat. It came to the conclusion that Articles 27(4) and 28(3) of the Framework Decision did not preclude Member States from providing for an appeal suspending execution of the decision of the judicial authority which gives its consent to the extension of a EAW to include prior offences, "provided that the final decision is adopted within the time-limits laid down in Article 17 of the Framework-Decision."[43] To reach such an outcome, the Court was satisfied that "the possibility of having a right of appeal follows implicitly but necessarily from the expression 'final decision' used in Article 17 (2), (3) and (5) of the Framework Decision."[44] Nonetheless, those provisions did not leave an unfettered discretion to the Member States, as they set tight time limits for the executing judicial authority to come up with a "final decision." For the Court, "it follows from the

[40] *Id.* at para. 52.

[41] Recital 12 *in fine* reads, "This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

[42] *Jeremy F.,* Case C–168/13 PPU, at para. 53.

[43] *Id.* at para. 75.

[44] *Id.* at para. 54. Article 17 especially deals with the time limits to execute the EAW. It sets tight time limits for the executing judicial authority to come up with a "final decision." However, the Framework Decision fails to define what "final decision" actually means.

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decision that certain limits must be set as regards the margin of discretion enjoyed by Member States in this respect."[45] This comes from the "*underlying logic* of the Framework Decision and to its objectives of accelerating surrender procedures."[46] In view of the tightness of the time-limits and the need to swiftly reach "final decisions," the CJEU put a limit on the discretion of national authorities in implementing the EAW into domestic law. This is not surprising, as Member State procedural autonomy is traditionally limited by the principles of equivalence and effectiveness of EU law. As Articles 27(4) and 28(3) did not set time-limits for the "final decision" properly so called, the Court still held that the national authorities had to comply with the time-limits laid down in Article 17 of the Framework Decision for making a final decision.

On reading it, the judgment of the Court strikingly favors not only the protection of human rights generally speaking (at the expense of "*the underlying logic*" of the EAW, which may be understood to mean effectiveness and swiftness) but, more precisely, it emphasizes domestic human rights. However, it is doubtful that the CJEU has started off a new trend. It seems rather that the approach here has more to do with the specifics of the case, namely the very first preliminary reference of the Constitutional Council. The CJEU might have been willing to give further incentives to the *Conseil*, as it did already in *Melki and Abdeli*. As a response to the cooperative stance of the *Conseil constitutionnel*, the lenient approach of the CJEU is to be praised. It is a way to lure the Constitutional Council and those other constitutional courts that remain reluctant to engage in a dialogue with the CJEU through Article 267 TFEU. Moreover, it is valuable for the image of the CJEU, as it gives the impression that human rights rank highly on the CJEU's agenda when it comes to European Criminal Law and, more broadly, the area of freedom, security and justice.[47] The Constitutional Council could then draw all consequences from the CJEU ruling for the sake of human rights.

E. Back to the Constitutional Court

Two weeks after the decision of the CJEU, the French Constitutional Court ruled on the merits of the case, in conformity with the interpretation decided upon by the European Court. The *Conseil* quashed Article 695–46, paragraph 4 of the Code of Criminal Procedure, after noting that, according to the judgment of the CJEU, this provision "does not necessarily flow from the legal acts of the European Union institutions concerning the

[45] *Id.* at para. 56.

[46] *Id.* at para. 73(emphasis added).

[47] For further analysis of the CJEU ruling, see François Xavier Millet, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, 51 COMMON MKT. L. REV. 195, 213–15 (2014).

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European Arrest Warrant"[48] and should therefore be examined for compliance with the rights and freedoms guaranteed by the Constitution. Article 695–46, paragraph 4 is not covered by Article 88–2 of the Constitution, which could have constituted an obstacle to constitutional review, had the authorship of the standard been attributed to the European lawmakers by the CJEU.

For the Constitutional Court, the lawmaker's margin of appreciation in the transposition of an act of secondary legislation of the Union prevents it from taking the requirements of effective judicial protection lightly. The *Conseil*'s case law is clear on this point: according to Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789,[49] "no substantial encroachments may be made upon the right of the individuals concerned to seek effective relief before a court."[50] This does not entail that the right to be brought before a judge is absolute in its scope. The Constitutional Court guarantees the effectiveness of the available appeal procedures and possible equivalents thereto, without going as far as giving constitutional status to the right to be brought before two separate courts. In the case at hand, the refusal of the lawmaker to grant the right to appeal with regard to the extension of proceedings relating to an EAW constituted an "unjustified restriction"[51] in view of the fact that this restriction was not the necessary result of an obligation imposed by EU law.

The Constitutional Court then turned to the scope of its decision,[52] using a now-standard formula to imbue it with *ex tunc* effect,[53] accompanied by the provision that the

[48] *Conseil constitutionnel*, decision no. 2013–314 QPC, 14 June 2013, *M. Jeremy F. [Absence of appeal in case of extension of the effects of the European arrest warrant]*, Official Journal, 16 June 2013 at 10024, para 8.

[49] "A society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all."

[50] *Conseil constitutionnel*, decision no. 2012–283 QPC on 23 November 2012, para. 11.

[51] Conseil constitutionnel, decision No. 2013–314 QPC.

[52] According to Article 62, paragraph 2 of the French Constitution, "A provision declared unconstitutional on the basis of Article 61–1 is revoked as from the publication of the decision of the Constitutional Council or at a later date stipulated in the decision. The Constitutional Council determines the conditions and the limits under which the effects produced by the provision may be questioned." This formula is quite confusing in its wording and actually awards mixed effects to the Council's rulings- *ex nunc and ex tunc*, according to a modulation performed by the constitutional court itself. See on this subject, Magnon, *La modulation des effets dans le temps des décisions des juges constitutionnels*, ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNEL 558–91 (2011); Cartier, *L'effet utile des déclarations d'inconstitutionnalité*, 23 POLITEIA 15–55 (2013).

[53] "As a matter of principle, the declaration of unconstitutionality must benefit the party submitting the priority question on constitutionality and the provision ruled unconstitutional cannot be applied to proceedings in progress at the time the decision of the Constitutional Council is published, the provisions of Article 62 of the Constitution grant the Council the power both to set the date of repeal and to defer its effects as well as to provide for the review of the effects that the provision generates before this declaration takes effect." This formula has been standard since the decision of the Constitutional Council QPC No. 2011-110 of 25 March 2011.

declaration of non-conformity with the Constitution would take effect upon publication of the Constitutional Court's decision, and would be applicable to all appeals that were currently in process.[54]

So, what are the practical consequences of the partial abrogation of Article 695–46, paragraph 4 of the Code of Criminal Procedure? Decisions that are pending and not yet final may be appealed against before the Court of Cassation. However, these appeals and any reviews thereof are subject to strict deadlines, so that the very final decision is not delivered on a date that exceeds the sixty-day deadline prescribed by the framework decision.[55] Considering the fact that the investigating chamber must rule within thirty days of receipt of the request,[56] the deadline for the review of a potential appeal against the initial decision should theoretically be less than thirty days. However, the rules governing appeals in criminal matters are inadequate for this purpose[57] and should be discarded. If the legislators fail to engage in swift reforms concerning this matter, it will be the role of the Court of Cassation, within certain parameters, to mention the deadlines for the submission and review of appeals. The Court of Cassation will thus play the role of a "jurislator," justifying such a move through the necessity of imposing an interpretation of Article 695–46, paragraph 4 of the Code of Criminal Procedure that is in compliance with the framework decision,[58] with the words "without the possibility of appeal" having been expunged from the former. As has been correctly noted elsewhere, "the judges still therefore have the last word as they are the fundamental makers of a fair Europe."[59]

F. The Scope of the First Preliminary Reference

I. The French Constitutional Court as a Judicial Body in European Law

The first and most basic observation raised by the first preliminary question treated by the French Constitutional Court concerns the status of the *Conseil* itself: beyond mere doctrinal debates, at the European level, the Constitutional Court now qualifies as a Court, having jurisdiction for matters of European law. Under Article 267 TFEU, in fact, only national courts under the Treaty are entitled to make use of the preliminary reference

[54] Decision No. 2013–314 QPC at para. 11.

[55] Art. 17 of the Framework Decision; *Jeremy F.*, Case C–168/13 PPU, judgment of 30 May 2013, pt. 64.

[56] Code of Criminal Procedure Art. 695–46, para. 4.

[57] Five clear days for filing an appeal; forty days to review.

[58] Consistent interpretation required by the principle of primacy. *See* Case C–105/03, Criminal Procedure against Maria Pupino, [2005] E.C.R. I–5309.

[59] Jerome Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, *supra* note 28.

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procedure. Thus, on the one hand, by making a reference to the CJEU, the Constitutional Court signals that it considers itself to be a national court, and on the other hand, the CJEU's acceptance of its request acknowledges that the Constitutional Court meets the criteria of a judicial authority.

Indeed, the Council fulfills the various criteria for judicial authorities, as established by the case law of the CJEU.[60] It represents a "permanent body" established by law, the members of which are appointed by a public authority,[61] and the jurisdiction of which is compulsory, a body, moreover, that rules by means of "adversarial proceedings" applying "the rule of law." As to the criterion of judicial independence, given the constitutional and organic regulations that guarantee it, the Constitutional Court evidently takes on "the role of an objective outsider in relation" to the "authority,"[62] the acts of which are challenged before it. Finally, the guarantee of the impartiality of the members of the Court is undoubtedly somewhat imperfect, since in the course of previous positions they may have held, they may have taken part in the development of the legislative provisions that are being challenged or of European standards that may result in the dismissal of a claim.[63] However, it is clear that the CJEU applies the criteria with a certain degree of flexibility,[64] always assuming that the constitutional courts that submit preliminary references fulfill the criteria it has prescribed for defining judicial authorities.[65] The desire to encourage a certain degree of preliminary dialogue with the constitutional courts of the Member States takes clear precedence over the mere will to judge national practices (and particularly judicial traditions), which would be seen as inappropriate and intrusive by national authorities.

[60] Case C–61/65, Vaassen Göbbels, 1966, E.C.R. I–395; Case C–54/96, Dorsch Consult, 1997 E.C.R. I–4961.

[61] Except for "rightful" members, who are former Presidents of the Republic. This is probably a malfunction of the French system of constitutional justice. *See* Patrick Wachsmann, *Sur la composition du Conseil constitutionnel*, 5 JUS POLITICUM 14–16 (2010).

[62] Case C–24/92, Corbiau, 1993 E.C.R. I–1277.

[63] Art. 4, Decision on the procedure before the Constitutional Council for priority issues of constitutionality of 4 February 2010 (Official Journal of 18 February 2010 at 2986).

[64] Despite the non-decisive character of the intervention of *Consiglio di Stato*, the Court acknowledged it as a court (Cases C–69/96 to C–79/96, Garofalo, 1997 E.C.R. I–5603). Similarly, the Dutch Council of State had been recognized as having jurisdiction at a time when it only exercised on a restricted basis (Case C–36/73, Nederlandse Spoorwegen, 1973 E.C.R. I–1299).

[65] Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, *supra* note 8.

II. The Constitutional Court—Not the Ordinary Union Law Judge

The preliminary ruling does not render the Constitutional Court an ordinary adjudicator of European Union law. This function is, in fact, an inseparable component of the process of judicial review of domestic law for compliance with the EU treaties, which, when exercised by national judges, guarantees the "full effect" of EU law through the non-application of national provisions that are contrary to European norms.[66] In France, in 1975[67] the Constitutional Court decided to decline jurisdiction in monitoring compliance of legislation with international treaties under Article 61 of the Constitution. This lack of jurisdiction was stressed in relation to the *a posteriori* review power on the basis of Article 61–1 of the Constitution.[68] The French ordinary EU law judge is, therefore, the civil or the administrative judge. The Constitutional Court, for the time being, remains keen on a strict construction of its unique nature and competences, namely reviewing the conformity of statutes with the sole Constitution.

Referral to the CJEU for a preliminary ruling has not triggered a change in the function of the Constitutional Court with respect to EU law; on the contrary, the route undertaken by the French judges confirmed the existing case law on this issue. On 4 April 2013, the Constitutional Court confirmed that it could rule solely on the constitutionality of laws and that the review required by Article 88–2 does not in fact constitute a species of judicial review for compliance with international treaties, but rather a simple "verification stage"[69] that must precede constitutional review,[70] and that is an indispensable component thereof.

Thus, the *Jeremy F.* case does not constitute a *volte-face*, but rather a step along the road of the Constitutional Court's European case law. Within the context of this journey, the P QPC 2013 follows the *Melki* case of 2010, giving continuity and depth to the judicial dialogue, and furnishing an important contribution to the debate on the order of referrals.

In the ruling *Aziz Melki and Selim Abdeli* of 22 June 2010,[71] the CJEU began an initial dialogue with the Constitutional Court,[72] attempting to address the thorny question of the

[66] Case C–106/77, Finance Administration of the State against Société anonyme Simmental, 1978 E.C.R. I–629, pt. 24.

[67] *Conseil constitutionnel*, decision no. 74–54 DC, 15 January 1975, *IVG*.

[68] *Conseil constitutionnel*, decision no. 2011–217 QPC, 3 February 2012, *M. Mohammed Akli* B. Rec. p. 104.

[69] Bruce Rabillon, *supra* note 11, at 104.

[70] Along a similar line Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, *supra* note 8.

[71] Cases C–189/10 & C–188/10, Aziz Melki and Selim Abdeli, 2010 E.C.R. 2010 I–05667.

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compatibility between the organic legal provisions relating to QPC and the provisions of Article 267 TFEU relating to the preliminary ruling procedure. In an *obiter dictum*, the CJEU implicitly invited the Constitutional Court to disregard the requirements deriving from Article 61, stating that "the requirement for a strict deadline imposed upon national courts cannot result in the impossibility of procuring a preliminary ruling on the validity of the provision under scrutiny."[73] While in this quotation, the obligation of allowing the possibility of a preliminary ruling as a prerequisite for any form of judicial review refers to the difficulties in challenging the validity of a directive, it can also be readily applied to the interpretation of directives. The *Jeremy F.* ruling, three years later, undoubtedly constitutes a positive response to the request made by the CJEU:[74] The Constitutional Court agreed to go over the deadline for reviews in order to refer the preliminary issue to the CJEU, prior to exercising its own constitutional review.

Secondly, by means of its 2013–314 P QPC ruling, the Constitutional Court also seems to have settled the debate on the order of referrals, which was initiated by the *Cour de cassation* in 2010.[75] In its judgment concerning online games,[76] the Constitutional Court had already stated:

> Neither Article 61–1 of the Constitution nor Articles 23–1 and following of the Ordinance of November 7th 1958 referred to hereinabove preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union.[77]

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[72] The CJEU referred in particular to the Council's Ruling no. 2010–605 DC of 12 May 2010, *Law on the liberalising competition and sector regulation of gambling and online gambling*, rec. at 78.

[73] *Melki and Abdeli,* Cases C–188/10 and C–189/10 at para. 56.

[74] Henri Labayle, Rostane Mehdi, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, supra at note 8; Bruce Rabillon, *supra* at note 11, 119.

[75] On 16 April 2010 the *Cour de cassation* called upon the CJEU for an appeal of validity of an action concerning the compatibility of the priority of the QPC with the requirements of the CJEU for national judges as common law judges of the Union. Cass., *Aziz Melki*, No. 10–40002.

[76] Conseil constitutionnel, decision n ° 2010–605 DC.

[77] Para. 14.

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The Court added:

> Sections 23–1 and following of the Ordinance of November 7th 1958 referred to hereinabove do not deprive Courts of law or Administrative Courts, including when they are requested to transmit an application for a priority preliminary hearing on the issue of constitutionality, of the freedom, or, when their decisions cannot be appealed against in domestic law, of their duty to refer to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.[78]

The Constitutional Court has thus attributed to the QPC the status of an alternative preliminary reference, an additional tool for the protection of human rights in a legal sphere that has become European in nature. In other words, the QPC and the preliminary reference procedure are distinct in their scope and are to be used independently. In April 2013, the Constitutional Court itself resorted to the preliminary reference procedure. The French Constitutional Court thus masterfully demonstrated the complementarity of these two instruments, which should be used in a spirit of cooperation between national and European judicial institutions.

III. The Constrained Future of Preliminary Rulings from the Constitutional Court

Révolution de palais or revolution in French constitutional law? Without minimizing the importance of this very first preliminary reference, it must nevertheless be noted that the perspectives opened up by this case are quite limited. Indeed, the possibility of raising a preliminary issue before the CJEU only happened because two conditions were fulfilled: the ability to make use of the urgent ruling procedure and the fact that the legal issue at stake concerned the European Arrest Warrant under Article 88-2 of the Constitution. However, since both the first and second conditions are rarely fulfilled, their coincidence will, most likely, very rarely resurface.

Regarding the first condition, the Constitutional Court, in the context of such a question, has shown itself able to bend certain tenets of its own rules of procedure, even issuing a valid ruling two weeks after the deadline imposed by the organic law. This exception observes the principle of loyal cooperation enshrined in Article 4(3) of the Treaty on European Union (TEU). However, it does not stretch to *a priori* constitutional review, which

[78] Para. 15.

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requires a shorter time limit,[79] and it only seems possible in the context of an urgent preliminary ruling procedure, given that the average ordinary procedure in the CJEU lasts approximately sixteen months.

Circumvention of the deadline came about due to reciprocal concessions that the Constitutional Court and the CJEU agreed on in this case: the Constitutional Court accepted the exceeding of the time limit since the CJEU delivered a ruling swiftly. It is, however, a contingent balance, which cannot be repeated regularly. Furthermore, the CJEU upheld two arguments presented by the Constitutional Court: The deprivation of liberty to which the applicant was subjected during the main trial, and the time limits which the Constitutional Court must observe when issuing a ruling. However, it is not certain that the mere presence of a deadline can be used in order to justify an emergency ruling in the future.[80] In addition, the use of the emergency procedure is limited to questions involving freedom, security, and justice,[81] which constitute a further obstacle to a broader use of the preliminary reference procedure by the Constitutional Court. As for the accelerated procedure,[82] which may involve any area of EU law, the conditions for its implementation seem too restrictive for this option to be used by a constitutional court. Indeed, an "extraordinary emergency" is required to justify the use of this procedure.[83]

Regarding the second condition, it is debatable whether referrals will be confined to the limited field of EAWs. One can have doubts as to the likelihood of further preliminary references when it comes to statutes transposing EU norms *other* than measures concerning EAWs. Only the latter enjoy full and absolute constitutional immunity under Article 88–2 of the Constitution. Through this provision, the constituent power consented without reservation to the EAW in all of its features, whereas it never explicitly endorsed the other numerous secondary norms that are adopted by the EU institutions and can have far-reaching legal effects domestically. For those norms, Article 88–1 of the Constitution is applicable.

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[79] Bruce Rabillon, *supra* note 11, at 124. Concerning the possibility for the Council to refer to the CJEU for a *preliminary* ruling in the context of preliminary oversight, see Jerome Roux, *supra* note 28.

[80] To our knowledge, this type of justification has not yet been received by the Court, which emphasized the deprivation of liberty suffered by a person pending the decision (*see, e.g.*, Case C–278/12 PPU, Adil v. Minister voor Immigratie (July 18, 2012), http://curia.europa.eu/) or the situation of children separated from their parents pending the settlement of custody cases (see, for example, Case C–497/10 P.P.U., Mercredi v. Chaffe, 2010 E.C.R. I–14309). Along a similar line: Marie Gautier, *L'entrée timide du Conseil constitutionnel dans le système juridictionnel européen*, 19 ANNUAIRE JURIDIQUE DE DROIT ADMINISTRATIF 1086 (2013); Xavier Magnon, *supra* note 28, at 932.

[81] Art. 23*bis* of the Statute of the CJEU.

[82] Art. 105 of the Rules of procedure before the CJEU.

[83] The CJEU acknowledged the urgency in the ruling *Melki and Abdeli.*

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Article 88–1 is arguably the first and foremost provision relating to the European Union that can be found in the French Constitution. It reads:

> 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 the 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.

Initially, Article 88–1 was perceived as being mainly symbolic and therefore deprived of any legal effect. Yet, it is being increasingly relied on by French judges as a constitutional mandate allowing, requiring, or prohibiting certain actions. *Inter alia*, in relation to EU directives, both the *Conseil constitutionnel* and the *Conseil d'Etat* have read into Article 88–1 a constitutional obligation to transpose directives.[84] Such an obligation already derives from EU law through the duty of loyal cooperation enshrined in Article 4(3) TEU. However, the domestic judges are still reluctant to ground their rulings on EU provisions. That explains why they discovered a *constitutional* requirement to transpose directives. In doing so, they not only gave a national constitutional imprint (in a dualistic fashion) to their judgments, but they were enabled to discretionarily set limits on this obligation, which were to be found in the Constitution itself and not in EU law. Above all, this obligation shall not trump the requirement for a directive to respect the "*constitutional identity of France*."[85] The obligation to transpose directives is therefore relative and not stringent, as it shall yield before the constitutional core of the Member States. This a major difference with EAWs, as the latter are fully immune from constitutional challenge. The *Conseil* did not mention French constitutional identity as a valid claim against national measures implementing EAWs. For domestic measures implementing *other* EU secondary acts, though, the infringement of constitutional identity may lead to a declaration of unconstitutionality.[86] To sum up, *under Article 88–2, no claim connected with constitutional identity can hold and a preliminary reference can be made. Under Article 88–1, constitutional identity can serve as a limit to EU integration and the prospect of an institutional dialogue with the CJEU remains uncertain.*

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[84] *Conseil constitutionnel*, decision no 2004–496 DC of 10th June 2004, *Act on Trust in the Digital Economy*; *Conseil d'Etat*, judgment of 8 February 2007, *Arcelor Atlantique et Lorraine*. On the *Conseil*'s ruling, see the annotation by JACQUELINE DUTHEIL DE LA ROCHÈRE, 42 COMMON MKT. L. REV. 859–69 (2005).

[85] *Conseil constitutionnel*, decision no 2006–540 DC of 27 July 2006, *Act pertaining to Copyright and Related Rights in the Information Societ*y.

[86] However, the *Conseil* made it clear that the constitution-making power could actually give up French constitutional identity: "[T]he transposition of a directive cannot run counter to a rule or principle inherent to the constitutional identity of France, *except when the constituting power consents thereto*." *Conseil constitutionnel*, decision no. 2006–540 at para. 19 (our emphasis). On this controversial option, see FRANÇOIS XAVIER MILLET, L'UNION EUROPEENNE ET L'IDENTITE CONSTITUTIONNELLE DES ETATS MEMBRES 42–45 (2013).

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G. Conclusion

The first preliminary reference of the French Constitutional Council to the CJEU is undoubtedly a milestone event, which may even herald the start of a new era. However, it might also remain isolated. Because of its curtailed jurisdiction, the *Conseil constitutionnel* will never have many opportunities to refer a case to the CJEU. Unless it overrules its current approach, any further preliminary reference is bound to happen in the course of the review of a domestic statute implementing EU law. If we now know that the *Conseil* will not shy away from sending in a case relating to the EAW, it remains to be seen whether it will repeat the experience in a situation involving another EU secondary norm that is not being specifically addressed in an *ad hoc* provision of the Constitution such as Article 88–2 but falls within Article 88–1. Although it is understandable that the *Conseil constitutionnel* is reluctant to engage in a dialogue with the CJEU when no less than national constitutional identity is infringed by EU law, it would, however, be well-advised to do so in order not to undermine the fragile European project.

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