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Uncertainty for Foreign Investors, Hefty Bills for French Taxpayers

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The duality of functions of the French Supreme Administrative Court makes it reluctant to request the opinion of the CJEU or of the French Constitutional Court before passing judgment on the compatibility of French taxes with EU law or with the French Constitution. Result: French authorities must levy new taxes to fund the reimbursement of "old" taxes eventually held to be in breach of EU law or of the French Constitution.

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On November 14, 2017, the French Parliament eventually adopted an emergency law introducing an exceptional levy on 320 French companies (or French branches of foreign companies): those having a worldwide turnover exceeding one billion euros will see their corporate tax rate increased to 38.3 percent instead of 33.3 percent, and those having a turnover exceeding three billion euros will see their corporate tax rate go up to 43.3 percent (a sliding scale has been introduced to ensure that a one euro difference in worldwide turnover does not tip the taxpayer into the highest rate bracket).

At the same time, and without any apparent sense of contradiction, the French Parliament passed a law whereby the standard rate of 33.3 percent—applicable to all companies—will be decreased over the coming four years to 28 percent to make France more competitive and attract foreign investors.

The reason for this exceptional levy is the need to fund (part of) the 10 billion euros in illegal taxes which the French government must reimburse to (mostly other) large companies.

If it were not for this "exceptional" levy, the French authorities would breach their commitments vis-à-vis the European Commission to keep their budget deficit

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for financial year 2017 under three percent of gross domestic product.

This is but the latest episode in the long-running resistance opposed by the French Supreme Administrative Court, the Conseil d'Etat, the French Constitutional Court and the Court of Justice of the European Union ("CJEU") in tax matters coming within the ambit of the French Constitution or of European law.

The purpose of the article is to draw attention to the apparent reasons for this opposition as well as to the costs it entails for the French taxpayer and the legal insecurity it creates for the very same foreign investors which the French government endeavors to attract to France.

Conseil d'Etat's Advisory Role

The Conseil d'Etat is an institution which was created under Napoléon in 1799. However, before the French Revolution (1789), there already existed a *Conseil du Roi*.

As a result of the Napoleonic Wars, Conseils d'Etat were created along the French model in several European countries incorporated within the Napoleonic Empire: Belgium, the Netherlands, Luxembourg, Italy. However, at least nowadays, the Conseils d'Etat existing in those countries have far more limited roles than the French Conseil d'Etat.

By its very name ("Conseil" is French for council but also for advice) the foremost role of the Conseil d'Etat is to "advise" the French government on the implications of proposed laws and regulations especially with regard to their compatibility with the French Constitution, with European Union law as interpreted by the CJEU, and with the European Convention on Human Rights as interpreted by the European Court of Human Rights.

This advisory function reaches further than the Conseil d'Etat proper.

Indeed, the influence of the (approximately) 300-strong Conseillers d'Etat makes itself felt in the uppermost reaches of the ministerial cabinets and the all-powerful French administration.

This is because Conseillers d'Etat are allowed to take a temporary leave of absence in order to occupy those administrative functions while retaining their position in the Conseil d'Etat and have the right to take up their functions within the Conseil d'Etat again, if and when they leave their advisory position in the executive branch.

Since 2008, the Conseil d'Etat also plays an advisory role for the French Parliament, if the latter so requests.

It is noteworthy that the advice given by the Conseil d'Etat to the French government is confidential, unless the government waives that confidentiality. The same goes for advice given to the French Parliament.

Conseil d'Etat's Jurisdictional Role

Besides its advisory role, the Conseil d'Etat also has a *jurisdictional* role.

French law makes a fundamental distinction between judicial courts and tribunals, placed under the authority of the Cour de Cassation, and administrative courts and tribunals placed under the authority of the CE.

Conflicts between private individuals or companies and the French Administration, including in tax matters fall under the exclusive jurisdiction of the administrative courts.

This is also the case for disputes between French civil servants and their employer, the French Administration (disputes between private sector employees "assimilated to civil servants" (French railways personnel, French private schools' teachers, Paris metro's personnel, notaries' clerks, etc.) and their employer fall however under the jurisdiction of the judicial courts)).

Administrative proceedings are first adjudicated upon by Administrative Tribunals with the right of appeal (for both parties) to the Administrative Courts of Appeals.

A decision by an Administrative Court of Appeals may only be appealed to the Conseil d'Etat on a point of law.

Such will be the case, among others:

- if it is claimed that the French law or regulation at issue is contrary to the French Constitution, in which case the Conseil d'Etat *must* request a preliminary ruling of the French Constitutional Court; or
- if it is claimed that the French law or regulation at issue is contrary to European Union law, as interpreted by the CJEU, in which case the Conseil d'Etat *must*, as a matter of European Union law, address a request for a preliminary ruling to the CJEU, except if:
  - — the CJEU has previously already ruled on a similar issue (possibly involving another Member State); or
  - — if the Conseil d'Etat can reasonably take the view that the conformity of the French law or regulation at issue with European law is evident beyond a doubt (so called "Acte clair" doctrine).

According to the CJEU's case law, failure by a national Supreme court, such as the Conseil d'Etat, to request a preliminary ruling constitutes a breach of European law which may make the Member State concerned liable for damages (Case C-224/01 *KÖBLER*, judgment of September 30, 2003. Also C-173/03 *Traghetti Del Mediterraneo*, judgment of June 13, 2006).

Under French law, however, liability for damages arising from the failure of the Conseil d'Etat to request a preliminary ruling from the CJEU must be adjudicated upon by the very same Administrative Tribunals and Administrative Court of Appeals which fall under the jurisdiction of the Conseil d'Etat and, in the last instance, by the Conseil d'Etat itself.

New Taxes to Reimburse Taxes Held in Breach of EU Law or of the French Constitution

The exceptional levy introduced in November last is the latest in a series of taxes that have had to be reimbursed as the result of a ruling of the CJEU or of the French Constitutional Court.

As aforesaid, the reason for this exceptional levy is the need to fund (part of) the 10 billion euros of illegal taxes which the French tax administration must reimburse.

Those taxes were introduced under the presidency of Francois Hollande. They consisted of a special levy (another one!) on the dividends distributed by French companies to their resident—or nonresident—shareholders.

The purpose of the "Hollande" levy was to finance the budgetary cost of the reimbursement of two previous taxes which had also been declared contrary to European Union law or to the French Constitution, namely:

- the withholding tax which had been levied on French dividends received by pension funds not based in France, thereby discriminating them vis-à-vis French pension funds; and
- the reimbursement to French companies of the foreign tax credit which they had been denied on dividend received from foreign EU subsidiaries.

Similarly, the "Hollande" levy was held first to be, in part, contrary to European law by the CJEU (case C-365/16 *Association française des entreprises privées (AFEP)*, judgment of May 17, 2017) and, a few months later, to be contrary to the French constitution in its entirety by the French Constitutional Court (case 2017-660, judgment of October 6, 2017).

The duality of roles played by the Conseil d'Etat, first as an advisor to the government (and Parliament) during the preparatory stage of a draft law or regulation, and, subsequently, as supreme administrative court in tax disputes lies, it is submitted, at the origin of those recent instances of costly reimbursement of taxes which were held, shortly after their introduction, to be contrary to European Union law or to the French constitution.

In these instances, the Conseil d'Etat, had presumably taken the view in its advisory capacity, that the (then proposed) tax was not contrary to European Union law or to the French constitution.

If that is the case, the Conseil d'Etat is understandably reluctant a few years later, this time in its jurisdictional capacity, to request in a timely manner a preliminary ruling from the CJEU or from the French Constitutional Court when apprised of such a request by a taxpayer who alleges the contrariety of that tax with European law or with the French constitution.

When, at long last, the Conseil d'Etat has no option but to address a request for a preliminary ruling to the CJEU (possibly as a result of infringement proceedings threatened by the European Commission against France) and the decision of the CJEU upholds the argument of the taxpayer, the French authorities have to reimburse all taxpayers who have previously paid the tax now found to be illegal (the only limitation on these hefty reimbursements is the statutory period within which the reimbursement must be claimed. The starting point of that period is, as a rule, the time when the tax was paid, and not the time when its contrariety with European law was established following a judgment of the CJEU).

True, the individual Conseillers d'Etat who have advised the government (or Parliament) on the compatibility of the tax with the Constitution or with EU law, are expected to abstain from sitting in judgment on that same issue a few years later (see art.R.122-21-1 introduced in the *Code de Justice Administrative* by the *décret* 2008-225 of March 6, 2008 enacted as a result of the *Procola* judgment of September 28, 1995 of the European Court of Human Rights (case 14570/89). In practice, however, compliance with this rule is hard to verify and its violation is not sanctioned (see the *Quintanel* and *Collectif Egalité Retraite* cases referred to below).

However, there is no denying the fact that there is a strong "esprit de corps" within such an elite jurisdiction. How could it be otherwise?

As icing on the cake, there remains the obvious conflict of interest faced by the Conseil d'Etat if it is called upon to adjudicate on a claim for damages arising from its earlier failure to address a request for a preliminary ruling to the CJEU in a timely manner when it was bound to do so.

A typical example of this situation was evidenced recently in proceedings brought by a number of French civil servants before the French Administrative Courts.

Divide between Administrative Courts and Judicial Courts

French administrative law initially provided that female civil servants who had borne children while in service were entitled to early retirement with full pension.

In 2001, in answer to a request for a preliminary ruling from the CE, the CJEU ruled that this regime was contrary to the prohibition of gender discrimination in that it barred male civil servants who had been responsible for the education of their children during their period of service from benefiting from the early retirement rule applicable to their female colleagues (case C-366/99 *Griesmar*, judgment of November 29, 2001. See also case C-206/00 *Mouflin*, judgment of December 13, 2001).

As a result of the *Griesmar* case, the French regulation at issue was amended in 2004: Henceforth early retirement with full pension would be granted to all civil servant, whether male or female, who had taken a minimum (continuous) leave of at least two months to look after the education of a young child during their period of service.

A number of civil servants brought proceedings before various administrative courts throughout France, arguing that the new regulation (hereafter the

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2004 Regulation) was just as discriminatory as the previous one, even though it was presented as gender neutral.

Namely, female civil servants who give birth to children while in service are obliged by law to take maternity leave of more than two months and keep their full salary and pension rights entitlement during that period.

Male civil servants, however, are not obliged to take parental leave; moreover, if they elect to do so, they do not receive any salary during their optional parental leave.

A number of these proceedings were eventually brought before the CE which held that the 2004 Regulation did not lead to indirect discrimination to the detriment of male civil servants (CE no. 265097, *D'Amato & Autres* and CE, no. 280681,*Delin*, judgments of December 6, 2006. Also CE, nos 281147 and 282169, *Marchand-F.O.* judgment of July 6, 2007).

The CE also held that there was no need to request a preliminary ruling of the CJEU before arriving at that conclusion ("Acte clair" theory: no need to request a preliminary ruling by the CJEU when it is "crystal clear" that EU law is not infringed by the national law or regulation at issue).

Sometime thereafter, similar proceedings were brought by Mr and Mrs Leone, along with 88 other claimants, before the Administrative Tribunal of Lyon, and, upon appeal, before the Administrative Court of Appeals of Lyon. That Court decided to request a preliminary ruling by the CJEU.

In its judgment, the Administrative Court of Appeals of Lyon justified its request on the (very unusual) grounds that it did not agree with the CE's previous decisions and took the view that the 2004 regulation could violate EU law.

On July 17, 2014 the CJEU took the view that the 2004 Regulation, even though it was adopted to bring French law in line with the earlier ruling of the CJEU in the *Griesmar* case, was actually only "ostensibly neutral as to the sex of the civil servants concerned" (case C-173/13 *Leone*).

Indeed, the conditions laid down by the 2004 Regulations were "in reality liable to be met by a much lower proportion of male civil servants than female civil servants, with the result that it places a much higher number of workers of one sex at a disadvantage as compared to workers of the other sex" (*Leone* judgment at § 51).

The French judicial courts quickly fell in line with the position adopted by the CJEU in its *Leone* judgment when apprised of proceedings brought by employees " assimilated to civil servants" seeking compensation for their employers for the discrimination suffered when they had taken early retirement.

The CE however declined to do so when apprised of similar proceedings brought by civil servants against the French administration.

Sitting in Judgment of One's Own Advice

In its *Quintanel* judgment(case 372426 *Quintanel*, judgment of March 27, 2015), the CE took the view that such claims were groundless because the CJEU, in its *Leone* judgment, had stated that the indirect discrimination at issue could be accepted if, in the opinion of the national courts, it was justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim. The CE stated, in substance, that this was the case because the indirect discrimination brought about by the 2004 Regulation was justified by legitimate social policy aims, "having regard to French society at the time."

The dismissal of the Quintanel's claim for damages by the CE was hardly surprising: The decision whereby it did so was taken by a Chamber composed of Conseillers, half of whom had taken part in the advisory opinion given to the French government in connection with the drafting of the regulation enacted in 2004 to bring French law in line with the *Griesmar* case.

This judiciary saga did not stop there.

In subsequent proceedings, brought by other claimants, the CE was petitioned to address a request for a preliminary ruling to the CJEU and/or to the French Constitutional Court, regarding the question of whether the Chamber apprised of the proceedings, some members of which had taken part in the drafting of the 2004 Regulation, met the impartiality requirements laid down by Article 47 of the Charter of Fundamental Rights of the EU.

The CE—again, unsurprisingly—refused to request a preliminary ruling from the CJEU, or the Constitutional Court and dismissed the proceedings. Additionally, it imposed a fine on the plaintiffs to sanction their "audacity" (case 395562 *Collectif Egalite Retraite*, judgment of October 19, 2016).

Conclusion

One questions whether the same scenario did not arise with regard to the withholding taxes, the annulation of which led to the "Hollande" levy, and with regard to the "Hollande" levy itself: Were some of the Conseillers d'Etat involved in the drafting of these levies at a ministerial level? Did the CE (confidentially) advise the French government at the drafting stage that they were in line with EU law and/or with the French Constitution? And if so, did some of the Conseillers who were involved with the preparation of these opinions later sit as judges in the Chambers which were called upon to rule on the alleged lack of conformity of these levies with EU law and/or the French Constitution?

It is respectfully submitted that the current situation is very unsatisfactory and damages the credibility of France as a leading European Member State.

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