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Introduction  

It has been widely maintained by various scholars that the establishment and the setting up of the CJEU, including its judicial style and procedure, have been greatly influenced by the French Legal system.  

When it comes to judicial control and review of administrative acts or measures the French have a very distinct system of Administrative Law and procedure including a separate and comprehensive system of Administrative Courts known as the Conseil d’Etat.  

The Conseil d’Etat, which forms an essential part of the Executive in France, has three functions: to advise the government, to judge the acts of the administration, and to manage and oversee the administrative jurisdiction. The Judicial Division within the Conseil d’Etat, known as the Section du Contentieux, entertains all administrative litigation including actions against the government by the ordinary citizen. The ordinary Civil Courts in France are prohibited by law to review acts concerning the government or public administration.  

The French Conseil d’Etat: Historical Background  

The French perceive the doctrine of separation of powers in a rather interesting way in that they apply this doctrine to separate the Civil Courts and their competence in the area of Civil Law, from the
Administrative Courts which form part of the Conseil d'Etat, the function of which is inter alia to decide and determine cases having an administrative law and public law nature.

Thus, the French judicial system is divided into two: the ordinary Civil Courts which deal with private matters and with matters that do not concern the government qua administrator of the State, and the Conseil d'Etat, which forms an integral part of the Executive and which also incorporates within it a comprehensive system of Administrative Courts.

The predecessor of what is now known as the Conseil d'Etat was the Conseil du Roi (King's Council) of the Ancien Regime (The Old Regime). Its function was to advise the King on legal and administrative matters as well as to act as a Court to decide on complaints made against the legality of regulations made by the King's Council. Civil matters were determined by the Civil Courts known as the Parlements and it was not until 1641 that the conflict and the rivalry between the two Courts was addressed, although not quietened, by the enactment of the Edict of Saint-Germain. This law excluded the Parlements from deciding matters involving the Executive.

In 1790 the constituted French National Assembly enacted the Law 16-24 prohibiting the Civil Courts from interfering judicially with the administration of the government or any of its public bodies. The Civil Courts were also prohibited from questioning public officers on account of their administrative decisions.

The Conseil d'Etat as is known today was established by Napoleon Bonaparte in the Constitution of the Year VIII. It had a dual role: that of drafting legislation for the government, and that of resolving disputes involving public administration. The Conseil d'Etat also acted as an appeal Court where the private
citizen could appeal against a Minister’s response to his complaint. Although the Conseil d’État’s decision was not binding on the administration at the time, it was invariably followed. The Conseil d’État played a crucial role in the drafting of the Codes of Napoleon.

The procedure by which an action for judicial review (recours pour excèss de pouvoir) could be lodged was developed by the Conseil d’État during the reign of Napoleon III, from 1852 onwards. During this period the Conseil d’État gained much importance and developed much jurisprudence.

With the Law of 24 May 1872 the litigation section within the Conseil d’État was established in its own right and the administrative sections were more clearly defined. The Conseil d’État had three administrative sections, and the judicial section known as la section du contentieux. A further section, la Section de Legislation (the Legislative Section) was added in 1880. The Law of 24 May 1872 empowered the Conseil d’État to decide any disputes involving the government and the citizen, eliminating the residual power of the Emperor to override the Conseil’s opinion.

At the end of the Second World War it became obligatory for the government to consult the Conseil d’État on all proposed legislation. In 1963 this role was further reinforced by the decree of the 30 July from which the Commission du rapport et des études was created. The role of this Commission is to draft an Annual Report to the Executive containing all the considered and collective views of all the sections of the French Conseil d’État. The 1963 role also reinforced the Conseil d’État’s role as expert in administrative law.

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1 Department of the Interior, Department of Finance, and Department of Public Works
Today the Conseil d'Etat, although forming an integral part of the Executive, has its own separate and impartial Judicial Division, staffed with highly trained Civil Servants who have read administrative law. It is composed of five administrative sections, Department of the Interior, Department of Finance, Social Affairs Department, Administration Department, and Department of Public Works, and one judicial division consisting of a complex hierarchical system of administrative courts: the Tribunaux Administratifs which are the French Administrative Courts of First Instance, and the Cours Administratives d'Appel, the Administrative Courts of Appeal. The Conseil d'Etat, in its judicial function, has first and last instance jurisdiction in certain cases designated by the French Administrative Law. It is also an appellate court in cases of appeal from the Tribunaux Administratifs which cannot be lodged before the Cours Administratives d'Appel. The Conseil d'Etat is also a Court of Cassation where it reviews a judgment of an inferior court on procedural error or illegality only. If the judgment is annulled, it will be returned to a different lower court for a fresh judgment. The Conseil d'Etat also reviews the legality of the judgments delivered by the Cours Administratives d'Appel.

In certain cases, a dispute may involve whether it is of an administrative law nature or of a civil law nature. The Tribunal des Conflits is a Court of Jurisdictional Disputes which decides whether the ordinary civil courts or the administrative courts have jurisdiction.

The CJEU: Historical Background

The Court of Justice of the European Union, although not possessing a historical background which spans centuries, has had its share of evolutive
dynamism in respect of the jurisdictional powers which it has attained during its almost sixty years of existence.

The Court of Justice of the European Union was established by the Treaty on European Coal and Steel Community which was signed in Paris in 1951. The function of the Court was to take judicial control of the Community created by the Treaty, to ensure that the law was observed in the interpretation and implementation of the Treaty, and ‘to ensure that the new Community should be based on democratic principles and the rule of law’. In 1957 the European Economic Community and the European Atomic Energy Community were established. Each Community had its own Court but the Convention on Certain Institutions Common to the European Communities changed this and provided that a single Court of Justice was to have jurisdiction over all three Communities. Its role was to ensure that the instruments of the European institutions and of governments were compatible with the Treaties. It also had the task to give rulings, at the request of national courts, on the interpretation or validity of Community Law provisions.

Today the CJEU comprises the whole body of the judicial system of the European Union. It is composed of three courts: the Court of Justice, the General Court and the Civil Service Tribunal. The General Court was established in 1988 and was designated as the Court of First Instance. With the coming into force of The


3 Article 3 of the Convention.

Treaty of Nice the General Court was granted wide powers to review administrative acts and measures taken by the EU institutions. On the other hand, the Court of Justice acts, inter alia, as a Court of last instance where appeals on points of law only may be brought before it.\textsuperscript{5}

It has been argued that ‘the judicial structure of the Court of Justice of the European Union was strongly influenced by ideas derived from continental, especially French, administrative law’.\textsuperscript{6} The Court of Justice may be said to act as an administrative court because its role is to protect Member States and their citizens from illegal acts or omissions of the EU institutions.\textsuperscript{7} It is a role which the Conseil d’Etat plays exclusively.

Procedure Before the Courts

According to Brown and Bell, the greatest influence which French Administrative Law has had on

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\item \textsuperscript{5} The Court of Justice is empowered to review actions against a Member State for failure to fulfil its obligations under EU Law and actions for the annulment of a measure, in particular, of a regulation, directive or decision, adopted by an institution or other body of the EU. In actions for failure to act, the Court of Justice and the General Court share jurisdiction.

\item \textsuperscript{6} Brown & Jacobs, The Court of Justice of the European Communities, Sweet & Maxwell 2000, pg. 1

\item \textsuperscript{7} This argument has been put forward by Kapteyn PJG and Verloren van Themaat P in Introduction to the Law of the European Communities, Kluwer Law International 1998.
\end{itemize}
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the CJEU is the extent of the jurisdiction of the Court and the procedure which it follows.\footnote{Brown NL & Bell, French Administrative Law, Oxford University Press 2003, pg. 279-280}

Both courts have a written and oral procedure and both employ the services of a Judge Rapporteur, whose role is to draft a report of the facts and the arguments of the parties as well as to draft the actual judgment (projet). The three cornered debate also takes place in both courts where the respective counsels of the parties present their oral submissions followed by the much valued submissions of the Advocate General in the CJEU or the Rapporteur Public in the Conseil d'Etat.

The role of the Advocate General at the CJEU resembles greatly that of the Rapporteur Public at the Conseil d'Etat. Both are impartial and independent opinion givers. Both give their opinion orally before the respective courts and this usually contains an analysis of the case, the rules applicable to it, followed by their own conclusions. In both cases, these submissions are held at high value by the Court.

With the oral procedure closed and the judges deliberating, the system in the Conseil d'Etat departs somewhat from that utilised in the CJEU. Whereas the Advocate General is not present during judicial deliberation, the Rapporteur Public is.\footnote{But see Kress v. France, ECHR 2001-VI where the European Court of Human Rights held that the role of the Rapporteur Public violated the litigant’s right to a fair hearing.} He does not actively participate during judicial deliberation but he is present to answer any questions the judges may have regarding the case.

Prior to lodging a judicial review action before the CJEU or the Conseil d'Etat, certain conditions and
requisites must be satisfied. Gaining access to the Conseil d’Etat by the individual citizen is not as difficult as it is before the CJEU. This may be attributed to the fact that the Conseil d’Etat is a national court whereas the CJEU is a supranational court empowered, inter alia, to review acts of supranational institutions and member states.

In order that a judicial review action may be successfully lodged before the CJEU, a natural or legal person must prove his locus standi. Locus standi refers to whether or not an individual or legal person has sufficient standing in order to bring forward his complaint before the CJEU. If such person can prove that an act or measure of one of the EU’s institution concerns him directly and individually, then his action will be admitted for review before it. However, demonstrating direct and individual concern may prove to be extremely difficult.  

Gaining access to the Conseil d’Etat is not as difficult. A person lodging a review action must be able to show that the nature of the act complained of is an administrative act and that it is injurious to him. The applicant must also show that prior to lodging his complaint before the Conseil d’Etat, he lodged his objection before the administrative body concerned and that he must have received an answer from such body. The time-period during which the judicial review action must be lodged is two months from the date of publication of the administrative decision or act complained of. The same time limit applies in the case of a judicial review action before the CJEU.

10 Art. 263 TFEU introduced a new limb whereby a natural or legal person need only prove direct concern in the case of a regulatory act which does not require further implementation.
Grounds of Review

The power to review administrative acts by the Court is the basis of any democratic society. The French interpretation of the separation of powers forms the basis of the notion of the protection of the citizen from abuse or unlawfulness of the State or its authorised agents. The right to challenge administrative acts is an inherent right of the citizen based on the principle of equality of treatment.

The doctrine of judicial review has been developed exclusively by the Conseil d’Etat, including the four grounds of review. As Schwarze puts it, ‘The main body of French Administrative Law can essentially be regarded as the Conseil d’Etat’s creation’.\(^{11}\)

An action for judicial review under French Administrative Law is lodged by means of an application (recours) referred to as ‘recours pour excess de pouvoir’ which literally translated means ‘application on the grounds of excess of power’. This action entitles the Conseil d’Etat to inquire into acts and decisions of the administration in cases where a violation of the principle of legality is alleged. Non-observance of such principle may give rise to a violation of any one or more of the four grounds of review which the Conseil d’Etat has developed doctrinally throughout the years, namely (i) l’incompétence (lack of competence), (ii) la vice de forme (infringement of an essential procedural requirement), (iii) la violation de la loi (violation of any rule of law), and (iv) détournement de pouvoir (misuse of power). It has been held that the influence of French juristic thought is clearly imprinted on the grounds of

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\(^{11}\) Schwarze J, European Administrative Law, Sweet & Maxwell 1992, pg.103
review as envisaged by article 263 TFEU.\textsuperscript{12} Interestingly, the four grounds of review under the French droit administratif were borrowed and implanted into the ECSC Treaty (1951)\textsuperscript{13} and on the basis of these grounds the Court of Justice acquired jurisdiction to review decisions or recommendations of the High Authority. Today these same grounds are contained in Article 263 TFEU. However, it is to be noted that the CJEU has made certain marked departures from the French doctrine of judicial review as developed by the Conseil d’Etat.

Article 263 TFEU gives the CJEU (the General Court) jurisdictional competence to review the legality of legislative acts, acts of the Council, of the Commission and of the European Central Bank as well as jurisdiction to review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The grounds on which the Court has competence to review such acts are (i) lack of competence, (ii) infringement of an essential procedural requirement, (ii) infringement of the Treaties, and (iv) misuse of powers.

Lack of competence or l’incompétence denotes lack of authorisation on behalf of the administrative body when taking the administrative decision complained of. The approach to this ground of review of the French Administrative Courts and the CJEU differs in that the CJEU places importance both on the measure and the legislative basis it purports to be based on whereas the Conseil d’Etat places importance on the powers which the administrative body taking the decision possesses. The Conseil d’Etat does not delve

\textsuperscript{12} Craig P, EU Administrative Law, Oxford University Press 2006, pg. 265

\textsuperscript{13} Article 33 of the ECSC Treaty.
into the substantive elements of the administrative decision complained of as does the CJEU. It also further classifies this ground of review as to the type of incompetence attached to the administrative body. Thus it differentiates between incompétence ratione materiae (incompetence due to lack of power to adopt the act complained of), incompétence ratione temporis (incompetence due to non-observance of the prescribed time) and incompétence ratione loci (incompetence in relation to the territory to which the administrative act applies).

On the other hand, the CJEU does not seem to classify the ground of lack of competence in these terms but it has annulled measures of the Council because the latter chose the wrong legal basis for the adoption of regulations which it could have otherwise adopted on a different legal basis. Similarly the CJEU has annulled measures on the basis that the Commission was not empowered to enter into international agreements (incompétence ratione materiae) because it was not within its jurisdiction to do so (incompétence ratione loci).

La vice de forme, the equivalent of which is ‘infringement of an essential procedural requirement’ concerns procedural rules rather than the substantive act or measure itself. French Administrative Law distinguishes between two types of procedures: (i) formalités substantielles and formalités non substantielles. The formal is a procedural requirement which if violated gives rise to the right of redress whereas the violation of the latter does not, as it is not essential that it be followed. It is only facultative. This is because the non-essential formalities do not,

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generally speaking, give rise to a violation of individual rights.

Four types of essential procedural requirements have been identified by the Conseil d'Etat: (i) failure to observe the duty to give reasons, (ii) failure to observe the principle of the rights of defence, (iii) failure to observe the rules of consultation, and (iv) failure to observe the rules of composition of councils or boards.

Under EU Law, infringement of an essential procedural requirement occurs when the procedure prescribed by the Treaty to adopt a measure is not observed. This also includes a violation of procedural rules laid down in secondary legislation based on the Treaty or which are prescribed by a general principle of law, such as the principles of natural justice. Like French Administrative Law, EU Law makes a distinction between essential and non-essential procedural requirements. A violation of this ground also takes place where Article 308 TFEU is not observed. This article requires administrative and legal acts adopted by the institution to state the reasons on which such acts are based and ‘must disclose in clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question’. The right to present one’s case and to have access to the relevant documents in circumstances where a decision of an institution can adversely affect their rights has also been upheld by the CJEU and is regarded as a general principle of law which particularly applies to natural or

15 This right closely resembles the right to be heard and to be given the opportunity to present one’s case.

legal persons against whom proceedings are commenced.17

The test employed by the CJEU and the Conseil d'État to decide whether the ground of infringement of an essential procedural requirement exists may be said to be quite similar. An infringement of the unwritten principles of law is regarded by both courts as being a violation of this ground, which in both legal systems includes the right to be heard and the right to present one’s case. In both systems of law there is a duty to give reasons and a duty to state the legal basis upon which a measure is being taken.

The third ground, that of violation of the law under French law and violation of Treaty Law under EU law includes also the violation of the general principles of law and any rule of law including subsidiary legislation.

Violation de la loi under French Law is an alleged violation of a rule of law, whether written or unwritten. This ground engages the Conseil d'État to verify whether or not a particular law has been infringed by the administration. This requires the court to make an appreciation of the administration decision complained of, the facts surrounding such decision, and the applicable law. The exercise of verification of the facts of the case involves the test known as the exactitude matérielle et l’évaluation des faits. It involves both a subjective and an objective test in that primarily the judge assesses whether the damage alleged in fact exists, followed by an objective appreciation of the facts of the case (qualification juridique des faits).

17 In cases where it is the natural or legal person proposing the lawsuit, the requisites of direct and individual concern must be satisfied before the case may initiate.
Violation of Treaty rules or of any rule of law relating to its application will also annul the administrative act complained of under EU Law. This ground may be said to overlap with the other grounds of review because lack of competence, omission to clearly state the reasons behind an act and infringement of an essential procedural requirement all constitute a violation of the Treaty rules or any subsidiary rule. This may also explain why the CJEU does not habitually identify the ground upon which it is relying when reviewing an act. This is especially so when the case under review concerns the correct legal basis for a measure.18

Détournement de pouvoir, translated as ‘misuse of power’ is a ground of review upon which the Conseil d’Etat analyses the reasons which led the administrative body to take a particular act or enact a particular measure. This ground of review refers to improper intention and improper procedure followed on the part of the administration. The Conseil d’Etat has developed three categories of cases under this heading which if proved, will lead to the annulment of the administrative act complained of: (i) when the administrative act is completely taken without the public interest in mind, (ii) when the administrative act is taken on the basis of the public interest but the discretion which the administration exercises in doing so was not conferred by law for that purpose; (iii) in cases of détournement de procedure where the administration, concealing the real content of the act under a false appearance, follows a procedure reserved by law for other purposes. This ground of review entails the administrative judge to analyse and establish two things, the intention of the administration behind its decision, and the legal aim

which is rarely stated by the administration and which is envisaged by the law conferring the discretion to the administration.

Misuse of power under EU Law is the ground which may be said to resemble mostly the French ground of review of détournement de pouvoir. Tillotson and Foster define this ground as alleging ‘the use of a legitimate power in an illegitimate way or for an illegitimate end’. This ground is usually invoked against decisions of the Commission and EU legislative acts. Like the French Conseil d’Etat, the CJEU, under this heading, engages in an exercise of determining the subjective intention of the institution from which the challenged act emanates in order to try and establish, or at least infer from the institution’s acts, whether such institution had in fact ulterior motives other than those legitimately stated in the challenged measure. However, since this intention is quite difficult to establish, both the CJEU and the Conseil d’Etat have to rely on circumstantial evidence from which the subjective intention may be inferred. Originally the CJEU applied the French approach to this ground and examined the subjective intention of the institution without considering the objective elements of the case. However, today the CJEU also examines if there was an objective deviation from the aim of the Treaty on the part of the institution (objective consideration). Where more than one aim has been pursued in adopting the contested decision, both Courts, discriminate between an improper aim which was decisive in the attainment of such decision and an improper aim which, although illegal, was not the dominant aim leading to the contested decision.

Judgments and Degrees of Judicial Control

The early judgments of the CJEU resembled judgments of the Conseil d'Etat in that they were, as Arnull puts it, ‘spectacularly uninformative’\textsuperscript{20} However, with the introduction of the publication in the law reports of the Opinion of the Advocate General and a detailed account based on the report of the Judge Rapporteur, there was a move away from its French origins. To date, the judgments delivered by the Conseil d'Etat remain very short and very uninformative as to the legal doctrine underlying the judicial decision. The judgments of the Conseil d'Etat are, according to Arnull, ‘designed to give the impression that the Court is merely deducing outcomes determined by legislative provisions’.\textsuperscript{21} The Conseil d’Etat does not undertake any interpretative analysis of the circumstances of the case and the law. It merely slots the case into the purview of the applicable law, and states the applicable rule to that case. In many cases, due to the lack of legislation in the area of French Administrative law, the Conseil d’Etat has to formulate itself the rule which permits it to decide the case and it does this in a very concise manner.

When performing judicial review of administrative acts or measures, both the CJEU and the Conseil d'Etat exercise different degrees of control over the administrative body taking the contested decision. The degree of control exercised over the EU institutions

\textsuperscript{20} Arnull A, The European Union and its Court of Justice, Oxford University Press 2006, pg. 623

\textsuperscript{21} Ibid.
and the administrative bodies respectively depends on the extent of discretionary powers afforded to such institutions or bodies. Where the law requires the institution or the public body to act within defined parameters and under certain conditions, the degree of control of both courts will be more stringent and comprehensive since discretionary power is limited by legislative provisions.

There are two types of judicial control over administrative acts and measures, utilised by both the CJEU and the Conseil d’Etat: (i) Comprehensive Review also referred to as full or normal review, and (ii) Restricted Review.

Comprehensive review of an administrative measure is exercised where a particular mode of action has been prescribed by the Treaty and the Institution has little if any discretion in its implementation. It will adopt this approach and apply full review in cases concerning questions of law, and in cases where the Institution has relied on factual circumstances which are a pre-condition for the exercise of its subsequent powers prescribed by the relative legislation. In Commission v. Tetra Laval, the CJEU exercised full review when although acknowledging that the Commission did have a margin of discretion when interpreting information of an economic nature, nonetheless engaged in determining whether the evidence relied on by the Commission was factually accurate. The Court also verified whether that evidence contained all the information required to assess the situation at hand and whether such information was capable of substantiating the conclusions which the Commission had drawn from it. In other words, the CJEU scrutinised every step followed by the Commission in interpreting information of an economic nature which subsequently lead to the contested measure. In
the area of State Aid, the CJEU also applies full review because it perceives State Aid as a legal concept rather than a matter of policy. However, the CJEU usually restricts its control where a complex economic appraisal is involved. This degree of control is also exercised in cases where the Commission imposes fines on undertakings or prohibits undertaking concentrations. It will also exercise full control over measures which may affect human dignity or individual rights.

Full judicial control over administrative acts, referred to as ‘normal control’, is also utilised by the Conseil d’Etat. This approach usually involves the scrutiny of both fact and law by the court. Unlike the CJEU, the Conseil d’Etat has established through its judgments the areas in which it will apply normal control of review, such as areas which concern individual rights, cases involving disciplinary action against public officers, police action which allegedly affects human dignity, administrative measures taken in relation to religious sentiment, refusals by the Minister to grant visas to foreigners, administrative decisions relating to adoptions and cases involving the right of trade unions to represent a given group.

Restricted review, on the other hand, is exercised where the institutions or the public bodies have discretion whether or not to pursue a particular mode of action. This limited control of review is usually applied by the CJEU in cases involving complex economic, social and technical assessments carried out by the EU institutions involved. The Conseil d’Etat originally applied this form of control over civil employment cases which mainly concerned the interpretation of the facts in a given case. When exercising restricted review, both the CJEU and the Conseil d’Etat apply the test for manifest error of appraisal or assessment (erreur manifeste
d'appreciation). But both courts have developed their own interpretation of the doctrine. Whereas the CJEU encompasses both error of fact and error of law within this test, the Conseil d'Etat limits this doctrine to a wrong assessment of the facts on the part of the administration.\(^\text{22}\)

The CJEU has held that in cases where the EU institution has wide discretionary powers its review will be confined to verifying whether the institution ‘has exceeded the scope of its discretion by a distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process’.\(^\text{23}\) On the other hand, the Conseil d'Etat engages in an exercise of interpretation of the facts of the case and in relation to the applicable law. If this interpretation, which is performed by the administration when taking the contested decision, reflects a gross error which is apparent and serious, the Conseil d'Etat will quash the decision.

Conclusion

The doctrine of judicial review under French Administrative Law and under EU Administrative Law has been mainly developed judicially. It is remarkable that in both systems of law the Courts have had to fill in the gaps of the law since the latter was insufficient to cover all areas which required regulation. Both the CJEU and the Conseil d'Etat have had to supplement the law with general principles of law not forming part of the written law.

\(^{22}\) The Conseil d'Etat has a separate doctrine known as the erreur du droit, where the Court determines whether the public body has made an error when applying the law.

\(^{23}\) Case C-225/91, Mantra SA v. Commission, [1993] ECRI-3202
The procedure followed in both courts is also quite similar. This is because the CJEU was modelled on the French model. In both systems the courts are not very willing to delve into administrative affairs where the administration or the institution concerned has wide discretionary powers. The grounds of review envisaged by Article 263 TFEU, although originally based on the French model, now also incorporate juristic thought and doctrine of other Member States, adopting not only general principles of law but also the judicial style of delivering more detailed and more reasoned judgments. Both courts have been instrumental in developing their administrative law system through their judgments. As Schwarze states, ‘what the French Conseil d’Etat did for French Administrative Law through its creative law-making, the European Court of Justice has initiated is similar manner for the evolving edifice of European Administrative Law’.24

Note:
This article has been based on the author’s dissertation entitled ‘The Doctrine of Judicial Review in French Administrative Law and EU Administrative Law: A Comparative Study’, presented for the MA (Laws) degree, at the University of Malta.