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Preliminary Reference on Validity and the National Court: What Contribution to the Rule of Law and Effective Judicial Protection in the EU? A Focus on the French Administrative Judge

Abstract

While the cases of preliminary ruling on validity are not numerous before the European Court of Justice, particularly in comparison with the preliminary ruling on interpretation, this mechanism plays an essential role in promoting the legality of the European legal order. Since direct access to the courts is ultimately very restrictive for individual claimants, indirect access to the Union courts is an essential means of ensuring that Union norms are subject to judicial review. However, because of the conditions set up for its implementation, the national judge has a certain margin of appreciation, and in the end, as the analysis of the practice of the French administrative judge shows, the hypotheses for triggering a valid preliminary ruling remain limited. However, this does not mean that the national court is resisting, as this practice can be part of a dialogue between judges. However, it leads us to put into perspective the capacity of the preliminary ruling on validity to compensate for the very limited access to actions for annulment before the European Court of Justice.

Keywords: preliminary ruling in validity, national judge, French administrative judge, *acte clair*, case law, European Court of Justice, *Conseil d'Etat*

I Introduction: Why Is It a Question?

The role of the national judge and, more broadly, that of the dialogue between judges, in the dynamics and deepening of the integration process has for long been stressed[1] and

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1 Robert Lecourt, *L'Europe des juges* (Bruylant 1976).

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is frequently analysed. The national judge is a pillar of the integration process, and this central role has had repercussions on its office and its powers.[2] Indeed, in the name of the imperative of the effectiveness of Union law, its powers have increased.[3] At the same time, its responsibilities in the Union's legal order towards the concrete enforcement of the European Union law and principles have also increased. This led to the greater involvement of the European Court of justice in monitoring the national courts. Since the *Köbler* case,[4] a Member State may be held liable if the national court violates its obligation to make a reference for a preliminary ruling. Hence, the national court has an obligation, based on Article 267 TFEU, to make a reference for a preliminary ruling to the Court of Justice when a question concerning the interpretation or validity of a Union rule arises during proceedings, in the case it is a court against whose decisions there is no judicial remedy under national law.[5]

One of the reasons for the increased supervision of the national court is its essential role for the implementation of Union standards and thus their effectiveness. In this context, the national court is the decisive level, not only for the daily application of Union norms, but especially their uniform application in all the Member States of the Union.[6] The national court is also a core element in guaranteeing the Rule of Law in the European Union legal order.[7] This is not contrary to the principle of the Court of Justice's monopoly on interpreting and assessing the legality of Union rules.[8] In this context, the national judge is a relay. Such a role is regularly stressed, particularly since the famous UPA ruling.[9] While the Court of Justice was invited, following the Court of First Instance,[10] to relax its interpretation of the standing of individuals, natural or legal persons, in the context of an action for annulment,

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[2] Oliver Dubos, *Les juridictions nationales, juge communautaire* (Dalloz, 2001); Mariolina Eliantonio, *Europeanisation of Administrative Justice?* (2009 Europa Law Publishing 2009); Jan H. Jans, Sacha Prechal, Robert J. G. M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015).

[3] Emilie Chevalier, 'Chapter 7 Remedies' in Chris Backes, Mariolina Eliantonio (eds), *Cases, Materials and Text on Judicial Review of Administrative Action* (Hart Publishing, 2019) 555–690.

[4] ECJ, 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI: ECLI:EU:C:2003:513.

[5] Of course, the prerogatives of the national courts are slightly different according to the type of preliminary ruling, on interpretation or on validity. While the Court of Justice has the monopoly of interpretating and ruling on the validity of EU norms (art. 19 TEU), the national judge has a wider margin of discretion while applying EU law and may, to a certain extent, be in a position of interpreting EU norms. On the contrary, it is never possible for the national judge to review the legality of EU norms.

[6] Alec Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority: *CILFIT* and *Foto-Frost*' in Miguel Poiares Maduro, Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart Publishing 2010) 201; Rob van Gestel, Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019).

[7] ECJ, 23 April 1986, *Parti écologiste 'Les Verts' v European Parliament*, 294/83, ECLI:EU:C:1986:166.

[8] Article 19 TEU.

[9] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462.

[10] CFI, 3 May 2002, *Jégo-Quéré & Cie SA v Commission of the European Communities*, T-177/01, ECLI:EU:T:2002:112.

based on Article 263 §4 TFEU, the EU supreme judge confirmed the strict interpretation retained in the *Plaumann* case.[11] According to the Court, this restrictive approach is still compatible with the fundamental right to access to the court[12] and to right of effective judicial protection,[13] whereas, in practice, it is it almost impossible for individuals to challenge acts of general application. In fact, the Court bases the argument of the systemic nature of the remedies, according to which all the direct and indirect remedies developed within the legal order of the European Union constitute a consistent system, the articulation of which safeguards the right to an effective remedy against the acts of the Union.[14] In this context, the role of the national court is emphasised, a role enforced through the preliminary ruling on validity.[15]

The aim of this paper is to analyse the practice of preliminary rulings on validity by the French administrative courts. The analysis is based on an empirical approach, which aims to assess the extent to which this practice effectively guarantees the Rule of Law at the level of the Union or, on the contrary, constitutes an obstacle. Indeed, if the national court does not refer a preliminary ruling on validity, the submission of Union norms to judicial review, especially acts of general application such as regulations, may be potentially non-existent, even if review by way of a plea of illegality remains possible.[16] However, the approach of the French administrative courts in this respect is ultimately nuanced, their practice being characterised by a cautious use of the preliminary ruling on validity. This paper will first stress the importance of the use of the preliminary ruling of validity by the national judge (II) and the peculiarity of the position of the French administrative judge in this respect (III). Then, it will offer an analysis of the practice of the French administrative judge (IV), before developing some concluding remarks (V).

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[11] ECJ, 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, 25-62, ECLI:EU:C:1963:17.

[12] Articles 13 ECHR and 47 of the Charter of Fundamental Rights.

[13] ECJ, 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, C-432/05, ECLI:EU:C:2007:163.

[14] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462

[15] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462, para 40 and 41: '40 By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts* v *Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity. 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'

[16] Article 277 TFEU.

II The Importance of the National Court's Practice of Referring a Preliminary Ruling on Validity

In the light of the Court of Justice's approach to the system of legal remedies, the national court's practice of preliminary rulings on validity brings a decisive contribution to guaranteeing the effectiveness of the right of access to court and effective judicial protection, and thus ultimately to guaranteeing the Rule of Law for the Union legal order. The contribution of the national court to the effectiveness of the right to access to court is different from its contribution in the case of a reference for a preliminary ruling on interpretation. In the case of an action brought before it, the national court has a role to play in censoring national rules that do not comply with Union law, if necessary, by requesting a preliminary ruling on interpretation. As far as the practice of referring matters for a preliminary ruling on validity is concerned, one needs to analyse another side of the national court's action, which is that of guaranteeing the legality of Union norms. As mentioned above, this role is not self-evident, due to the monopoly of the Court of Justice. However, according to the systemic conception of legal remedies within the Union, its intervention is then decisive in guaranteeing that the legality of EU norms can finally be reviewed, even if happening at a very late stage. The triggering of a preliminary ruling on validity is therefore a prerequisite for the full effectiveness of the right of access to court in the EU legal order.

The use of preliminary rulings on validity by the national court seems to have received less attention in the academic literature.[17] This may first be justified by the fact that fewer judgments are given on validity references. In terms of litigation strategy, references for preliminary rulings on validity are part of a defensive strategy on the application of Union law, which, from the point of view of the claimants, may seem less interesting and useful, since in this case they seek to prevent the application of Union law. On the contrary, when a reference for a preliminary ruling on interpretation is requested, it is from a protective perspective, and the applicants seek to obtain the application of Union law to their benefit. Through the integration process, the claim of the application of Union law is intended to challenge or set aside a national rule, and then is a source of increased protection for the applicants. The objective of the integration process is first and foremost to apply the Union's norms within the Member States. This lesser quantitative status therefore justifies a more limited interest since, *de facto*, references for preliminary rulings on validity have a more limited visibility. Moreover, the attention paid to the dynamics of the integration process leads mainly to focus on enforcement of secondary Union law within the national legal orders.

Nevertheless, in the face of the *status quo* of the European Court of Justice on the conditions of standing in actions for annulment, the national court has no less responsibility

[17] T. L. Early, 'The scope of preliminary rulings on the validity of Community law' (1980) 15 (2) The Irish Jurist (new series) 237–262; Nial Fennelly, 'The role of the national judge in ensuring access to community Justice Reflections on the case law of the community courts four years on from Jégo-Quéré/UPA' (2006) (7) ERA Forum 463–475. https://doi.org/10.1007/BF02856584

than in the context of the positive application of European Union law. Although the preliminary ruling on validity neutralises the application of an illegal Union norm,[18] the national court nevertheless participates, *in fine*, in the application of Union law and, more especially, fundamental EU norms. Moreover, the intervention of the national court, by means of the preliminary ruling on validity, is essential to guarantee the promotion of the Rule of Law, since it opens a possibility not only to guarantee the legality of the norms of the Union, but also of the national implementing acts. Indeed, in the perspective of the development of the European administrative space,[19] there are many acts adopted through co-administration procedures in different areas. Whether these mechanisms are horizontal or vertical, they all generate a chain of national and European acts, usually of a different nature, binding or non-binding. This category of acts creates challenges for judicial review.[20] For example, the legality of the national act may be conditional on the legality of the Union norm.[21] Therefore, the effectiveness of the review of the legality of the national implementing act may remain conditional on the review of the legality of the national norm. Such hypotheses are developing, whether through mechanisms of administrative cooperation or co-administration, or when national acts are adopted 'on the basis' of Union norms.

III The Particularity of the French Administrative Courts Regarding Preliminary Rulings on Validity

This paper, which does not claim to offer an exhaustive analysis of the issue, will focus primarily on the French administrative court, with the ambition of giving an overview of the practice of national courts. The French administrative judge is undeniably comparable to any

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[18] ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452

[19] Herwig C. H. Hofmann, Alexander Türk (eds), *EU Administrative governance* (Elgar 2006, Cheltenham, Northampton) https://doi.org/10.4337/9781845429966; Herwig C. H. Hofmann, 'Mapping the European Administrative Space' (2008 July) 31 (4) West European Politics 662. https://doi.org/10.1080/01402380801905918; Emilie Chevalier, 'Espace administratif européen' in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2022, Bruxelles) 907.

[20] Herwig C.H. Hofmann, Alexander Türk, *Legal challenges in EU Administrative Law: Towards an Integrated Administration* (Elgar 2009) https://doi.org/10.4337/9781848449206; Jarle Trondal, Michael Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system' (2017) 9 European Political Science Review 73. https://doi.org/10.1017/S1755773915000223; Matthias Ruffert, 'European Composite Administration: the Transnational Administrative Act' in Oswald Jansen, Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) 277–306; Eberhard Schmidt-Aßmann, 'Le modèle de l'administration composée et le rôle du droit administratif européen' (2006) Revue Française de Droit Administratif 1246–1255.

[21] Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Non justiciable National Law' (2020 March) 16 (1) European Constitutional Law Review 63–90. https://doi.org/10.1017/S1574019620000073; see for example Emilie Chevalier, 'Précisions sur l'accès au juge national dans le cadre d'une procédure administrative composée (CJUE, 29 janvier 2020, GAEC Jeanningros, C-785/18)' (2020) (2) Jus Vini/ Journal of Wine & Spirits Law 257–268.

other judge of a Member State, as far as their obligations based on Union law are concerned. Behind the reference to the 'administrative judge', the paper refers here to the judges of first instance *(Tribunal administratif)*, the administrative courts of appeal and finally the Council of State. It is interesting to note that a preliminary reference on validity has not yet been made by the judge of emergency (interim relief judge). This can easily be explained: when an application for a ruling is made in emergency cases, the judge limits themself to a 'manifest' control of the legality of the act that is the subject of the appeal.[22] To question the validity of an EU act would lead to a return to a classic review of legality. Furthermore, regarding the judges who rule on the merits of the case, it should be remembered that they are not all in the same position regarding the exercise of the preliminary ruling procedure. Only the court 'against whose decisions there is no judicial remedy' is under an obligation imposed by Union law to make a reference for a preliminary ruling.[23] In the case of France, it is the Council of State, with a few exceptions.[24] Nevertheless, it remains relevant to include all judges in the analysis, since, if any doubts arise concerning the validity of an EU norm, any national judge is under an obligation to refer to the European Court of Justice.[25] The mention of a few additional elements may help here to highlight what may characterise the position of the French administrative judge and explain the general background of the study.

1 Conditions of Access to a French Administrative Judge

First of all, in France, by virtue of the principle of jurisdictional dualism, the judicial judge and the administrative judge co-exist, the latter being responsible for reviewing the legality of the acts and actions of the public authority.[26] In this respect, a focus on its use of the preliminary ruling on validity is particularly relevant, since it is while reviewing the legality of national administrative acts that questions arise most frequently as to the validity of a Union norm. Indeed, this question is dealt with the logic of the exception of illegality.[27] The challenge of the illegality of the European norm is then part of the arguments raised by the plaintiff to obtain the annulment of the national act implementing the Union regulation. The Union norm challenged indirectly may be a legislative act or an executive act of the Union,[28] and the national norm an administrative act. Moreover, it is relevant to stress

[22] Article L521-2 of the Code of Administrative Justice.

[23] Article 267 TFEU.

[24] Article L111-1 of the Code of Administrative Justice, Art. L311-2 and s. of the Code of Administrative Justice.

[25] See ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452.

[26] Chris Backes, Mariolina Eliantonio (eds), *Cases, Materials and Text on Judicial Review of Administrative Action* (Hart Publishing 2019).

[27] Mariolina Eliantonio, Dacian Dragos, *Indirect Judicial Review in Administrative Law – Legality vs Legal Certainty in Europe*, Routledge, 2023.

[28] For the distinction, see Olivier Dubos, François-Vivien Guiot, "Actes d'exécution de l'Union', in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2022, Bruxelles), 93.

that administrative courts represent a potentially very accessible way for individuals to succeed in indirectly challenging Union norms. Indeed, the standing requirements before the French administrative judge are broadly assessed, as they are based on interest rather than on subjective right.[29] In order for an action for annulment *(recours en excès de pouvoir)* to be admissible,[30] the applicant must show that they are individually and directly affected by the act, namely. that their personal situation must be impacted following the adoption of the act. Thus, insofar as a Union norm implies a national implementing act or generates implementing acts, the French administrative court may be regarded as accessible to compensate for the narrowness of direct access to the Union court.[31]

2 Relationship between the French Administrative Judge and the Court of Justice

Relations between the Court of Justice and the French administrative courts have not always been smooth. Indeed, one may identify a certain lack of confidence on the part of the French administrative courts in making a reference for a preliminary ruling. First, in the case of the ordinary courts, courts have sometimes recalled the freedom of the ordinary courts, the decisions of which are subject to remedy, to refer for preliminary rulings, even if the parties request them to do so. For example, in a press release, a member of the Administrative Court of Appeal of Lyon recalled the importance of the principle of procedural autonomy, while deciding whether to refer to the Court of justice or not.[32] Of

[29] Backes, Eliantonio (n 26).

[30] Obviously, action for annulment is not the only way for an applicant to challenge the validity of an EU norm indirectly. The action in liability may also be used and is available before the French administrative judge. However, it is a much less relevant remedy in this respect.

[31] In accordance with the reservations expressed by Advocate General Jacobs in his conclusions in the UPA ruling (Opinion of Advocate General Jacobs delivered on 21 March 2002 under Case C-50/00 P, *Unión de Pequeños Agricultores*) the accessibility of this route remains conditional on the existence of national implementing acts, and therefore cannot be used in cases where the Union norm does not require implementing acts.

[32] Comment by Marc Clement, 1st Councillor at the Administrative Court of Appeal of Lyon, 'Right to be heard, right of defence and obligation to leave the territory: about the decision of the Administrative Court of Appeal of Lyon of 14 March 2013, M.X. n°12LY02704, available at <http://www.gdr-elsj.eu/2013/04/29/asile/droit-detre-entendu-droit-de-la-defense-et-obligation-de-quitter-le-territoire-a-propos-de-larret-caa-lyon-du-14-mars-2013-m/> accessed 30 December 2022: 'In view of all the difficulties described above, it is legitimate to ask whether it would be appropriate to refer a question to the Court of Justice for a preliminary ruling. This is not the route taken by the Court of First Instance and the Administrative Court of Appeal. […H]is right, which in the past may have been confined to specialised and technical disputes, is now a matter of everyday life in the courts. The current system of dialogue between the Court of Justice and the national courts means that the number of references for preliminary rulings remains limited (of the 423 references for preliminary rulings registered in 2011 for the 27 Member States of the European Union, 31 came from French courts). Preliminary references are therefore an exceptional measure. Furthermore, it should be stressed that the mechanism of the preliminary ruling aims to provide a general overview and does not transfer the decision from the national court to the European court.'

course, such a position is not contrary to EU law., however, it reflects a certain claim to the freedom of whether or not to use the mechanism of Article 267 TFEU. The position of the Council of State is even more delicate. First, the French Council was at the origin, very early on, of the theory of the clear act *(acte clair)*. Indeed, in the *Société des pétroles Shell-Berre* ruling,[33] the Council of State considered, from 1964, that it could itself interpret a European norm when this interpretation did not pose any serious difficulty. This approach was subsequently confirmed by the Court of Justice itself in the *CILFIT* case.[34] The President of the Administrative Jurisdiction Division, Bernard Stirn, who later became Vice-President of the Council of State, considered that such a position was part of a context of 'mistrust', and, 'behind this decision there is a desire to limit the number of preliminary questions: it was not until 1970 that the first preliminary reference was made, 13 years after the entry into force of the Treaty of Rome.[35] The Council of State subsequently became more open to the EU legal order from the 1980s onwards, incorporating European principles and solutions and recognising the specific nature of EU law.[36] However, there are still points of friction. Regarding the practice of referring cases for preliminary rulings, France was recently condemned for failing to comply with EU law because of the refusal of the Council of State to refer a case for preliminary rulings on interpretation.[37] Clearly, there is no 'war of judges' between the French administrative courts and the Court of Justice of the European Union, but the exercise of preliminary rulings can crystallise tensions, and the decision on whether or not to make a reference for a preliminary ruling is a means of expressing the sovereignty of the judge.

3 The Place of the Preliminary Ruling on Validity in the System of Domestic Remedies

One point that also reflects the specificity of the administrative court's approach to the validity of preliminary rulings is the place of this mechanism within the domestic remedies. Two elements shall be explained.

First, the enforcement of the preliminary ruling of validity may be linked to the implementation of the Priority Question of Constitutionality *(question prioritaire de constitutionnalité – QPC)*. This mechanism, introduced following a constitutional revision in 2008, allows the ordinary court to suspend the proceedings before it and to refer the matter to the Constitutional Council for a ruling on the constitutionality of the legislation,

[33] Council of State, 19 June 1964, *Société des pétroles Shell-Berre*.

[34] ECJ, 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 283/81, ECLI:EU:C:1982:335

[35] Council of State, 10 July 1970, *Synacomex*.

[36] Bernard Stirn, Le Conseil d'Etat et l'ordre juridique européen, available at <https://www.conseil-etat.fr/publications-colloques/discours-et-interventions/le-conseil-d-etat-et-l-ordre-juridique-europeen#_edn7> accessed 30 December 2022.

[37] ECJ, 4 October 2018, *Commission v. France*, C-416/17, ECLI:EU:C:2018:811.

insofar as such a question is important for the resolution of the dispute submitted before it.[38] However, it may happen that, in addition to the plea of unconstitutionality of the law, in the same case, the invalidity of the Directive which is implemented by the challenged legislation is raised. This latter plea then has the same purpose, which is to set aside the challenged national norm. The question then arises as to the articulation, from a temporal point of view, between the priority question of constitutionality and the preliminary reference for a preliminary ruling on validity. The use of the word 'priority' to describe the preliminary reference to the Constitutional Council obliges the national court to refer the matter first to the Constitutional Council, and, if the legislation is declared in compliance with the Constitution, it can then refer the matter to the Court of Justice to challenge the validity of the Directive. This approach was in line with Union law and the principle of primacy of EU law, since the obligation to bring the case before the Constitutional court only has the consequence of potentially postponing the referral to the ECJ.[39] On the contrary, if the legislation is declared unconstitutional, it shall be repealed, and consequently a preliminary reference on validity becomes irrelevant for the dispute. As a result of this articulation, some references for preliminary rulings on validity are not made, to the European Court of Justice, and this means that some opportunities to assess the validity of the EU norm may potentially be lost.

Second, the preliminary ruling on validity is a mechanism of primary importance for the implementation of the principle of primacy in the French legal order, since it is a condition of the legality of EU norms and implementing national norms *in fine*. It is well-known that guaranteeing compliance with the supreme norms of the Union's legal order, and especially with fundamental rights, has been a decisive factor in implementing the principle of primacy of the Union's norms, and above all in removing the obstacles specified over the decades by the various supreme courts of the Member States.[40] In the French system, and especially with regard to the implementation of the principle of primacy before the administrative court, the Council of State has developed a conciliatory case law in the *Arcelor* judgment, delivered in 2007.[41] Indeed, the administrative judge considered that, in principle, the national court does not review the legality of national regulatory acts that implement a directive into the domestic legal order, except in two cases: first, in the event of infringement of a principle inherent in the constitutional identity of France; second, when the national act is challenged towards a fundamental constitutional right that has no equivalent in European Union law. Nevertheless, in the most frequent cases, the argument raised aims at challenging the regulatory act in relation to a fundamental constitutional right

[38] Constitutional Law N° 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890); Organic Law No 20091523 of 10 December 2009 on the application of Article 611 of the Constitution (JORF of 11 December 2009, p. 21379).

[39] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, ECLI:EU:C:2010:363.

[40] Ruling of the German Constitutional Court, 'Solange I', 29 May 1974.

[41] Council of State, 8 February 2007, *Société* Arcelor Atlantique et Lorraine et autres, n° 287110.

which has its equivalent within the European legal order. Then, the administrative judge considers that he is not competent to review the implementing regulatory act in relation to the constitutional right, since it would lead the national judge to review the directive with a refence to a constitutional right indirectly. Consequently, and complying with the reasoning of the Court, the only possible means of reviewing the legality is to refer the matter to the Court of Justice for a preliminary ruling to review the validity of the implemented directive. This would make it possible to obtain an indirect review of the legality of the national regulatory act. Specifically, in this case, the Council of State subsequently referred to the Court of Justice for a preliminary ruling on the validity of Directive 2003/87/EC.[42] After having reviewed the Directive with the EU principle of equality, the European judge confirmed the validity of the Directive.[43] In this way, the mechanism of a preliminary ruling on validity in this context appears to be a central means of guaranteeing the legality of national law itself and of the effectiveness of remedies.[44]

IV Analysis of the Practice of Preliminary Ruling in Validity by the French Administrative Courts

In order to carry out an empirical analysis of the practice of preliminary rulings on validity, two distinct but complementary points of view are considered: an analysis based on the judgments of the Court of Justice on preliminary rulings on validity referred by the French administrative courts, and an analysis of French administrative case law on judgments in which the question of submitting a reference to the Court of Justice for a preliminary ruling on validity has been raised but was declined by the administrative judge.

1 Assessment of ECJ Ruling Following a Referral to the French Administrative Courts for a Preliminary Ruling on Validity

Unsurprisingly, noticeably for the above-mentioned reasons, the number of rulings of the Court of Justice held on references for preliminary rulings on validity is relatively limited.

[42] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ L 275, 25.10.2003, p. 32–46).

[43] ECJ, 16 December 2008, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie*, C-127/07, ECLI:EU:C:2008:728.

[44] For a similar approach of constitutional review of legislation by the Constitutional Council, see CC, 30 November 2006, *Loi relative au secteur de l'énergie*, 2006-543 DC; CC, Décision n° 2013-314P QPC of 4 April 2013, M. Jeremy F.

As a result, the number of rulings on references from French administrative courts is even more limited.[45]

First, it is worth noticing that there are more questions referred by the Council of State, in comparison to those referred by other administrative judges. This prevalence can be explained by an objective element. The Council of State, where the majority of its rulings are not subject to appeal, is under an obligation to make such a reference if a question arises before it. Moreover, for certain types of litigation, the Council of State is the judge of first and last resort, meaning that there is only one level of jurisdiction. This is particularly the case for appeals against administrative acts adopted at government level by ministers. The Council of State is also directly competent for acts adopted by national agencies. In the case of a centralised state such as France, this type of act may constitute, *par excellence*, acts of application or implementation of Union legislation. This is the case regarding decisions authorising GMOs, marketing of plant protection products or others.

Second, the areas concerned are limited but still diverse. They mainly refer to the main important EU policies, which require enforcement measures at the national level. Thus, from the 1980s onwards, references for preliminary rulings were made in the agricultural sector.[46] From the 2000s, the preliminary questions also concern the environmental field, whether on waste management,[47] or the control of gas emissions.[48] Finally, in 2021, the Council of State referred a question concerning the banking sector.[49] These areas seem to have one thing in common, they are highly technical, which would give the national judge a more significant incentive to question the EU judge.

Beyond the quantitative approach, an analysis can be made from a qualitative point of view, and in particular assessing what the contribution of the French administrative court can be to guaranteeing the legality of the European Union's norms. First, all, the preliminary requests initiated by the French administrative judge led to the confirmation of the legality of the challenged Union norms. However, it does not mean that the interest of those preliminary rulings is limited from the perspective of the Rule of Law. Indeed, for example,

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[45] 31 preliminary rulings in validity have been referred by French courts. In comparison, it is about 70 for the German courts, about 50 for Italian courts.

[46] ECJ, 8 March 2007, *Roquette Frères contre Ministre de l'Agriculture, de l'Alimentation, de la Pêche et de la Ruralité*, C-441/05 : ECJ, 11 May 2000, *Gascogne Limousin viandes SA v Office national interprofessionnel des viandes de l'élevage et de l'aviculture* (Ofival), C-56/99, ECLI:EU:C:2000:236 ; ECJ, 24 January 1991, *Société industrielle de transformation de produits agricoles (SITPA) v Office national interprofessionnel des fruits, des légumes et de l'horticulture (Oniflhor),* C-27/90, ECLI:EU:C:1991:32 ; ECJ, 8 June 1989, *Association générale des producteurs de blé et autres céréales (AGPB) v Office national interprofessionnel des céréales (ONIC)*, 167/88, ECLI:EU:C:1989:234.

[47] ECJ, 10 November 2016, *Eco-Emballages SA v Sphère France SAS e.a. and Melitta France SAS e.a. v Ministre de l'Écologie, du Développement durable et de l'Énergie*, Joined Cases C-313/15, C-530/15, ECLI:EU:C:2016:859.

[48] ECJ, 26 July 2017, *ArcelorMittal Atlantique and Lorraine SASU v Ministre de l'Écologie, du Développement durable et de l'Énergie*, C-80/16, ECLI:EU:C:2017:588.

[49] ECJ, 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution (ACPR)*, C-911/19, ECLI:EU:C:2021:599.

the last reference for a preliminary ruling on validity gave rise to an interesting ruling, confirming the contribution of this mechanism to the general case law of the Court. In the judgment of 15 July 2021, *Fédération bancaire française v. Autorité de contrôle prudentiel et de résolution (ACPR)*,[50] the Court of Justice ruled on the Union acts that may be the subject of a reference for a preliminary ruling on validity, considering that they may also be non-binding acts, such as guidelines issued by the European Banking Authority, the approach of Article 267 TFEU being distinguished from that of Article 263 TFEU, and this judgment recalled the conditions for admissibility of a reference for a preliminary ruling on validity, as regards the applicants: whereas a preliminary ruling on validity is not accessible to an applicant that would have standing for a direct action for annulment, the applicant does not have to prove, during the action before a national court and the objection of illegality raised, that the act is of direct and individual concern to them.

Finally, to complete the study of preliminary references on validity triggered by the French administrative court, we can mention the case of the 2018 ECJ ruling on mutagenesis organisms.[51] This judgment has been widely noted as bringing an important limit to the commercialisation of GMOs. However, the contribution of the judgment, which decided to include organisms obtained by mutagenesis in the category of GMOs, and therefore in the scope of EU regulation, results from the answer given to the Court of Justice on the question on interpretation requested by the French Council of State. However, here, the Council of State had also requested a preliminary ruling on validity, seeking a review of Articles 2 and 3 of Directive 2001/18 in relation to the precautionary principle. According to the Court of Justice, such a review had become unnecessary because of the interpretation given by the Court of the Union. Indeed, the question of validity used to have an interest if the Court would have considered that mutagenesis organisms would not fall within the scope of the Directive. Thus, the purpose of the reference for a preliminary ruling on validity would potentially have been to seek increased protection of human health by EU law, but this judgment could confirm the secondary interest in the preliminary reference on validity, compared to the preliminary reference on interpretation. Interpretation has priority over validity review, since the former makes it possible to preserve the existence of the Union norm. In addition, in the case of a preliminary ruling on interpretation, the Court has developed a dynamic interpretation of Union law. This is especially the case in the field of environmental and human health protection. Indeed, the existence of guiding principles, such as the precautionary principle, gives the European Court of Justice a certain room to manoeuvre while interpreting of EU norms, 'in the light of the precautionary principle', as the saying goes. In the aforementioned ruling, the Court of Justice clearly makes a constructive interpretation of the 2001 Directive, an updated interpretation in a way,

[50] ECJ, 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution (ACPR)*, C-911/19, ECLI:EU:C:2021:599.

[51] ECJ, 25 July 2018, *Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt*, C-528/16, ECLI:EU:C:2018:583.

because mutagenesis techniques were not particularly developed at the time the Directive was adopted.

An analysis of the case law of the Court of Justice on references for preliminary rulings on validity is an important first step in understanding the practice of the administrative courts and its effects. This level of analysis may be regarded as the positive side of the reference for preliminary rulings on validity, namely when the national court has enforced it. In order to complete the picture, it is necessary to analyse the practice from the national level. From this point of view, the negative side, when no reference for a preliminary ruling on validity has been made, becomes visible.

2 Analysis of French Administrative Case Law: The Case of Judgments Refusing to Refer a Preliminary Ruling

The analysis of domestic case law is necessary because of the very small number of references for preliminary rulings on validity to the Court of Justice. This analysis will help to identify why a reference is not made. The submitted analysis of French administrative case law focuses on judgments handed down by administrative courts, administrative courts of appeal and the Council of State, in which a plea concerning a request for a preliminary ruling on validity was raised, but no reference was made. The aim is therefore to present and discuss reasons for refusal, if any. A qualitative approach is adopted, while referring to rulings reflecting the main trends followed by the French administrative courts.

What can be noted first is that pleas aiming to raise the invalidity of a Union standard are quite regularly present among those submitted by applicants. This may be explained by the main purpose of appeals before the administrative judge, which is to review the legality of administrative acts. The argument relating to the invalidity of a Union standard is then invoked as part of the pleas raised to challenge the legality of the national administrative decision. Moreover, the procedure before the French administrative court is mainly a written one, which favours a practice of the applicants which consists of listing all the possible arguments, without always developing them with the same intensity. In this context, the exception of illegality of a Union norm is an argument frequently raised, but often insufficiently developed for the administrative judge to pay particular attention to it. As such, in most cases, the French administrative does not even respond to it. Apart from the case of an unsubstantiated plea, there are various reasons for the administrative court to refuse to make a reference for a preliminary ruling on validity.

First, rarely, the administrative court considers the application to be inadmissible because of the status of the applicants. Going before the national court may be a way of compensating for the limited direct access to the EU courts. According to the *TWD* ruling,[52]

[52] ECJ 9 March 1994, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland,* C-188/92, ECLI:EU:C:1994:90.

the admissibility of a reference for a preliminary ruling on validity is conditional on the inadmissibility for the same applicants of the action for annulment against the allegedly invalid act, based on Article 263 TFEU. The administrative judge is then competent to assess the admissibility of the reference for a preliminary ruling on validity requested by the applicants. The Administrative Court of Appeal of Paris considered that, although the action for annulment had been declared admissible by the Court of First Instance against a decision of the Commission related to State aid, it was admissible for the applicants to ask for a preliminary ruling on validity. Indeed, in this case, the Court of Justice had declared direct action inadmissible at the appeal stage. By referring to these rulings, the administrative court of appeal was able to declare admissible the reference for a preliminary ruling on validity requested by a company to challenge the legality of the Commission's decision, even if, in this case, the judge did not send a preliminary ruling to the ECJ.[53]

Another ground for refusal of reference is when the question raised is regarded as not relevant to the dispute.[54] Besides, a reference for a preliminary ruling on validity is refused is when the contested national act is annulled on another basis, in particular because of a violation of a domestic norm, which, for the judge, makes it unnecessary to refer to the Court of Justice.

Furthermore, the national administrative court relies on the absence of a serious difficulty in assessing the legality of the Union norm to justify the non-referral to the Court of Justice. Indeed, the national judge, whose decision is subject to appeal, has the possibility of not referring a preliminary ruling on validity if the question does not raise any difficulty regarding the assessment of its validity.[55] It is a transposition of the *acte clair* theory, applicable to the preliminary ruling on interpretation. However, its enforcement concerning the *validité claire* seems to be delicate. Indeed, while considering that the validity of an EU norm is evident, the border is narrow and the effective review of the legality of the EU norm is close. In order to review the merits of the request for a preliminary ruling, the administrative judge systematises the consideration of the argument relating to the exception of invalidity of the Union norm by recalling the scope of their obligations under Union law. The administrative court quotes the relevant case law of the Court of Justice, namely the *Foto-Frost* and *UPA* judgments. Thus, the powers of the national judge are based on the system of legal remedies, noting that

[53] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523.

[54] Council of State, 2 October 2006, 277722: 'Considering that, contrary to what is maintained by the applicant, the question of the validity of the regulation of the European Parliament and of the Council of 31 March 2004 and of the interpretation of its Article 15 has no bearing on the solution of the present dispute; that, therefore, the conclusions tending to have a preliminary question referred to the Court of Justice of the European Communities can, in any event, only be rejected;'.

[55] ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452, para 14: 'Those courts may consider the validity of a community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the community measure.'

'as the Court held in its judgment of 25 July 2002 in *Unión de Pequeños Agricultores* (Case C-50/00), the Treaty established a complete system of remedies and procedures intended to ensure the review of the legality of the acts of the institutions of the Union.' Moreover, the judge recalls the scope of their powers as regards the assessment of the validity of a Union regulation, noting 'that, on the one hand, as the Court of Justice of the European Union held in its judgment of 22 October 1987 in *Foto-Frost v Hauptzollamt Lübeck-Ost* (aff. 314/85), while the national courts may review the validity of an act of the institutions of the Union and, if they do not consider the pleas of invalidity put forward by the parties before them to be well-founded, reject those pleas by concluding that the act is fully valid, they do not, on the other hand, have jurisdiction to declare those acts invalid themselves.'[56] Thus, the limit of the national court's power lies in the finding the illegality of the Union norm, since it has consequences for the existence of the norm. Thus, only the Court of Justice can call into question the validity of the norm within the Union legal order. The national court can therefore refuse to refer the question on validity if the legality of the EU norm is evident. The division of roles, as established by the Court of Justice, ultimately gives the national court a wide margin of appreciation in deciding whether to make a reference for a preliminary ruling on validity, especially when its decision is subject to appeal. In the case of a court where its decision is not subject to appeal, the position is more delicate and the margin of assessment more limited.

However, at the stage of assessing the relevance of bringing a case before the Court of Justice, the national court may find itself in the position of the European judge, and almost replace it, given that it assesses the legality of the Union norm. Indeed, the national court has considerable latitude in finding whether the difficulty is serious or not. Generally, to reject the request for a preliminary ruling on validity, the administrative court relies heavily on the rulings and even on the reasoning of the Court of Justice itself.[57] The idea is that such a reference reveals that there is no serious difficulty to assess the legality of the norm. It is particularly easy when the European judge had intervened in similar cases.[58] Such a case is quite common, particularly in the field of state aid.[59] In other cases, following the same approach, the administrative court may refuse to make a reference for a preliminary ruling on validity, whereas preliminary rulings have already been made in other cases, even though the reference is on interpretation of EU law.[60] For example, the Council of State mentioned that the British High Court already referred a question to justify the refusal to ask itself to the Court of Justice, in the context of an emergency procedure. Indeed, in this case, one may

[56] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523.

[57] See for example Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523, referring to case C-33/14 P.

[58] See for example Administrative Tribunal of Nantes, 17 May 2016, n° 1008276.

[59] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523, Administrative Tribunal of Nantes, 17 May 2016, n° 1008276.

[60] Council of State, 21 April 2017, 392317.

assume that when the final ruling would be handed by the French administrative judge, the ECJ would have adopted its own ruling on the question on validity.[61]

While considering the seriousness of the plea related to the invalidity, the position of the national court may sometimes be ambiguous, and the border related to its lack of competence to decide on the invalidity of the EU norm, is thin. Indeed, in some cases, the supreme administrative Court seems to enforce the review of the legality of the EU norm. For example, in the case of 13 April 2018, the Council of State has thus assessed the Commission's exercise of its state aid control function.[62] Then, the reasoning is quite long in comparison with the classic style of rulings, and the reasoning of the Council of State is the implementation of a judicial review. Another example is the ruling of 6 October 2021 where the Council of State reviews the validity of Article 54 of Directive 2018/1972 establishing the European Electronic Communications Code, not only in relation to the Aarhus Convention, but also to Articles 11 and 191 TFEU, and specially the precautionary principle.[63] Here, the Council of State ruled also on the direct effect of the Aarhus Convention, ratified by the EU. Thus, the assessment of the absence of serious doubt concerning the validity of an EU norm should not be understood as referring to a limited review of its manifest illegality. If it is not a full review, comparable to that of the Court of Justice itself, it is still a detailed review for the national stage.

Finally, another way of avoiding referral to the Court of Justice is for the administrative court to use the method of *interprétation conforme*, to finally circumvent the request for a preliminary ruling on validity. In the ruling of the Administrative Court of Strasbourg of 21 January 2016, the national judge interpreted Article 39 of Council Regulation 889/2008 on organic production and labelling of organic products, whereas the applicants asked for a preliminary ruling on validity. It considers that this provision shall be interpreted as requiring that tethered animals must have access to open air areas at least twice a week,

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[61] Council of State, Ord., 29 October 2003, 260768: 'Considering therefore that the enforcement of the provisions of Article 4 of the Decree of 1 August 2003 should be suspended; that, on the other hand, there is no need to refer to the Court of Justice of the European Communities for a preliminary ruling on the validity of the Directive of 28 January 2002, since the High Court of Justice has provided for a preliminary ruling with the same scope as that which could result from the present applications'.

[62] Council of State, 13 April 2018, 412098: 'it results from the decision of 5 May 2017 that the Commission, contrary to the applicants' contention, examined compliance with the transparency obligations imposed on the Member States by points 104 to 106 of its guidelines. The plea that it vitiated its decision with a manifest error of assessment on that point is not accompanied by sufficient details to enable its merits to be assessed'; see also Council of State, 9 March 2016, 384092.

[63] Council of State, 6 October 2021, 446302: 'The applicants argue that the insufficient number of studies on the available 5G frequency bands and the doubts about its health effects should have led to the non-adoption of Article 54, Despite the uncertainties and scientific studies on this subject, which are not the subject of any consensus in view of the current state of scientific knowledge available, it does not appear that compliance with the precautionary principle would require, in addition to compliance with the limit values for exposure to electromagnetic fields, additional protective measures against a risk linked to the use of 5G technology. In those circumstances, the pleas alleging disregard for the precautionary principle and the protection of human health must be rejected'.

where access to pasture is not possible.[64] Such interpretation is complying with the labelling requirements, and therefore considers that it is not necessary to accept the applicants' request to refer the matter to the Court of Justice for a preliminary ruling on validity.

V Conclusion

The essential role of the national judge in the process of European integration no longer needs to be demonstrated. The national court is the decisive relay for the day-to-day application of Union law. Although the tensions surrounding the use of the preliminary ruling on interpretation have gradually diminished, especially on the part of the supreme courts, the use of the preliminary ruling on validity remains specific and seems to fall within the scope of powers of the national court, especially in the case of a national court such as the French administrative court, the competence of which is to review the legality of national rules. In this context, the triggering of a reference for a preliminary ruling on validity may be perceived as encroaching on its traditional function, which may explain the development of ways of avoiding referring to the Union court.

Could we really speak of attempts from the French administrative judge to circumvent or avoid the obligation to make a reference for a preliminary ruling on validity? This is not certain. Rather, it is a matter of the national court finding ways of fulfilling its function, i.e. of reviewing the legality of the national act submitted to it, since the reference to the Court of Justice may be only one means among others to review the illegality of the national norm. Obviously, the administrative judge may be more inclined to preserve the control of legality, and to exploit to the maximum the means that limit the dispute to their own courtroom. On top of that, the national court tries to favour the quickest means of action, bearing in mind that referral to the Court of Justice will lead to a suspension of the proceedings for at least ten or fifteen months.

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[64] Administrative Tribunal of Strasbourg, 21 January 2016, 1404968: '[...] that the aforementioned provisions of Article 39 of Regulation (EC) No 889/2008 require that, when they are tethered, cows must have access to an open-air area at least twice a week, in order to promote their welfare; however, these provisions cannot be interpreted as requiring cows to be kept outside at least twice a week, even in the event of climatic conditions or the state of the ground that do not allow them to be taken outside or make it particularly difficult, which would run counter to the intended purpose; that this interpretation appears to be in conformity, on the one hand, with recital 21 of Regulation (EC) No 834/2007, which recommends flexibility "to allow for the adaptation of biological standards and requirements to local climatic or geographical conditions" and, on the other hand, with Article 14(1)(b)(iii) of the same text, which generally makes permanent access to open-air areas subject to the condition that "climatic conditions and the state of the ground so permit"; that, consequently, and without there being any need to refer this point to the Court of Justice of the European Union for a preliminary ruling, in the absence of any serious difficulty, the obligation laid down by the provisions of the aforementioned Article 39 of Regulation (EC) No 889/2008 must be understood as requiring livestock farmers to give their herds access to an open-air area at least twice a week, subject to climatic conditions or the state of the ground not allowing them to be moved out effectively'.

The limited practice of referring questions for preliminary rulings on validity should not lead to question the interest, nor the importance of the relationship between the national court and the Court of Justice. Its contribution to the Rule of Law in the Union's legal order is essential. However, its enforcement remains very random, depending on parameters that are beyond the judge's control in most cases (requests from the parties, quality of the arguments submitted, etc). It is true that concentrating on references made by the administrative courts leads to a certain bias, since certain areas do not appear, which does not mean that they are not dealt with in the context of preliminary rulings on validity. And this study should be extended, both to other judges and to other Member States, since the promotion of the Rule of Law must be assessed globally within the Union's legal order. However, also because of the temporal dimension, since a reference for a preliminary ruling on validity possibly leads to a review of the legality of a Union regulation a long time after its adoption, the reference for a preliminary ruling on validity cannot be seen as a fully adequate way of compensating for the restrictive nature of the conditions of access to the Union courts by way of an action for annulment. A change in the interpretation of standing requirements is undoubtedly desirable, but it cannot be expected solely from the court itself, based on the development of the *Plaumann* case law. It will also require the allocation of additional resources to the Court of Justice, and even changes in its functioning, in order to cope with a potential increase in litigation, while remaining compatible with the requirements of the Rule of Law and effective judicial protection.