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Preliminary rulings on validity of European Union acts: an initial empirical analysis

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Preliminary rulings on validity of European Union acts: an initial empirical analysis.

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Article 267 TFEU is often described as the keystone of the European system of judicial remedies[1]. This article provides the Court of Justice of the European Union with jurisdiction to "give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union". Therefore, it is generally accepted that there are two kinds of preliminary requests: preliminary requests on interpretation and preliminary requests on validity.

Much has been said on preliminary references and their key role for the evolution of EU Law and the European integration process[2]. Professor Joseph Weiler refers to a "quiet revolution" in which the mechanism of the preliminary reference on interpretation plays a crucial role, as it establishes a dialogue between national courts and the European Court of Justice that fosters the process of constitutionalizing EU Law[3].

More recently, empirical studies[4] offer new insights on this remedy, focusing on national practices[5], on "sectorial practices[6]" or on stakeholders' role[7]. In addition, new data on the

[1] See in particular CJEU, Opinion of the Court 2/13 of 18 December 2014, paragraph 176, ECLI:EU:C:2014:2454. ; See C-561/19, ECLI:EU:C:2021:799, Consorzio Italian Management, 6 October 2021, paragraph 27.

[2] See the recent issue of the *European Journal of Legal Studies* on "CJEU Special Issue: The Preliminary Ruling Procedure Today: Revising Article 267 TFEU's Constitutional Backbone", Winter 2023.

[3] WEILER, J. H. H. (1994). A Quiet Revolution: The European Court of Justice and its Interlocutors. *Comparative Political Studies*, 26(4), 510-534. https://doi.org/10.1177/0010414094026004006

[4] The book Researching the European Court of Justice presents various empirical studies on the CJEU. From l Rask Madsen M., Nicola F. G and Vauchez A. (eds), 2022, Cambridge University Press, 374 pages.

[5] See Sarmiento, D. y Arnaldos Orts, E. (2023). La cuestión prejudicial europea en la jurisdicción española, ¿un mito desmentido por las cifras? *Revista de Derecho Comunitario Europeo*, 76, 75-111. doi: https://doi.org/10.18042/cepc/rdce.76.03; Cheruvu S, Krehbiel JN. Do Preliminary References Increase Public Support for European Law? Experimental Evidence from Germany. *International Organization*. 2024;78(1):170-187. doi:10.1017/S0020818323000243

[6] See Rodger and Brook et al (eds.), Judicial Review of Competition Law Enforcement in the EU Member States and the UK (Kluwer 2024)

[7] See Hoevenaars, J. (2020), Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References, *European Papers*, Vol. 5, 2020, No 2, pp. 777-797

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Court of Justice of the European Union and its case-law are also provided. However, no database on preliminary ruling on validity is available. Neither can one find academic studies, whether empirical or doctrinal, specifically devoted to requests for preliminary ruling on validity, even if it is a form of indirect judicial review of norms adopted by EU institutions and organisms. This remedy is often presented as an alternative, to counterbalance the restrictive requirements legal and natural persons must comply with to have standing under Article 263 TFEU.

The aim of this paper is to share a dataset of preliminary references on validity since 1987, date of the landmark Foto-Frost case[8]. This judgement requires lower national courts to refer to the Court of Justice in case of doubt regarding the validity of a European norm, given that the Court of Justice of the European Union has the monopoly to review the acts adopted in accordance with the Treaties. The recently adopted reform of the Statue of the Court of Justice of the European Union now grants jurisdiction the General Court to rule on preliminary references from national courts in specific areas, including preliminary references on validity[9].

The database might be used by the academic community to support, confirm or infirm doctrinal debates on preliminary requests on validity. The study can also have a very practical interest for litigants and for national tribunals, as it shows under which circumstances a declaration of invalidity is pronounced.

The methodology followed to build the database will be presented in the first section, detailing the different criteria used to study the 518 requests that have been identified. Section two will present some interesting results that open new perspectives of research, as exemplified in section three.

I. Methodology: building the database

[8] Case 314/85, ECLI:EU:C:1987:452

[9] The Common system of value added tax; the excise duties; the Customs code; the tariff classification of goods under the Combined Nomenclature; the compensation and assistance to passengers in the event of denial boarding or of delay or cancellation of transport services; the system for greenhouse gas emission allowance trading.

1.1 Sample

The database covers the period 1987-2023 and is composed of 518 cases (20 are orders and 498 are judgments) in which a request for a preliminary ruling on validity has been formulated to the Court of Justice. Although the parties in a national dispute can raise a question on validity, it is the national court that must decide whether an assessment of validity is necessary for the solution of the dispute at hand. It can also refer a question on validity on its own motion. Sometimes, the Court of Justice itself decides that an assessment of validity is necessary even though it is not expressly requested by the referring national court. In those cases, the Court reformulates the question[10]. Sometimes, the national court requests a preliminary ruling on interpretation in the first place, and alternatively, a preliminary ruling on validity. This alternative request depends on the answer given by the Court of Justice to the question on interpretation. This explains why the Court of Justice does not always assess the validity of an EU norm and limits its ruling to the interpretation of the norm. In other cases, the question on validity is not admissible, or the Court decides that it lacks jurisdiction. However, we consider all these cases to be of interest as they also tell how the Court proceeds to review the legality of a European norm and to what extent national courts request a ruling on the validity of such norms.

Those 518 cases come from two complementary sources[11]. On one side, we relied on the available case-law database of the Court of Justice[12], using the following criteria: Period or date = "Date of delivery"; period= "from 01/01/X to 31/12/X"; Procedure and result = "Reference for a preliminary ruling", "Preliminary reference - urgent procedure"; Text = validity. Once a list of cases for the selected year was obtained, we went through each case to review whether it referred effectively to a question on validity. On the other side, this

[10] It happened several times: case C-212/19 (ECLI:EU:C:2020:726), case C-264/18 (ECLI:EU:C:2019:472), case C-300/07 (ECLI:EU:C:2009:358), case C-395/00 (ECLI:EU:C:2002:751), case C-37/89 (ECLI:EU:C:1990:254), case C-204/88 (ECLI:EU:C:1989:643), case 313/86 (ECLI:EU:C:1988:452) and case 20/85 (ECLI:EU:C:1988:283).
[11] We have not found any Learning Machine System able to recollect and offer data on preliminary requests for validity. That is the reason why our work is essentially “homemade”.
[12] https://curia.europa.eu/juris/recherche.jsf?language=en

first list of results has been compared with data obtained (in April 2023) from the Court itself[13] which allow to confirm the validity of our first list and even to remedy possible omissions.

Once the sample was obtained, we analysed each case through the lens of different criteria. Each case is identified by the identification number given by the Court of Justice as well as by the date of the delivery.

1.2 Criteria

1.2.1 Year of delivery

The first criterion of classification refers to the year of delivery. This allows to compare the number of requests per year and to determine whether there are trends over the years considered.

1.2.2 Opinion of the Advocate General

The second criterion refers to the delivery of an opinion from the Advocate General and is called "opinion given". As known, a written opinion is not always required, as for example in case of reasoned order (Article 99 of the Rules of Procedure of the Court of Justice). In addition, the Treaty of Nice introduced the possibility to dispense from having an opinion of the Advocate General for a judgement[14]. This has been translated in Article 20 of the Statute as "Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without

[13] I am extremely grateful to Flavien Mariatte, *Attaché* to the Registrar of the Court of Justice, who generously shared statistical information on preliminary rulings with me at the very beginning of my research.

[14] Art 252 TFEU states: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement." The protocol on the Statute of the Court of Justice was modified in that sense, jointly with the Treaty of Nice that entered into force on February 1st, 2003. Then the Rules of Procedure of the Court were modified accordingly in June 2003.

a submission from the Advocate General". Current Article 59.2 of the Rules of Procedure of the Court mentions also this dispense.

1.2.3 Parties

The next criterion refers to the kind of parties in the national procedure, that we have divided into different categories: individual[15], undertaking[16], association[17], national

[15] Individuals are natural persons when they act on their own. Farmers are also included (C-165/95, ECLI:EU:C:1997:490) Most of those requests relate to social security issues, free movement, taxes, consumer protection. We excluded natural persons when they act as representative of a corporation.

[16] We included in that category any corporation (legal person) whatever is its legal denomination. It can also be a cooperative.

[17] We included in that category any "association" as explicitly referred to. The association can be a professional association ("Syndicat", "Ordre des Barreaux", "Consiglio dell'Ordine degli Avvocati") or a consumers' association (case 686/18 ECLI:EU:C:2020:567, : Associazione Difesa Utenti Servizi Bancari Finanziari Postali Assicurativi) We included also the "Ligue des Droits de L'Homme" (Case C-817/19, ECLI:EU:C:2022:491) or the "Centraal Israëlitisch Consistorie van België" (Case C-336/19, ECLI:EU:C:2020:1031) or the "Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW" (Case C-426/16, ECLI:EU:C:2018:335) or the "Western Sahara Campaign UK" (Case C- C-266/16, ECLI:EU:C:2018:118), "Confédération paysanne" (Case C-528/16, ECLI:EU:C:2018:583) or Foundations such as the "Youth Smoking Prevention Foundation" (case C-160/20,ECLI:EU:C:2022:101), the "Stichting Zuid-Hollandse Milieufederatie, Stichting Natuur en Milieu" (case C-174/05, ECLI:EU:C:2006:170), the "Fondazione Cassa di Risparmio di San Miniato"(case C-222/04, ECLI:EU:C:2006:8). We also included in that category the "Fédération bancaire française" (case C-911/19, ECLI:EU:C:2021:599) and the "Fédération européenne de la santé animale" (case C-331/88, ECLI:EU:C:1990:391), the "Erzeugerorganisation Tiefkühlgemüse eGen" (case C-516/16, ECLI:EU:C:2017:1011), "Federazione Nazionale di Consumatori ed Utenti" (case C-686/18, ECLI:EU:C:2020:567) ; or Societies as in the case C-189/01(ECLI:EU:C:2001:420) regarding branches of the Netherlands Society for the Protection of Animals.

government[18], regional government, local government[19], other public entity[20] and a residual category of "other"[21]. The same categories apply to plaintiffs and defendants.

1.2.4 Referring national court

The following criteria have to do with the referring national court and explore whether such a court is "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" (Article 267 TFEU). We established three categories of court: constitutional court, court of last instance within the meaning of Article 267 TFEU, and non-last-instance courts. We relied on the information provided by the annual report of the Court of Justice as well as on the translation sometimes offered in the case itself to categorize each court[22]. In addition, we identified the country of the referring national court. As explained previously in footnote 18, each Member State has a code of reference.

[18] Each Member State has a code of reference. In that case, we used the ones of the annual report of the Court of Justice. By "national governments", we mean entities that are part of a national governments like ministries or council of ministries. In other cases, the party can be the State itself. This has been so in Case C-667/13 (ECLI:EU:C:2015:151, "Estado portugues"); Case C-336/00, (ECLI:EU:C:2002:509, "Republik Österreich"); Case C-155/89 (ECLI:EU:C:1990:312) and Case C-930/19 (ECLI:EU:C:2021:657, "The Belgian State"); Case C-561/18 (ORDER, ECLI:EU:C:2019:101 "Bundesrepublik Deutschland"; Case C-248/95 and C-249/95 (ECLI:EU:C:1997:377, "Federal Republic of Germany"). We also included the "Préfet du Gers" as he is the representative of the State in the French province of Le Gers. (C-673/20, ECLI:EU:C:2022:449).
In one case, the government of Aruba is the defendant, therefore this country has also a code of reference. Finally, Norway (State of the European Economic Area) has also a code of reference as this country has presented written submission in different cases.

[19] Municipalities

[20] An "other public entity" is an entity governed by Public Law that is not a ministry or part of a regional or local government. Many of such entities are regulatory agencies or national authorities (Tax authorities, social security entities, Customs agencies in many cases). The National Central Bank of Lithuania (Bank of Lithuania, C-772/2, ECLI:EU:C:2023:305,), the Bulgarian Bank (C-501/18, ECLI:EU:C:2021:249) and the Bank of Italy (C-686/18, ECLI:EU:C:2020:567) are also part of this category.

[21] This category includes public prosecutors (case C-399/11, ECLI:EU:C:2013:107; case C-204/88, ECLI:EU:C:1989:643; case 46/86, ECLI:EU:C:1987:287); a national assembly (case C-526/14, ECLI:EU:C:2016:767), a Dominican Convent (case C-285/93, ECLI:EU:C:1995:398), a Research Center (case C-372/17, ECLI:EU:C:2018:708) and a University (case C-269/90, ECLI:EU:C:1991:438; case 303/87, ECLI:EU:C:1989:128; case 164/86, ECLI:EU:C:1987:542).

[22] See for example the 2023 annual report at page 33, The table lists the different referring tribunals in each Member States, distinguishing between constitutional courts, courts of last instance and "other courts and tribunals". Available at: https://curia.europa.eu/jcms/jcms/Jo2_7000/en/

1.2.5 Subject matter

The criterion called "subject matter" refers to the area of EU Law dealt with in the specific case. Within "subject matter", we have included exactly the same categories, labelled as such by the database of the Court of Justice. A case can deal with one or various subject matters. There are in total 65 categories of "subject matter". Some of them have sub-subject matters, but for the sake of clarity we decided to use only the meta subject matter. Those subject matters refer also to the "specific areas" for which the General Court will have now jurisdiction for preliminary requests.

1.2.6 Act reviewed

A group of criteria focuses on the act reviewed. When referring to the act (or acts) object of review, the database identified the kind of act[23], its legal force (whether the act is a legislative act, a non-legislative act[24], an act with a different legal value or a non-binding act) and its author (European Commission, Council of the European Union, European Parliament and other).

1.2.7 Grounds of review

Regarding the identification and codification of the grounds used by the Court to review the act[25], we decided to rely on the grounds of review of Article 263 TFEU: incompetence, breach of an essential element of procedure, violation of the Treaties and other higher norms and misuse of power. Then, we created sub-categories of grounds (except in the case of misuse of power), based on the ones analysed by Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak in their "EU procedural law"[26].

[23] Directive, regulation, decision within the meaning of Art 288 TFEU as well as international treaty in the sense of Art 216 TFEU and "other act". In the case of international treaty, the Court assesses the validity of the act taken by the Union (normally a decision taken by the Council) that approves the conclusion of the international treaty.
[24] In case of non-legislative act, the analysis does not distinguish between delegated (Art 290 TFEU) and implementing acts (Art 291 TFEU).
[25] The Court assesses the grounds put forward by the national court in the order of reference. However, the Court can also appraise the validity of an act of the European Union in light of other pleas, based on the written submissions that can be made according to Art. 23 of the Statute of the Court of Justice of the European Union by the parties in the main dispute, the Member States and the EU institution, body, office or agency which act is under review.
[26] Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford University Press, second edition, 2023, from page 378 to 393.

Within the category of incompetence, we distinguished between (1) substantive incompetence referring to the legal basis, (2) territorial incompetence, (3) incompetence because the institution exceeded its powers of delegation or execution. In each case, we looked at an explicit reference to the terms “legal basis”, “territorial competence”, “exceeded its powers”.

Within the category of breach of an essential element of procedure, we identified the following sub-categories: (1) Duty to consult; (2) Requirement to hear the addressee (right to be heard); (3) Duty of confidentiality; (4) Compliance with internal procedural rules; (5) Requirement to provide a statement of reasons; (6) Publication and notification of the contested act.

For the category of “violation of the treaties and other higher norms”, we identified the following sub-categories: (1) Treaties (in case of reference to a substantive provision of the European Treaties); (2) Fundamental Rights (in case of specific reference to the term “Charter” and to the term “fundamental right”; (3) Secondary Law (in case of reference to a substantive provision of secondary law); (4) International Treaties (in case of reference to provisions of an international treaty). We also created specific sub-categories for some principles that are very frequently assessed by the Court like the (5) Principle of proportionality; (6) Principle of legitimate expectation; (7) Principle of equal treatment; (8) Principle of legal certainty; (9) Other principles (like the precautionary principle, the principle of subsidiarity, the principle of fiscal neutrality, the principles of logic and reasonableness, the principle that “the polluter should pay”, force majeure or the principle of cooperation in good faith)[27]. A last sub-category refers to (10) Manifest error of assessment (in case of specific reference to a manifest error of assessment when the institution has a broad margin of discretion, like in the case of assessment of economic facts and circumstances).

The misuse of power is a category of ground with no sub-category.

1.2.8 Outcome of the ruling

[27] For all these principles (proportionality, legitimate expectation, equal treatment, legal certainty and other principles), we looked for an explicit reference to one principle, whether invoked in a specific provision of primary or secondary law or as a general principle of EU Law.

Finally, the last criterion refers to the outcome of the ruling, whether the Court finds grounds of invalidity or not. In some cases, the invalidity is only partial in the sense that the Court only invalidates parts of the act reviewed or only one of the acts under review. In those cases, we consider the outcome to be "invalid".

The outcome will be "valid" when the Court considers that the examination of the question "has disclosed no factor of such a kind as to affect the validity" of the act under review. In a few cases, the Court considers that the act under review "is compatible" with a higher norm or a principle.

In other cases, when a request on interpretation is also referred, the Court can consider that an assessment of validity is not necessary, in view of the interpretation given. In that case, the outcome will be qualified as "Nothing- interpretation".

In other cases, the Court considers that the action is not admissible. The outcome is therefore "inadmissible". This can be the case for different reasons, based on Article 94 of the Rules of procedure of the Court of Justice or on the case-law of the Court of Justice. Article 94 requires national courts to provide the factual and legal context of the question as well as an explanation of why a preliminary ruling is necessary. In addition, the Court can also decide that a preliminary ruling is not necessary when the question is purely hypothetical, when it bears no relation to the dispute before the national court or when the act under review is not applicable to the case at hand.

In addition, the Court can declare a request inadmissible based on the TWD Textilwerke Deggendorf[28] case-law on the ground that the applicant did not bring an action for annulment, pursuant to the fourth paragraph of Article 263 TFEU, before the Courts of the European Union against the norm when he/she "without any doubt" had standing to do so.

Whereas usually the Court considers that it lacks jurisdiction when the referring court is not a court in the sense of Article 267 TFEU, at least in one case, the Court has simply said that the request was inadmissible because the national body did not meet the requirements to be considered as a referring court.

[28] Case C-188/92, EU:C:1994:90.

The Court considers also that the request is inadmissible when the norm under review is a norm of primary law.

The outcome will be “Already assessed” when the Court considers that since the act has already been reviewed, there is no need for a new assessment.

Finally, the outcome will be “Act not reviewable” when the Court considers that an assessment of validity is not necessary because the act under review is not legally binding. This does not mean that non-binding acts are not reviewable, simply that in the case at hand the act is not reviewable because of its legal value.

II. Some data

2.1 Ratio of declaration of invalidity.

First, we analysed the number of cases per year. We distinguished between the number of cases in which a request for a preliminary ruling on validity has been raised to the Court, the number of cases in which the Court assesses effectively the validity of a norm and the number of cases in which the invalidity of at least one provision of an act has been declared.

In total, since 1987, 518 cases (Judgment or Order) have dealt with a request for a preliminary ruling on validity. Out of these 518 cases, the Court assessed the validity of at least one norm in 425 cases (through 15 orders and 410 judgments) and found at least one act invalid in 106 cases (through 5 orders[29] and 101 judgments).

The ratio of declaration of invalidity varies between 0 per cent (1995, 1997, 2003, 2013) to 50 per cent (2005), depending on the year considered. The ratio of declaration of invalidity is calculated as the number of cases in which at least one act has been found invalid regarding the total number of requests of the year analysed. In total, the ratio of

[29] In all these cases, the Court decided through orders in application of the “acte éclairé” theory since the norm challenged has already been declared invalid by the Court. See case C-561/18 (Order, ECLI:EU:C:2019:101); cases C-369/15 to C-372/15 (Order,ECLI:EU:C:2016:811) ; case C-456/15 (Order, ECLI:EU:C:2016:567); case C-502/14 (Order, ECLI:EU:C:2016:512) and C-405/14 (Order, ECLI:EU:C:2015:402).

declaration of invalidity is around 20 per cent as an average for the period studied. It means that in a fifth of the requests, the Court declared at least one act invalid.

The ratio of declaration of invalidity is obviously higher if it is calculated based on the total number of requests in which the Court assessed effectively the validity of an act (ratio of declaration of invalidity by assessment). In total the average is of 25 per cent, with years in which no act has been found invalid (1995, 1997, 2003, 2013) to years in which the ratio of declaration of invalidity by assessment is of 50 per cent or higher than 50 per cent (1988, 1991, 1992, 2001, 2005 and 2020). It means that when the Court has assessed effectively the validity, the ratio of invalidity has raised to more than 50 per cent for some years.

The ratio of declaration of invalidity cannot be associated with a "ratio of success" because we are not always capable of determining whether (and when) a party has invoked the invalidity of the European norm or whether the national court has done so on its own motion[30]. Specially, when the order of reference is sent by a court of last instance or by a constitutional court, the plaintiff in the dispute before the referring national court is not necessarily the party that has an interest in the declaration of invalidity.

2.2 Opinion given

According to former Advocate General Eleanor Sharpston[31], the Court does not always follow clear criteria concerning the conditions under which an Advocate General opinion should be requested. However, it seems that an opinion is not needed in case of a chamber of three judges while it is always requested in the case of the Grand Chamber. In case of a chamber of five judges, the question remains open. Therefore, the criterion of "opinion given" will shed light on the extent to which there is a relation between the kind of

[30] The order of reference of the national court is not always available. In addition, even if available, it is not always possible to understand if the request comes from one party in the national procedure or the national court raises the question on its own motion.

[31] Eleanor Sharpston, The Changing Role of the Advocate General, in Anthony Arnull (ed.), Piet Eeckhout (ed.), Takis Tridimas (ed.), Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs, Oxford University Press, 2008, p 20-33.

chamber and the opinion delivered. We will also see whether an act can be assessed as invalid in cases in which an opinion has not been given.

The criterion on "opinion given" covers the period between June 2003 and December 2023 and refers exclusively to Judgements. In total, there are 260 cases. Data show that while there is a higher number of cases decided without an opinion of the Advocate General in the case of a chamber of three judges (43 Judgments) than in the case of a chamber of five judges (33 cases), the number of cases in which the Court appraised effectively the validity of at least one act is exactly the same (29 cases of assessment of validity without an opinion of the Advocate General in the case of chambers of three and five judges). In the case of the Grand Chamber, an opinion has always been given.

What seems unexpected is that the Court has found an act to be invalid even in the absence of an opinion given by the Advocate General. This has been the case in nine Judgments from a chamber of three judges and in five Judgments from a chamber of five judges. More particularly, in the case of a chamber of three judges, the Court relied on a previous judgement of the General Court to declare the invalidity of the act reviewed on one occasion[32]. Six out of the nine Judgments refer to the subject-matter "Free movement of goods - Customs union - Common Customs Tariff" [33] and two refer to the "Environnement-pollution"[34]. All the acts reviewed are adopted by the European Commission, except one[35] which was adopted by the Council.

In the case of a chamber of five judges, it is important to note that in one case the Court declared a legislative act[36] invalid that refers to an anti-dumping duty[37], because of a manifest error of assessment. The rest of the cases refer to acts adopted by the European Commission in the framework of classification of goods under the Combined

[32] Case C-268/22, ECLI:EU:C:2023:508
[33] Case C- 210/22, ECLI:EU:C:2023:693; case C-182/19, ECLI:EU:C:2020:243; case C- 372/17, ECLI:EU:C:2018:708; case C-91/15, ECLI:EU:C:2016:716; joined cases C-522/07& C-65/08 (ECLI:EU:C:2009:663), joined cases C-304/04 & C-305/04 (ECLI:EU:C:2005:441). In all of these cases, the request refers to the classification of goods under the Combined Nomenclature.
[34] Case C- 506/14 ECLI:EU:C: 2016:799 (case of automatic application of the case-law of the Court to declare invalid one of the provisions under review (par. 58); case C-180/15, ECLI:EU:C:2016:647 (same solution- par.52). The two cases refer to a question related to trading of emission of greenhouse gas.
[35] Case C-268/22, ECLI:EU:C:2023:508
[36] Case C-324/19, ECLI:EU:C:2021:94
[37] It falls within the subject-matter of "External relations".

Nomenclature[38]. The last case[39] refers to another specific subject-matter ("Agriculture and fisheries") and to an error of assessment from the European Commission.

2.3 Parties

2.3.1 Plaintiffs[40]

As far as plaintiffs are concerned, undertakings represent the most numerous category of plaintiffs (324 requests), followed by individuals (131), associations (42), other public entities (18), national governments (10), "others" (5), regional governments (2) and local governments (1).

As known, in case of action for annulment under Article 263 TFEU, national governments are privileged applicants, while regional governments and local governments are not[41].

Most cases in which national governments are plaintiffs are disputes in appeal or of last instance, in which the national governments became plaintiff because of the system of national remedies. National governments were defendants and undertakings (and one individual) were plaintiffs in first instance[42]. Most cases refer to State aids and classification of goods under the Combined Nomenclature.

Interestingly, if we exclude regional and local governments as well as "other plaintiffs" considering the low number of cases, the highest ratio of declaration of invalidity (regarding the total number of requests) is when the plaintiff is "another public entity"

[38] Case C-273/09, ECLI:EU:C:2010:809; case C-310/06, ECLI:EU:C:2007:456 and case C-15/05, ECLI:EU:C:2006:259

[39] Case C-585/15, ECLI:EU:C:2017:105.

[40] There could be various categories of plaintiffs in a same action, or various members of a same category of plaintiffs (this is frequently the case of undertakings). The same happens for defendants.

[41] See Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford University Press, second edition, 2023, page 321.

[42] The referring court is a court of last instance in Case C-212/19 (ECLI:EU:C:2020:726); Case C-592/17 (ECLI:EU:C:2018:913); case C- 667/13 (ECLI:EU:C:2015:151); case C- 222/04 (ECLI:EU:C:2006:8); case C- 336/00 (ECLI:EU:C:2002:509); case C-19/13 (ECLI:EU:C:2014:2194); C-376/07 (ECLI:EU:C:2009:105); C-375/07 (ECLI:EU:C:2008:645). Only in two cases, C- 155/89 (ECLI:EU:C:1990:312) and C- 165/07 (ECLI:EU:C:2008:302), the national court is a court of appeal (instance between the first and the last instances).

(38,88 per cent), followed by undertakings (20,98 per cent), individuals (20,61 per cent), associations (14,28 per cent) and national governments (10 per cent).

This ranking is similar in case of ratio of declaration of invalidity by assessment of validity. The highest ratio is the one of "other public entities" (43,75 per cent), followed by undertakings (25,85 per cent), individuals (24,54 per cent), associations (16,21per cent) and national governments (12,5per cent).

The two ratios show that when the plaintiff is "another public entity", the Court is more likely to declare an act invalid in more than 40 per cent of the cases.

2.3.2 Defendants

In terms of defendants, the category of "other public entity" represents the most numerous one (286 requests), followed by national governments (141), undertakings (56), individuals (28), regional governments (25), local governments (8), associations (7) and other kind of defendants (4)[43].

Interestingly, if we exclude local governments, associations as well as "other defendants" considering the low number of cases, the highest ratio of declaration of invalidity by requests occurs when the defendant is an "other public entity" (23,42 per cent), followed by national governments (18,43 per cent), individuals (17,85 per cent), undertakings (16,07 per cent) and regional governments (16 per cent).

This ranking is similar in case of ratio of declaration of invalidity by assessment. In that case, the highest ratio is the one of "other public entities" (28,63 per cent), followed by national governments (21,84 per cent), individuals (23,80 per cent), undertakings (20,93 per cent), and regional governments (16,66 per cent).

[43] In two cases, the defendant is a public prosecutor (case C-399/11, ECLI:EU:C:2013:107; case 46/86, ECLI:EU:C:1987:287), and in one case, the defendant is an university (C-269/90, ECLI:EU:C:1991:438) and in another case, it is the National Assembly of Slovenia (C-526/14, ECLI:EU:C:2016:767).

In the specific case of other public entities, in 252 cases (out of 286), a public entity is the exclusive defendant. In 34 cases, the other public entity is challenged jointly with a national government, a regional government, an individual, an association or an undertaking.

In 111 cases, the defendant is exclusively a national government. It means that in 30 cases, the national government is challenged along with another category of party like another public entity, a regional government, a local government, an undertaking or even an individual.

Therefore, most cases refer to disputes between undertakings and other public entities (201 cases), followed by disputes between undertakings and national governments (96 cases). There are 68 cases referring to disputes between individuals and other publics entities, and 48 between individuals and national governments.

2.4 National referring court[44]

The country whose courts have most requested a preliminary ruling on validity is by far Germany (155), followed by the United Kingdom (73), Italy (68), the Netherlands (64), France (46), Belgium (38), Austria (20), Ireland (13) and Spain (10). On the contrary, courts from Cyprus, Croatia, Hungary, Romania and Slovakia have never requested a preliminary ruling on validity.

In between, are courts from Czech Republic (6), Greece (5), Bulgaria (4), Luxembourg (4), Portugal (4), Sweden (4), Denmark (3), Estonia (3), Lithuania (2), Poland (2), Slovenia (2). Finland (1), Latvia (1) and Malta (1).

Regarding declarations of invalidity, among the six Member States with the largest number of requests (Germany, United Kingdom, Italy, Netherlands, France and Belgium), Netherlands has the highest ratio of declaration of invalidity by assessment (44 per cent). It means that when the Court of Justice assessed the validity of at least one norm at the request of a Dutch court, it declared the invalidity of at least one norm in 44 per cent of the requests. Netherlands is followed by Germany (33,58 per cent), Italy (17,3

[44] In case of joined cases, there is more than one single court that can come from different Member States (8 cases in total) and from different category of court or tribunal (4 of them).

per cent), Belgium (16,66 per cent), United Kingdom (12,85 per cent) and France (2,10 per cent).

In terms of category of court[45], 383 requests come from non-last instance courts, 122 from courts of last instance and 18 from constitutional courts. This number is not surprising considering that non-last courts are more numerous than courts of last instance[46] and constitutional courts[47].

Regarding declaration of invalidity, courts of last instance have a higher ratio of declaration of invalidity by assessment (31,91per cent), than non-last instance courts (23,75 per cent) and constitutional courts (20 per cent). This means that the Court of Justice declared the invalidity of at least one norm in more cases when the request came from a last instance court.

2.5 Subject matter

The data highlight not only how many requests fall within a certain subject matter but also how many requests fall exclusively within one subject matter. However, in many cases, a request falls within more than one subject matter.

"Agriculture and fisheries" is the subject matter to which more requests refer (220), followed by "free movement of goods"[48] (103), "approximation of laws" (73) and "external relations"[49] (66). They are followed by "fundamental rights"[50] (31) and "freedom of establishment" (31), "competition" (26), "social security" (24), "environment" (23) and "principles, objectives and tasks of the Treaties" (23). Then come "transports" (19), "freedom to provide services" (19), "taxation" (18), "consumer protection" (16), "free movement of workers" (13), "area of freedom, security and justice"(13) and "provisions

[45] In some joined cases, there are different referring courts that can be from different categories of court. In total, there are five cases in which the referring courts are from different categories.
[46] In some Member States, there is more than one single court of last instance, depending on the subject matter.
[47] Some Member States do not have constitutional court.
[48] This includes customs cooperation, customs union, charges having equivalent effect, common Customs Tariff, Value for customs purposes, Quantitative restrictions, Measures having equivalent effect and State monopolies of a commercial character. Therefore, the classification of goods under the Combined Nomenclature falls within this subject-matter.
[49] This subject-matter includes, among other subjects, the commercial policy which refers to dumpling, GATT and WTO.
[50] Fundamental rights refer to Charter of Fundamental Rights and European Convention on Human Rights.

governing the institutions" (13), "public health" (10), "energy" (10), "intellectual, industrial and commercial property" (10), "data protection" (9), "non-discrimination" (8), "financial provision" (7), "social policy" (7), "free movement of capitals" (7) and "accession" (6). The rest of the subject-matters with less than 6 requests that refer to them are "economic and monetary policy" (6), "Internal market – Principles" (5), "safeguard measures" (5), "citizenship of the Union" (4), "French overseas departments" (3); "general and final provisions" (3), "telecommunications" (3), "justice and home affairs" (2), "closer cooperation" (1), "coffee" (1), "ECSC matters" (1), "Euratom matters" (1), "Overseas countries and territories" (1), and "staff regulations of officials and conditions of employment of other servants" (1).

Considering requests that refer exclusively to a single subject matter, "agriculture and fisheries" continue to be the first (144), followed by "free movement of goods" (58), "external relations" (33), while in the case of "approximation of laws", only 10 requests refer exclusively to it. Then come "competition" [51] (13), "social security" (13), "transports" (11), "taxation" (10), "environment" (8), "energy" (7), "area of freedom, security and justice" (4), "freedom of establishment" (2), "principles, objectives and tasks of the Treaties" (1), "social policy" (1), "free movement of capitals" (1), "free movement of workers" (1) and "fundamental rights" (1).

No request refers exclusively to "freedom to provide services", "consumer protection", "provisions governing the institutions", "public health", "data protection", "intellectual, industrial and commercial property", "non-discrimination", "financial provision", and "accession". This means that the request falls within at least two different subject matters when dealing with those subjects.

However, the subject matter for which there is a higher ratio of declaration of invalidity in relation to the number of assessment of validity is "energy" (60 per cent) followed by "freedom of goods" (30,76 per cent), "external relations" (25,86 per cent), "agriculture and fisheries" (25,78 per cent), "taxation" (22,22 per cent), "environment" (23,52 per cent), "fundamental rights" (18,51per cent), "social security" (21,05 per cent), "provisions governing the institutions" (22,22 per cent), "free movement of workers" (18,18 per cent)

[51] In that case, the 13 requests refer all to State aids.

and “approximation of laws” (18,51per cent). In the case of AFSJ and “public health”, the ratio is null since there is no declaration of invalidity in those two subject matters (and when the request falls also within another subject matter). In the case of “energy”, the high ratio is explained by the fact that many of the requests (six out of ten) refer to a same provision that the Court declared invalid.

So, while “agriculture and fisheries” is the most numerous subject matter, its ratio of declaration of invalidity is not the highest. The same happen to “approximation of legislation” which is the third subject matter in absolute terms (73 requests) but has only a ratio of declaration of invalidity of 18,18 per cent. Many other subject matters with less requests in absolute terms have a higher ratio of declaration of invalidity: taxation (18 requests, 22,22 per cent), environment (23 requests, 23,52per cent), social security (24 requests, 21,05 per cent), provisions governing the institutions (13 requests, 22,22per cent). “Fundamental rights” has a ratio very similar to “approximation of legislation” with less requests (31 requests,18,51per cent). Only “free movement of workers” with 13 requests has a lower ratio of declaration of invalidity than “approximation of laws” (18,18 per cent).

When a request falls within an exclusive subject matter (energy excluded for the reasons explained previously), the ratio of invalidity in relation to assessment of invalidity is higher in the case of “taxation” (40 per cent), followed by “free movement of goods” (38,29 per cent), “environment” (33,33 per cent), “external relations” (24,13 per cent), “agriculture and fisheries” (22,96 per cent), “approximation of laws” (16,66 per cent), “competition- state aids” (14,28 per cent) and “social security” (12,5 per cent). In the case of “transports”, while 11 requests fall exclusively within this subject-matter, no declaration of invalidity has been pronounced by the Court.

In conclusion, while “agriculture and fisheries” is the most important subject-matter in absolute terms, its ratio of declaration of invalidity is not the highest. On the contrary, “free movement of goods” has one of the highest ratios of declaration of invalidity whether the request falls exclusively in this subject (38,29 per cent) or in this one and others (30,76 per cent).

As far as the specific areas in which the General Court will have now jurisdiction to hear requests on preliminary rulings, we have found that only 10 requests fall exclusively within the VAT specific area (8 assessments of validity- 3 declaration of invalidity) and two in the exclusive "excise duties" specific area (2 assessments of validity- 1 declaration of invalidity).

"Customs code" is a sub-subject matter of "Customs cooperation" within the broad subject-matter of "free movement of goods"[52]. However, none of the 56 requests that fall exclusively within "free movement of goods" falls within this specific area. Regarding the "combined nomenclature", this specific area is not classified as a sub- subject matter of "free movement of goods". However, we have identified 53 requests that refer exclusively to "customs union" (a sub-subject matter of "free movement of goods"), 42 requests of them the Court appraised the validity of at least one act and pronounced 17 declarations of invalidity.

The subject matter "transport" includes now a sub-subject matter on "compensation and assistance to passengers". However, none of the 19 requests that fall exclusively within the subject matter "transport" refers to passengers 'rights. This does not necessarily mean that no request refers to this specific area but only that so far, the database of the Court of Justice has not identified any request as falling within such sub-subject matter.

The same happens to the last specific area in which the General Court will have now jurisdiction. "Greenhouse gas emission allowance trading" is now a sub-subject matter of "pollution", a sub-subject matter itself of "environment". While 22 requests refer exclusively to "environment", only eight refer to "pollution". However, none refers specifically to "gas emission allowance trading".

Finally, we have not identified any request that falls at the same time in more than one specific area of jurisdiction.

2.6 Act reviewed.

[52] We are always referring to the subject matters used in the database of case-law of the Court of Justice of the EU that we have used for our database.

The acts reviewed have been classified according to the kind of acts, which means regulation, directive, decision, recommendation adopted by the institutions and bodies in all the areas of competences of the EU (except the CFSP) and other kinds of acts.

Among the other acts one can find the Convention implementing the Schengen Agreement signed by some Member States in 1990[53] or the Guidelines of the European Banking Authority (EBA) of 22 March 2016. The Court has also ruled through a preliminary ruling on validity that it has competence to rule on the validity of a Council act on CFSP (Council Decision 2014/512/CFSP of 31 July 2014)[54].

An act or several acts can be challenged in a same request. It means that two different kinds of acts may be challenged (a regulation and a directive for example), or more than one act of a same kind is under review (two regulations for example).

At least one regulation has been under review in 348 requests and the Court has assessed its validity in 292 cases and declared invalidity in 74 cases. Then come directives (92 requests, 76 assessments of validity and 9 invalids), decisions (75 requests, 58 assessments of validity and 21 invalids) and other acts (17 requests, 12 assessments of validity and 1 invalid). In the case of recommendation, the Court was requested only once and declared it invalid.

However, in terms of ratio of declaration of invalidity (by requests and by assessments of validity), decisions have a higher rate (28 per cent and 36,20 per cent respectively), than regulations (21,26 per cent and 25,34 per cent), directives (9,78 per cent and 11,84 per cent) and other acts (5,88 per cent-8,33 per cent).

Regarding the binding legal value, the acts have been classified between legislative[55] and non-legislative acts[56] (implementing acts or delegated acts). Some acts do not enter in such categories and are classified as “others”, either because they have no binding legal

[53] The Advocate General SZPUNAR considered the Convention as an “act of the European Union”. See paragraph 34 of his opinion. Case C-365/21, ECLI:EU:C:2022:823.
[54] Case C-72/15, ECLI:EU:C:2017:236. In that case, the Court ruled that the CFSP decision was valid.
[55] A legislative act is an act adopted according to a legislature procedure (Art 289 TFEU).
[56] A non-legislative act is an act that has not been adopted following a legislative procedure. It can be an implementing act or a delegated act. Implementing acts can be adopted by the Council of the European Union or the European Commission.

value ("guidelines" and "recommendation") or because of the authors of the act (Member States, European Council[57]. European Central Bank) or because since the act is an act adopted within the CFSP or the former JHA chapter, it cannot be classified as legislative or non-legislative act.

Most of the acts challenged have been adopted by the Council of the European Union or the European Commission. Many of them have also been adopted jointly by the Council and the European Parliament (all of them are legislative acts). In two cases, acts adopted by the European Central Bank have been challenged; in other two cases, acts adopted by the European Banking Authority have also been challenged (and declared invalid in one case); in other two cases, acts adopted by Member States (concretely the Convention implementing the Schengen Agreement) have also been challenged and one decision of the European Council has also been challenged.

In absolute terms, more requests refer to legislative acts (277) than to non-legislative acts (269). In 42 requests, a legislative act is under review jointly with a non-legislative act (implementing act of a legislative act mostly). In 44 requests, a non-legislative act is under review jointly with a legislative act (42 times) and with another act with another legal value (2 times).

Regarding the 277 legislative acts, 206 are acts adopted by the Council and 71 are legislative acts adopted by the Council and the European Parliament. The Court assessed the validity of such acts in 231 requests and declared invalidity 32 times (20 regulations; 8 directives; 4 decisions).

In the case of the 269 non-legislative acts, 19 are acts adopted by the Council and 250 acts are adopted by the European Commission. The Court assessed the validity in 205 cases and declared invalidity 73 times (55 regulations; 1 directive and 17 decisions).

In terms of ratio of declaration of invalidity, non-legislative acts have a higher rate (27,13 per cent- 32,73 per cent), followed by acts with other legal value (11,11 per cent- 15, 38 per cent) and legislative acts (11,55 per cent- 13,85 per cent). However, the Court was

[57] The decision of the European Council is an act of constitutional relevance as it modified Art 136 TFUE, following Art 48 TEU (case C-370/12, ECLI:EU:C:2012:756).

requested to assess the validity of acts with other legal value only on 18 occasions. It did so on 13 occasions and declared invalidity twice. Curiously, in one case, the act found invalid was a recommendation[58]. In the other case[59], the acts under review declared invalid were two notices from the European Commission.

2.7 Grounds of review

As in the cases of other variables, more than one ground of review can be invoked by the parties, the national referring court and the Court of Justice. In that section, we will examine the grounds used by the Court of Justice to review the validity of an act of the European Union, when they are invoked along with other grounds and when they are invoked exclusively. There are obviously fewer requests in which an exclusive ground of review is invoked.

The most common ground of review refers to one kind of incompetence, which is when one institution exceeds the powers that have been conferred on it by delegation or for the implementation of other acts. This ground of review is taken into account by the Court of Justice in 139 requests. It is exclusively invoked in 87 requests.

This ground is followed by the principle of proportionality (127 requests, 30 in which it is invoked exclusively), the principle of equal treatment (109 requests, 22 exclusively invoked), violation of a provision of the Treaties[60] (103 requests, 51 exclusively invoked), fundamental rights (86 requests, 30 exclusively invoked), statement of reasons (61 requests, 7 exclusively invoked), legitimate expectations (50 requests, 9 exclusively invoked) , manifest error of assessment (48 requests, 19 exclusively invoked), legal certainty (45 requests, 2 exclusively invoked), substantive competence which refers to the

[58] In that case C-501/18 (ECLI:EU:C:2021:249), the Court of Justice quotes the Grimaldi case : “82. First of all, it should be noted that, while Article 263 TFEU excludes the Court’s review of acts having the nature of a recommendation in the context of an action for annulment, it follows from Article 19(3)(b) TEU and the first paragraph of Article 267(b) TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the institutions of the Union, without any exception (see, to that effect, judgments of 13 December 1989, Grimaldi, C-322/88, EU:C:1989:646, paragraph 8; of 13 June 2017, Florescu and Others, C-258/14, EU:C:2017:448, paragraph 71; of 20 February 2018, Belgium v Commission, C-16/16 P, EU:C:2018:79, paragraph 44; and of 14 May 2019, M and Others (Revocation of refugee status), C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71 and the case-law cited).")

[59] Case 217/87, ECLI:EU:C:1988:425.

[60] In that case, the provision is a substantive provision (all the articles on freedom of movement or of one of the policies of the EU). Those provisions do not refer to general principles.

legal basis of the act reviewed (38 requests, 9 exclusively invoked), other principles[61] (28 requests, 4 exclusively invoked), provisions of international treaties (21 requests, 8 exclusively invoked), provisions of secondary law (16 requests, 7 exclusively invoked), misuse of powers (11 requests, none exclusively invoked). The rest of grounds are invoked residually[62].

In terms of ratio of invalidity in case of effective assessment of validity, delegation of powers is still a powerful argument to declare an act invalid when invoked with other grounds. It means that when invoked with other grounds, it leads to a declaration of invalidity in almost 40 per cent of the requests (39,53 per cent). It is followed by breach of secondary law (25 per cent) and manifest error of assessment (25 per cent). Then comes statement of reasons (22,80 per cent), principle of legal certainty (21,42 per cent), protection of legitimate expectations (20,9 per cent), fundamental rights (17,10per cent), equal treatment (15,68 per cent), principle of proportionality (15,17 per cent), substantive competence (14,70 per cent), provisions of Treaties (12,34 per cent), misuse of power (10 per cent) and other principles (4,34 per cent). Provisions of international treaties have never led to a declaration of invalidity.

However, interestingly, results change when the ratio of invalidity is calculated when a ground is exclusively invoked. In that case, the breach of statement of reasons is the most successful ground as it leads to 60 per cent of declaration of invalidity. It is followed by, protection of legitimate expectations (57,14 per cent), principle of legal certainty (50 per cent), breach of a provision of secondary law (50), other principles (50 per cent), delegation of powers (47,94 per cent), principle of proportionality (34,78 per cent), manifest error of assessment (25 per cent), breach of a provision of the Treaties (21,62 per cent), fundamental rights (15,38 per cent), principle of equal treatment (15 per cent), substantive competence (14,28 per cent). Misuse of power is never invoked exclusively.

[61] In that case, other principles such as the precautionary principle, the principle of subsidiarity, the principle of fiscal neutrality, the principles of logic and reasonableness, the principle that "the polluter should pay", force majeure and the principle of cooperation in good faith are invoked.

[62] The breach to consult has been invoked in six requests; the breach of the requirement to hear the addressee in four requests and the breach of publication and notification of the contested act in one case.

2.8 Outcome of the ruling

Finally, in terms of outcome, data show that the Court has assessed the validity of at least one norm in 425 cases. This means that it has not assessed the validity of a norm in 93 cases. Out of the 425 assessments of validity, the Court declared at least an act invalid in 106 cases.

Regarding the 93 cases in which the Court has not assessed the validity of at least one norm, the reasons was in 55 cases that the request on validity was referred as an alternative to a request on interpretation. In the rest of the cases (38), the question was inadmissible for the following reasons.

First, as states Article 94 of the Rules of Procedure, national courts have to provide the factual and legal context of the question referred and explain "the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings". In six cases, the Court declared the question inadmissible because the national court did not provide a clear explanation on why an assessment of validity was needed for the case at hand.

The information required by Article 94 of the Rules of Procedure is completed by the case-law of the Court of Justice on admissibility of preliminary requests. As explain Lenaerts, Gutman and Nowak, while there is a presumption of relevance of the question referred, the Court may declare a question inadmissible "1) where it is quite obvious that the interpretation of Union law that is sought bears no relation to the actual facts of the main action or its purpose; (2) where the problem is hypothetical; or (3) where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted"[63]. The authors also explain that "Of the three categories elaborated by the Court, some are intertwined to some extent with the earlier discussion in

[63] Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford University Press, second edition, 2023, page 93.

connection with the timing and content of the order for reference, such as the need for a clear description of the factual and legal context in the order for reference."[64]

In two cases, the Court considered that the question was purely hypothetical and declared it inadmissible. In one case, the Court considered that the question "bears no relation to the purpose of the main proceedings".

In other seven requests, the Court declared the question inadmissible because the act under review was not applicable to the case at hand.

In addition, the Court has declared eight requests inadmissible based on the TWD Textilwerke Deggendorf[65] case-law on the ground that the applicant had not brought an action for annulment, pursuant to the fourth paragraph of Article 263 TFEU, before the Courts of the European Union against the norm when it/he/she had standing to do so.

Regarding the nature of the referring body, the Court has declared one request inadmissible. In other two cases, the Court considered that it had no jurisdiction to rule on the request on validity referred by a body not fulfilling the criterion to be deemed a tribunal in the sense of Article 267 TFEU.

In four requests, the Court considered that since the act had already been reviewed, there was no need for a new assessment. The four requests were decided by Judgements[66], not orders. In one case, a question on the temporal effect on a declaration of invalidity was also raised[67]. In other two cases[68], other questions on interpretation were brought at the same time.

In two cases, the Court considered that an assessment of validity was not necessary because the act under review was not legally binding[69].

[64] Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford University Press, second edition, 2023, page 93.
[65] Case C-188/92, EU:C:1994:90.
[66] Case C-74/99, ECLI:EU:C:2000:547 ; Case C-120/08, ECLI:EU:C:2010:798; Case C-228/92, ECLI:EU:C:1994:168; Case C-15/99, ECLI:EU:C:2000:574
[67] Case C-228/92, ECLI:EU:C:1994:168.
[68] Case C-15/99, ECLI:EU:C:2000:574 ; Case C-120/08, ECLI:EU:C:2010:798.
[69] Case C-94/9, ECLI:EU:C:1992:181 and case C-11/05 ECLI:EU:C:2006:312

Finally, in two requests, the Court considered that it lacked jurisdiction because the act under review was primary law (a Treaty of Adhesion and Article 45 TFEU).

III. Open perspectives

The presentation of the results in section two is purely descriptive. This description is in itself of interest as many socio-legal research questions could stem from the data found and provide some explanation on how, when and why the Court of Justice (and the General Court in a near future) invalidated acts of the Institutions.

First it could be of interest to understand the reasons why in some years, more requests are referred to the Court, relying on other criteria such as the country of the referring court, the kind of referring court, the subject matter, the categories of the parties, the grounds invoked. This could help to understand whether there are correlations between the number of requests and any of the other criteria.

Another research question could be to understand why tribunals of some Member States raise more questions on validity to the Court than tribunals from other countries. The population of the country as well as the year of entry in the European Communities (and later the European Union) may partly explain those numbers. However, based on the data presented, these two variables are not working for the Netherlands or the United Kingdom. Netherlands shows also a higher number of cases than France. Both countries are founding Member States, and the population of Netherlands is around a third of the French population. Similarly, the United Kingdom shows also a higher number of cases than France. The population of both countries is above 60 million and the United Kingdom joined the European Communities more than twenty years after France and left the European Union in 2020. Therefore, other hypotheses could be explored as regards the training of the national judges or the economic structure of the country (whether the country is an importer country or a country in which agriculture is an important sector of the economy considering that, as explained earlier, “free movement of goods” and “agriculture and fishery” are two of the most numerous subject matters).

It could also be explored whether national courts have integrated the Foto-Frost case-law that require them to refer to the Court of Justice in case of doubt about the validity of a European norm. The fact that there is a higher ratio of declaration of invalidity by assessment when the referring court is a last-instance court may indicate that there was a risk of invalidity of an EU norm that lower courts did not refer to the Court of Justice when they had to. Comparison among countries could add a layer of complexity to understand in which Member States non-last instance courts apply better the Foto-Frost case-law.

The results presented could also be used to understand whether the preliminary reference on validity is used by legal and natural persons to remedy the limitations of standing in the case of action of annulment under Article 263 TFUE. This may be the case especially for legislative acts, considering that the Lisbon Treaty has soften the requirements individuals have to fulfil to have standing to challenge regulatory acts (as implementing and delegated acts). In this line, data on the practice of the TWD case-law by the Court of Justice can provide more insights on this question.

For all these examples of research questions, correlations among different criteria could be used to deepen the knowledge on the practice of one of the keystones of the EU judicial system. Is not Law also practice?