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The Case of Legal Certainty, an Uncertain Transplant Process in France

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Abstract

The reception of the fundamental principle of legal certainty in France shows how the characteristics of the French administrative system have consequences for the development and consideration of this principle. An analysis of the transplantation process reveals that it has been largely prepared, knowingly or unknowingly, to allow the principle of legal certainty to find at least a partial place in the French administrative system. It also shows the central role of the administrative judge in this process which led to the adaptation of the principle of legal certainty to the French legal order, and vice versa.

1. Introduction: the French administrative system and legal certainty, a hazardous meeting

The principle of legal certainty is considered to be a fundamental principle, which did not wait for European integration to develop.[1] Grounded on the rule of law, it expresses individuals' need for a stable and accessible legal order. More precisely, one may distinguish between the certainty of the law and the certainty of individual situations.[2] Thus, legal certainty has a double dimension: an objective and a subjective one. For many years now, it has been considered a fundamental European principle, with solid grounds in most European states. Obviously, there has been genuine European enthusiasm for the principle. French administrative law has been, and is still, to some extent equivocal. The principle of legal certainty had been considered foreign to the French system for a long time before its 'official' recognition in the ruling of

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1 J Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275-288.

2 J-L Bergel, *Théorie générale du droit* (Dalloz 2012) 43 : 'Objective legal certainty, of the law and its sources, is threatened by the disorderly proliferation of texts, the growing instability of rules and the deterioration in the quality of the law [...] As for subjective legal certainty, of the rights of legal persons, parties and third parties, positive law already includes, in most systems, mechanisms that allow its protection.'[own translation].

the Council of State of 2006, the so-called KPMG case.[3] Yet, the principle of legal certainty was not ignored by the French legal order even before this case. Indeed, if we consider that the principle of legal certainty is closely linked to the rule of law, it is obvious that it was taken into account in the French system. Nevertheless, it is still relevant to speak of transplanting when analysing the development of the principle of legal certainty here.

Legal transplant can be understood, basically, as the dissemination of a legal concept from an exporting legal order to a receiving legal order.[4] Such a process is usually not linear and direct. In the case of the principle of legal certainty and the French system, it has been regularly assessed as the result of processes of convergence between systems under European influences, favouring the circulation of models, especially between the Member States of the European Union.[5] The originality of this article lies in its analysis of the process of legal transplantation of the principle of legal security, which allows for a deeper analysis, going beyond the observation of influences and convergences. It is interesting to carry out this analysis, because it makes it possible to consider both the openness of the French administrative system, especially with regard to a principle that was considered foreign to it, and the extent to which the interaction of actors in charge of various missions is decisive, both for the preparation and for the realisation of the transplant. Thus, the analysis of the legal transplant process is key to understanding the implementation of a foreign principle in the host legal order.

The transplant process can be identified when considering the principle of legal certainty in its justiciable form, i.e., as an element to be considered by the judge, particularly in the context of judicial review and the weighing up of the various interests in a given case. In fact, despite its inherent character in any State governed by the rule of law, the principle of legal certainty has for a long time not been taken into account by the administrative courts while reviewing administrative action. For some years now, however, it has found its place in judicial review, and this process is clearly the result of the circulation of standards of judicial review across legal systems. The transplant process was largely orchestrated by the Council of State, which continues to shape its content and its adaptation to the French administrative order. This process has been shaped by different factors, of distinct significance, playing a role in sponsoring or, on

3 CE Ass, *Société KPMG et autres*, n° 228460, 24 March 2006.

4 See Y Marique & E Slautsky, 'Resistance to Transplants in the European Administrative Space – An Open-Ended Reading of Legal Changes' in the introduction to this special issue.

5 J Bell, 'Mechanisms for Cross-fertilization of Administrative Law in Europe' in J Beatson and T Tridimas (eds), *New Directions European Public Law* (Hart 1998) 47-67; F Chaltiel, 'La sécurité juridique' in J-B Auby (ed), *L'influence du droit européen sur les catégories du droit public* (Dalloz 2010) 579; F Train, 'L'articulation des conceptions nationales et communautaires en matière de sécurité juridique et de protection de la confiance légitime' (2007/2008) Revue des affaires européennes, 611.

the opposite side, of limiting the development of the principle. Those factors may sometimes have been overcome or have led to unexpected developments.

Four main factors may be identified to explain why and how the principle of legal certainty in the French administrative system has been developed: the historical structure of administrative law, the Europeanisation process, the place of the Council of State in the development of French administrative law, and the ambivalent role of the actions of judicial authorities. More precisely, it is the interaction between those various factors which has guided the process of transplanting the principle of legal certainty.

2. The cultural factor as delaying the explicit recognition of legal certainty

The unease provoked by the principle of legal certainty, taking the form of indifference or even reluctance to integrate it, may be explained mainly and primarily by the particular characteristics of French administrative law. Nevertheless, there have been regular discussions on the relevance of the principle of legal certainty for the French legal system.

2.1. The historical development of French administrative law

French administrative law emerged in the 19th century, following the French Revolution. In this context its development was a means to ensuring the effective separation of powers, in order to prevent judiciary power adjudicating on administrative matters.[6] Promoting administrative law was a way to provide a specialised set of rules for dealing with administrative matters. Consequently, administrative law was developed to ensure that administrative matters would be excluded from the judiciary's scope of jurisdiction (*juge judiciaire*). To this extent, it was not really regarded as a way to limit administrative powers, but rather as a way to take into account the peculiarities of administrative functions.[7] The basic idea was to decide that administrative matters should be adjudicated and reviewed by administrative authorities themselves. The Council of State, set up under Napoleon Bonaparte's regime in 1799, was not an independent court, but rather a 'councillor' to the head of state. It was only from

6 Loi of 16 and 24 August 1790 *sur l'organisation judiciaire*, article 13: 'Judicial functions are separate and shall always remain separate from administrative functions. Courts shall not, on pain of forfeiture, disrupt in any way the operation of administrative bodies, or summon administrators to appear before them by reason of their duties' [own translation].

7 B Sordi, 'Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in P Lindseth, S Rose-Ackerman and B Emerson (eds), *Comparative Administrative Law* (2nd edn Edward Elgar 2017) 23-37.

1872 onwards that the Council of State became a proper court with jurisdiction to rule on cases involving administrative authorities.[8] This led to the development of a specific corpus of rules applicable to administrative authorities and activities, under the authority of the Council of State.[9] The French system is then dualistic, composed of two different judicial orders: the judiciary courts and the administrative courts (which now comprise administrative courts and administrative courts of appeal, as well as the Council of State). Judiciary courts are empowered to apply private law to private activities, whereas the jurisdiction of administrative courts encompasses administrative activities which imply the enforcement of prerogatives of public power (*prérogatives de puissance publique*).[10] For a long time, administrative law mainly developed through case law. Thus, French administrative law qualifies as judge-made law. Case by case, the Council of State has developed the fundamental principles and rules underlying administrative action.[11]

In this context, the Council of State has widely promoted an objective conception of administrative law based on the pursuit of the general interest by public bodies. This implies that the first aim of administrative law is to ensure the enforcement of the general interest, rather than protection of individual rights, meaning that sometimes the balancing of interests may be to the detriment of the protection of individual rights. Thus, the Council of State's task is, first, the promotion of an objective conception of the legality principle. For a long time, due to the limited promotion and weakness of constitutional law, the legality principle was understood as the compliance of administrative decisions with legislative rules. From the second part of the 20th century onwards, however, the promotion of individual rights began to be included in administrative law through the development of general principles of law (*principes généraux du droit*). However, this conception, centred on the administration, rather than on individuals, creates an unfavourable context for the recognition of the legal certainty principle.

2.2. Highlighting French specificities

For decades, it was pointed out that the principle of legal certainty could not find its place in the French legal order because of the very logic

8 Loi of 24 May 1872 *sur la réorganisation du Conseil d'État*, article 9: 'The Council of State (Conseil d'État) adjudicates ... on actions for the annulment (annulation pour excès de pouvoirs) of the acts of the various administrative authorities'; H McCleave Cake, 'The French Conseil d'État — An Essay on Administrative Jurisprudence' (1972) 24(3) Administrative Law Review 315-334.

9 Tribunal des conflits, *Blanco*, 8 February 1873.

10 Conseil constitutionnel (CC), Decision n° 80-119 DC, Loi de validation législative: Conseil constitutionnel, 22 July 1908; Décision n° 86-224 DC, Loi relative au Conseil de la concurrence, 23 January 1987.

11 J Chevallier, 'Le Conseil d'Etat, au coeur de l'Etat' (2007) 123 Pouvoirs 5-17.

of the administrative system. In particular, it seemed to be opposed to the principle of mutability.[12] Based on the general interest, this principle refers to the constant adaptation of administrative action, which therefore implies the potential calling-into-question of administrative acts, where the general interest takes precedence over the protection of the rights acquired by individuals.[13] In this respect, the principle of legal certainty appears, then, to be a principle that paralyses administrative action, while at the same time calling into question the satisfaction of the general interest. According to the classical conception, '(r)egulation does not create any acquired right to its maintenance'.[14] However, one should not have an absolute vision of the principle of mutability, and the French system has never been radical in this regard. Thus, it is necessary to distinguish between a legal act and the situation it creates. An act benefits from the principle of mutability, whereas the situation created benefits from the principle of intangibility: the individual effects of an act are thus protected. Such an understanding of the principle of mutability then makes it more open to considerations of legal certainty, and justifies rules limiting the repealing of an administrative act in certain cases, or the time limits applicable to a judicial appeal, thus preserving the legal certainty of citizens *vis-à-vis* third parties. Nevertheless, it is accepted that, in the French legal system, citizens do not, in principle, have any subjective rights that can be invoked against the administration while adopting or amending regulations.[15]

However, some argue that, in addition to the lack of any need for such a principle, there would be no legal basis for enforcing such a principle in the French legal order, noticeably because of a lack of reference in the Constitution. However, some have pointed out that in the French legal order there are textual bases for deriving an unwritten principle or requirement of legal certainty without relying on a constitutional revision procedure.[16] Furthermore, as will be shown once more below, the absence of an explicit constitutional reference is not, in most cases, considered to be a decisive obstacle to the promotion of a 'new' principle.

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12 CE, *Compagnie des chemins de fer de l'est et autres*, n° 4244, 6 December 1907.

13 It is one of the three 'laws' of public service, see R Chapus, *Droit administratif général*, vol 1 (Montchrestien, Domat droit public 2001) 604; J-M Auby, 'L'abrogation des actes administratifs' (1967) I Actualité Juridique du Droit Administratif 131.

14 Auby (n13) 136; CE, *Mme Lacroix*, n° 287845, 13 December 2006 (decided a few months after the *KPMG* case).

15 N Foulquier, *Les droits publics subjectifs des administrés. Émergence d'un concept en droit administratif français du XIX^e au XX^e siècle* (Dalloz 2003).

16 Among the constitutional sources often mentioned are articles 2 and 16 of the Declaration of Human and Civic Rights of 26th August 1789. See M De Salvia, 'La sécurité juridique en droit constitutionnel français' (2001) 11 Cahiers du Conseil constitutionnel; AV Naquet, 'La sécurité en droit constitutionnel: non-dit ou non-être?' in *La sécurité en droit public*, 2018.

2.3. Discussions on the relevance of the principle of legal certainty in the academic world

While for a long time the principle of legal certainty was widely presented as absent from French administrative law, it is noteworthy that it has been the subject of much interest from French academics without, however, saying that the French doctrine has developed a 'real cult'[17] around legal certainty. The points of view addressed are certainly different. Since the 1990s, PhD dissertations have been devoted to the topic.[18] Especially in administrative law, a number of academics have aimed at recognizing the existence of a principle of legal certainty in most legal orders, while stressing that, in France, such a principle is not necessary. Some have argued that the concept of legal certainty is too vague, too uncertain, to be invocable,[19] and above all to constitute a limit to the discretionary power of the administration.[20]

One may have wondered whether it could be a 'principle that we are missing'[21], a question also considered by the French Constitutional Law Association.[22] Others have considered its possible incorporation in French administrative

17 F Rigaux, *Introduction à la science du droit* (EVO 1975) 373.

18 F Douet, *Contribution à l'étude de la sécurité juridique en droit fiscal interne français* (LGDJ 1997); F Touboul, *Le principe de sécurité juridique, essai de législation* (Thèse dactyl, Paris XI 1996); I Fournol, *Le principe de sécurité juridique en droit communautaire et en droit administratif* (Thèse dactyl, Paris II 1999); E Ben Merzouk, *Le principe de sécurité juridique en droit positif* (Thèse dactyl, Paris II 2003); A-L Valembois, *La constitutionnalisation de l'exigence de sécurité juridique en droit français* (Paris, LGDJ 2005); P Raimbault, *Recherches sur la sécurité juridique en droit administratif français* (LGDJ 2009); T Piazzon, *La sécurité juridique* (Defresnois-Lextenso 2009).

19 J-E Schoettl, 'Décisions du Conseil constitutionnel. Loi MURCEF' (1997) Actualité Juridique du Droit Administratif 971; L Favoreu and L Philip, *Les grandes décisions du Conseil constitutionnel* (Dalloz 2007) 793.

20 S Boissard, 'Comment garantir la stabilité des situations juridiques individuelles sans priver l'autorité administrative de tous moyens d'action et sans transiger sur le respect du principe de légalité? Le difficile dilemme du juge administratif ' (2001) 11 Cahiers du Conseil Constitutionnel.

21 B Pacteau, 'La sécurité juridique, un principe qui nous manque ?' (1995) (special issue) Actualité Juridique du Droit Administratif 151.

22 See the various reports and debates around the conference 'Constitution et sécurité juridique' organised in Aix-en-Provence in September 1999, Annuaire International de Justice Constitutionelle 71 ; B Mathieu, 'Le principe de sécurité juridique' (2001) 11 Cahiers du Conseil constitutionnel 66.

law,[23] or in specific fields of public law.[24] Moreover, comparative approaches also have their place.[25] Eventually, other articles have appeared from authors with a strong European background, aimed more at developing the idea of circulating legal solutions, as a source of inspiration for French system. It is also worth noting that practitioners such as lawyers,[26] notaries,[27] and public authorities,[28] have demonstrated an interest in the principle of legal certainty.

Of course, it is always complicated to determine the reasons why these actors and authors have become interested in the principle of legal certainty. Concerning the actions of the Senate, they are part of a broader advocacy approach for better security of the normative framework applicable to local authorities, criticizing in particular the legislative inflation which generates vagueness and complexity for local authorities, and especially locally elected officials.[29] Moreover, it can legitimately be considered that developments at the European Union level as well as a growing general interest in the circulation of norms, including in administrative law, have provided a context conducive to arousing

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23 M Fromont, 'Le principe de sécurité juridique' (1996) (special issue) Actualité Juridique du Droit Administratif 178 ff; D Labetoulle, 'Principe de légalité et principe de sécurité' in *L'État de droit, Mélanges Guy Braibant* (Dalloz 1996) 403; L Vapaille, 'Le principe de sécurité juridique: réalité et avenir en droit administratif français' (10 Aug 1999) 158 Les Petites Affiches 18; M Delamarre, 'La sécurité juridique et le juge administratif français' (2004) Actualité Juridique du Droit Administratif 186; A Cristau, 'L'exigence de sécurité juridique ' (2002) Recueil Dalloz 2814; Y Benhamou, 'Cursives remarques sur la sécurité juridique ' (3 May 1996) 54 Les Petites Affiches 19; G Pelissier, 'Développements récents de l'impératif de sécurité juridique' (20 Feb 1998) 22 Les Petites Affiches 6; L Tesoka, 'Principe de légalité et principe de sécurité juridique en droit administratif français' (2006) Actualité Juridique du Droit Administratif 2214.

24 J-R Pellas, 'Le principe de sécurité juridique en droit fiscal' in *Études en l'honneur de Georges Dupuis* (LGDJ 1997) 261; R Ricci, 'Les sources normatives du principe de sécurité juridique en droit public économique' (2000) Revue Internationale de Droit Economique 299; P Hocreitere, 'Sécurité et insécurité juridiques après la loi Solidarité et renouvellement urbains' (2003) Revue Française de Droit Administratif 141; B Teyssie, 'Sur la sécurité juridique en droit du travail' (2006) Droit social 703.

25 F Moderne, 'Une communicabilité contrastée: le principe de sécurité juridique en droit français et espagnol' in *Liber amicorum Jean-Claude Escarras. La communicabilité entre les systèmes juridiques* (Bruylant 2005) 835.

26 A conference was organised by the Confederation of Lawyers, see 'Les entretiens de Nanterre' (1990) 48 Juris-Classeur Périodique 1. The Senate also discussed the issue during a conference 'Sécurité juridique et action publique locale' (held on 29 April 1999). A report has added information to these discussions: J-P Delevoye and M Mercier, *Sécurité juridique, conditions d'exercice des mandats locaux: des enjeux majeurs pour la démocratie locale et la décentralisation*, Les rapports du Sénat, n° 166, 1999-2000; Y Gaudemet, 'La sécurité juridique' (1996) 8/9 Géomètre 26 ff; C Lepage, 'Sécurité juridique et contrats des collectivités locales' (9 and 10 Jun 1999) 160/161 Gaz Pal 1-49.

27 89th Congress of Notaries, Urbanisme et sécurité juridique (Notaires de France 1993); 94th Congress of Notaries, Liberté contractuelle et sécurité juridique (1998) 54 Les Petites Affiches 1.

28 The French Senate also organized a conference on this topic in 1999, 'Sécurité juridique et action publique locale'. See also Delevoye & Mercier and Gaudemet (n26).

29 Senate, *Renforcer la sécurité juridique de l'action publique locale*, 18 January 2000, available at https://www.senat.fr/rap/r99-166/r99-166.html accessed 23 April 2021.

curiosity and interest.[30] Furthermore, the consideration of solutions developed in European Union law could be part of the reflections on a common administrative law. More precisely, Michel Fromont, a specialist in German administrative law, studied the principle of legal certainty in Union, French and German law.[31] Above all, his article is part of a special issue on Administrative Law and European Community Law, edited in the review 'Actualité Juridique du Droit Administratif' (AJDA).

Among this work, a special issue published in the Cahiers du Conseil Constitutionnel in 2001 is noteworthy for its inclusion of contributions revealing the position of French public law on the case law of the European Court of Justice regarding the legal certainty principle. Two contributions are particularly relevant because they are authored by members of the Council of State. To a certain extent, they reflect the state of acclimatisation and openness of the French administrative system with regard to the principle of legal certainty. First, an article on 'The principle of legal certainty in the case law of the Court of Justice of the European Communities'[32] was written by Jean-Pierre Puissochet and Hubert Legal, then respectively a judge at the Court of Justice and a judge at the Court of First Instance. Above all, it is important to stress that they are members of the Council of State. Indeed, judges of French nationality within the Court of Justice are irremediably either magistrates of the Court of Cassation or Councillors of State. For completeness' sake, it should be noted that this article was published in the *Cahiers du Conseil constitutionnel*, a legal journal directed by the Constitutional Council. Puissochet and Legal first explain to what extent the recognition of the principle of legal certainty by the Court of Justice requires national authorities to respect it when implementing Union law. They then stress the limits of this case law by stating:

> *[t]he fact remains that the practice of the Community courts in this area, which it would certainly be fanciful to pretend to export as it stands, can be explained fairly well by the situation of compromise between dissimilar legal traditions in which the work of the judges in Luxembourg finds itself.*[33]

Moreover, they point out that French public law provides for most of the solutions developed by the ECJ case law on legal certainty, whereas the same cannot be said for the principle of legitimate expectations. The authors' conclusion is realistic about the caution expressed by the members of the French administrative courts with regard to the principle of legal certainty, seeking to

30 See below Section 3.
31 Fromont (n23).
32 J-P Puissochet and H Legal, 'Le principe de sécurité juridique dans la jurisprudence de la Cour de justice des Communautés européennes' (2001) 11 Cahiers du Conseil constitutionnel.
33 Puissochet and Legal (n32).

limit its potential impact on French administrative law,[34] even if this impact already seems unavoidable at this stage.

From a comparable perspective, we can refer to, in the same special issue, the contribution of Sophie Boissard, also a member of the Council of State, entitled 'How to guarantee the stability of individual legal situations without depriving the administrative authority of all means of action and without compromising on the respect of the principle of legality? The difficult dilemma of the administrative judge'.[35] The title testifies to the French system's desire not to be on the sidelines of European developments concerning the principle of legal certainty and, at the same time, to control its channels of reception in the national legal order. The article is interesting because it indicates, firstly, that the principle of legal certainty in itself would not bring about any upheaval for French administrative law. Many of the solutions it contains concerning the accessibility of the law or the stability of the law are already recognised. However, in a final stage, the author stresses that this principle could be useful for bringing relevant changes in French administrative law, noticeably regarding better safeguarding of the stability of individual situations.

This approach confirms the decisive weight of the administrative judges, and especially of the supreme administrative judges, in the production and shaping of administrative law. We also see that, from the perspective of French administrative law, this acclimatation by the administrative judges is an essential step for the appropriation of the principle.[36]

Another example is the contribution of Daniel Labetoulle, important former member of the Council of State, in the *Mélanges* dedicated to Guy Braibant, also former member with a significant academic career. It is perhaps necessary to point out that the *Mélanges* are works that aim to pay tribute to an eminent academic or lawyer and allow the contributing authors to tackle more original, innovative subjects, or with more freedom, especially for members of the Council of State. In an intervention in 2018 entitled 'Légalité et sécurité juridique en droit interne' (Legality and legal certainty in national law), on the occasion of a meeting entitled 'Entretiens du Conseil d'Etat',[37] Daniel Labetoulle referred

34 ibid: 'We therefore believe that we are dealing with a useful principle in Community case law, which must be implemented, as a fundamental principle, by the courts of the Member States in the context of their review of the application of Community law, but which does not require them - at least in the case of the French courts - to make significant changes to their reasoning and methods.' [own translation].

35 Boissard (n20).

36 ibid: 'The first question that may be asked concerns the need for the administrative court, as part of the doctrine invites it to do, to develop its case law in order to apply the Community principle of legal certainty more widely or even to enshrine the existence of an autonomous principle of legal certainty in domestic law in order to better define the terms of its review.' [own translation].

37 D Labetoulle, 'Légalité et sécurité juridique en droit interne' (Entretiens du Conseil d'Etat, 16 November 2018).

to his previous article, emphasising his interest in the subject, but above all the regret that he had, as a government commissioner,[38] 'failed to get the jurisprudence that a pecuniary decision cannot create rights to be abandoned.'[39] He also expresses his own 'reservations about the most recent Alitalia case law'.[40] In the *Alitalia* judgment,[41] the Council of State enshrined the general principle of law according to which the administration has a duty to repeal any act that has been illegal since its origin, or has become illegal, in particular as a result of the adoption of European Union law. Daniel Labetoulle went on to point out that the topic of this article was also a 'double wink'.[42] On the one hand, it was a reference to the 1991 report of the Council of State prepared under the authority of Guy Braibant, then President of the Report and Studies Section. On the other hand, he reported that

> *I had often told Guy Braibant that I was in complete disagreement with case law adopted in 1966 in accordance with his conclusions (Ville de Bagneux) which, starting from the idea that, according to the Dame Cachet case law, the administration could withdraw an act creating rights for illegality if the time limit for appealing against this act had not expired, had deduced that, when the time limit for appeal had not begun to run, withdrawal was possible indefinitely, without any time limit conditions: in this case the act creating rights could be withdrawn six months, one year, ten years after its enactment.*[43]

These contributions are therefore part of publications questioning approaches to French administrative law, especially those based on a conception of legality that is sometimes considered too radical. Daniel Labetoulle, in his 1996 article, thus pleaded for 'reciprocal accommodations'[44] of the principles of legality and legal security.

Consequently, the existence of a concern for legal certainty is evident and is reflected in particular in the desire to facilitate the transplantation of the principle into national law,[45] showing that the French administrative system is not so hostile to it, and shaping a more favourable context for its future recog-

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38 The government commissioner was replaced by the public rapporteur (*rapporteur public*). Despite being an ordinary member of the court, he has no adjudicating tasks. S/he merely gives his/her assessment of the case at hand and formulates what s/he thinks is the best possible outcome, proposing, if necessary, a change in the case law. His/her function is comparable to the one of the Advocate General before the ECJ.

39 Labetoulle (n37).

40 ibid.

41 CE, Ass., *Alitalia*, n° 74052, 3 February 1989.

42 Labetoulle (n37).

43 Labetoulle (n37).

44 ibid.

45 Raimbault (n18).

nition. Here, the Europeanisation process has played a significant role in initiating the circulation of the principle of legal certainty, testing the openness of French administrative law.

3. The Europeanisation process as a factor of circulation of the principle of legal certainty

What has been undeniably decisive is the promotion of the principle of legal certainty at European level, by Member States of the Union, the Court of Justice and the European Court of Human Rights.

3.1. Solutions developed by the European States

The principle of legal certainty is deeply rooted in the German system. In Germany, the guarantee of legal certainty counts as a fundamental constitutional principle. The German Constitutional Court mentions, in a decision of 1 July 1953 (later confirmed on 19 December 1961), that legal certainty is a key component of the *Rechsstaat*. It includes four principles: good faith (or legitimate expectations), clarity of legal rules, publicity of legal norms, and the *res judicata* principle. What characterizes the German conception is the particular attention paid to its subjective dimension, aiming at also protecting individual situations and rights.[46] This principle has also been developed in Spain, where it is recognized by the Constitution itself,[47] and in Portugal, Belgium, Luxembourg, Denmark, and Lithuania. Moreover, even in systems in which it is not expressly enshrined, it obviously exists, can take different forms, and be linked to other related notions.[48] For example, in Italy, the principles of good faith (*buona fede*) and trust (*affidamento*) are recognised in public law.[49] Even in common law systems, such as the United Kingdom or Ireland, the promotion of concepts such as estoppel or legitimate expectations may fall under the principle of legal certainty.[50]

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46 DS De Russel & P Raimbault, 'Nature et racines du principe de sécurité juridique: une mise au point ' (2003) 1 Revue Internationale de Droit Comparé 85; J Schwarze, *Droit administratif européen* (Bruylant 2009) 933; J-M Woehrling, 'Les principes de sécurité juridique et de confiance légitime dans la jurisprudence administrative française: un exemple de réception en droit français d'un principe européen d'origine allemande' in *Verfassung und Verwaltung in Europa* (Nomos 2014) 437.

47 Art 9 of the Spanish Constitution of 27 December 1978.

48 X Lamprini, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française* (Bruylant 2017) 291 ff.

49 M Fromont, *Droit administratif des Etats européens* (PUF 2006) 266.

50 P Craig, *Administrative Law* (Sweet & Maxwell 2016) 672; R Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000).

3.2. Promotion of legal certainty by the Court of Justice

The case law of the Court of Justice is undeniably a key element in the circulation of the principle of legal certainty within the European area.[51] The Court of Justice has recognised the principle of legal certainty within the Union's legal order since the early 1960s. It is clearly linked to the stability, accessibility, and clarity of the legal norm, which takes on a particular dimension from the point of view of the Union's legal order of integration. The principle of legal certainty is a general principle and a fundamental requirement of Union law.[52] It 'aims to ensure both the quality and integrity of the norm and the stability of legal situations.'[53] Above all, it is the basis for the recognition of rules such as the prohibition of retroactivity, the clarity and predictability of legal rules, and the limitation of the modulation of effects of its rulings over time.

This case law has undeniably had an impact on the legal systems of the Member States. As a general principle of Union law, it can be invoked against national authorities, especially national administrative authorities, when they 'implement' Union law or when their actions fall within the scope of EU law.[54] In these cases, French administrative authorities, and consequently the French administrative judge, have to respect and to ensure compliance with the EU general principle of the law of legal certainty.[55] Obviously, the status of a 'general principle of EU law' is very powerful, to ensure the dissemination of this legal principle in the Member States' legal orders.

3.3. Promotion of legal certainty by the European Court of Human Rights (ECtHR)

While the role of the Court of Justice in promoting legal certainty at the European level is widely emphasised, the role of the European Court of Human Rights should not be overlooked. Indeed, it may have been at least equally important, especially since the authority of its case law is not limited, at least from a formal point of view, by the same conditions as Union law.

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51 Lamprini (n48) 290 ff.

52 Joined cases 7/56, 3/57 to 7/57 *Mlle Dineke Algera, M. Giacomo Cicconardi, Mme Simone Couturaud, M. Ignazio Genuardi,Mme Félicie Steichen contre Assemblée Commune de la CECA* EU:C:1957:7; Joined cases 42 and 49/59 *S.N.U.P.A.T. v. Haute Autorité de laCECA* EU:C:1961:5; J Boulouis, 'Quelques observations à propos de la sécurité juridique' in *Liber Amicorum P. Pescatore* (Nomos-Verlag 1987) 53.

53 R Mehdi, 'Variations sur le principe de sécurité juridique' in *Le droit de l'Union européenne en principes,Liber amicorum en l'honneur de Jean Raux* (Apogée 2006) 177, 178.

54 D Simon, 'L'application de la Charte par les juges administratifs' (2014) Europe 1; S Platon, 'La Charte des droits fondamentaux et la "mise en œuvre" nationale du droit de l'Union: précisions de la Cour de justice sur le champ d'application de la Charte' (2013) (chron 11) Revue des Libertés et Droits Fondamentaux.

55 See below.

It has, however, followed the path traced by the Court of Justice. Thus, in the *Marckx* judgment, the Court considered that the legal certainty principle is 'necessarily inherent in both Convention law and Community law'.[56] In its case law, several rights linked to the principle of legal certainty have been recognised, even if the principle is not explicitly enshrined in the Convention.[57] The requirements of accessibility, predictability and stability of the law are attached to it. It is also worth mentioning that the concept of 'legitimate expectations' (*espérance légitime*) has been widely developed, according to Article 1 Protocol n°1,[58] which may also have consequences for the dissemination of the legitimate expectations principle across Member States.[59]

The principle of legal certainty is therefore, undeniably, a widely circulating principle. The former President of the European Court of Human Rights stressed that 'the principle of legal certainty is interesting because it comes from German law and has been imported into the case law of the Court (and into different national systems in Europe) through the European Court of Justice and Community law',[60] adding that 'the case law of the European Court of Human Rights is, of course, a collective creation'. Many influences are exchanged and shared by judges.

However, it is worth noting that the prevailing conception of the legal certainty principle which is promoted at the European levels is not so much about the immutable stability of the law, but rather about the preservation of individual rights in a changing context.

4. The Council of State as the conductor in chief of the integration of the principle of legal certainty

The reception process was initially, and finally for quite a long time, in the hands of the Council of State. Clearly, the borrowing of principles of European law, as well as the inspiration drawn from other national systems, was from the outset expressly noted, whether in the Council of State's 2006 report on legal certainty, or following the case law enshrining the principle of legal certainty.

56 *Marckx v. Belgium* (1979) Series A No 31 [58].

57 M De Salvia, 'La place de la notion de sécurité juridique dans la jurisprudence de la Cour européenne des droits de l'homme' (2001) 11 Cahiers du Conseil constitutionnel.

58 *Kopecky v. Slovaquie* (2004) 41 EHRR 944.

59 See below.

60 J-P Costa, 'Concepts juridiques dans la jurisprudence de la Cour européenne des droits de l'homme: de l'influence de différentes traditions nationales' (2004) 57 Revue Trimestrielle des Droits de l'Homme 101.

4.1. A legal system more open to legal certainty requirements

Through the intervention of the administrative judge, the requirements of legal certainty began to have a more significant impact on the French administrative system. Above all, what reflects the consideration of the requirement of legal certainty, in line with the German conception and that of the Court of Justice, is the development of a conception which takes into account the importance of preserving the stability of individual situations. The judge has thus developed, following a case-by-case approach, ways to limit the consequences of illegality. The *Conseil d'Etat* has recognised the possibility of neutralising the effects of certain illegalities. In its *Vassilikiotis*[61] and *Titran*[62] judgments the judge developed powers of partial annulment with the delivery of an injunction, or of conditional abrogation with differed effects. Even more emblematic, and directly inspired by the case law of the Court of Justice,[63] the *AC!* judgment[64] was the first case in which the Council of State modulated the effects of the annulment over time. It then stressed that the

retroactive effect of the annulment is likely to have manifestly excessive consequences because of the effects that this act has produced and the situations that may have arisen when it was in force, and because of the general interest that may attach to a temporary maintenance of its effects, it is for the administrative judge (…) to determine whether the annulment is retroactive or whether it is in the general interest to maintain its effects temporarily, while taking into consideration, on the one hand, the consequences of the retroactivity of the annulment for the various public or private interests involved and, on the other hand, the disadvantages that a limitation in time of the effects of the annulment would present, with regard to the principle of legality and the right of individuals to an effective remedy; that it is for the Court to assess, by comparing those factors, whether they can justify derogating exceptionally from the principle of the retroactive effect of contentious annulments and, if so, to provide in its annulment decision that, subject to any contentious actions instituted on the date of the annulment against acts taken on the basis of the act in question, all or part of the effects of that act prior to its annulment shall be regarded as definitive or even, where appropriate, that the annulment shall not take effect until a later date to be determined by it.[65]

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61 CE, *Vassilikiotis*, n° 213229, 29 June 2001.
62 CE, *Titran*, n° 222509, 27 July 2001.
63 See O Dubos and F Melleray, 'La modulation dans le temps des effets de l'annulation d'un acte administratif' (2004) (n° 8, Étude 15) DA 11.
64 CE Ass., *Association AC!*, n° 255886, 11 May 2004.
65 ibid. [own translation].

Such an approach is quite similar to that adopted by the Court of Justice.[66] However, the Council of State has made sparing use of it, since it does not involve any major upheavals in the litigation,[67] and it is only used in exceptional cases.

4.2. The 2006 Council of State report on legal certainty[68]

Each year the Council of State draws up a report which aims both to give an account of its activity during the past year and to deal with a topical legal issue. This annual report is part of the dual functions of the Council of State, both advisory and contentious. In the 2006 report, and therefore the one that concerned the activity of 2005, the topic was legal certainty. The topic was not new for the Administrative Supreme Court, since the annual report of 1991 had already covered this topic.[69] This choice is obviously not insignificant or innocent. It is clearly a matter of laying the foundations for future developments. In this report, the Council of State notes the broad development of the principle of legal certainty, particularly in other European systems, also with reference to constitutional case law. Moreover, what is interesting is that the concept of legal certainty that will prevail following the *KPMG* ruling of the Council of State has already been developed. It is based on a number of axes reinforcing the objective dimension of legal certainty: accessibility, simplification, and the quality of legislation. So, the promotion of the legal certainty principle is here interconnected with the need to fight against the complexity of law. Of course, it already expresses a way to take into consideration the situations of citizens, but it does not aim at creating more subjective rights for the protection of their individual situations. And, in the report, the Council of State stresses the fact that 'despite the absence of solemn recognition of a principle of legal certainty, numerous rules have resulted from this'.[70] It is worth noting that in the report the Council of State widely referred to the case law of the

66 Article 264 TFEU; Case C-402/05 *Kadi and others v. Commission* EU:C:2008:461.

67 CE Section, *France Télécom, Rec.*, 86, 25 February 2005; EP Bordenave, 'Conclusions' (2005) Revue Française de Droit Administratif 787; (2005) Actualité Juridique du Droit Administratif 997, chr. Landais and Lenica; (2005) 57 DA note Bazex and Blazy; (2005) Juris-Classeur Périodique A 1162, note Saulnier-Cassia; CE 11 January 2006 *Association des familles victimes du saturnisme*, Req. n° 267251; (2006) Actualité Juridique du Droit Administratif 116 ; CE 12 December 2007 *M. Sire* et *M. Vignard*, Req. n° 296072 et 296818; (2008) Actualité Juridique du Droit Administratif 638, concl Guyomar.

68 Available at https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/rapports-annuels/securite-juridique-et-complexite-du-droit-rapport-public-2006 accessed 23 April 2021.

69 Council of State, 'De la sécurité juridique' EDCE n° 43, *Rapport public1991* (Documentation Française 1992).

70 Council of State, 2006 report, 291.

Court of Justice, and to European Member States, to explain, in a summary comparative perspective, how the legal certainty principle is enforced.[71]

4.3. The reception of legal certainty while 'enforcing EU law'

Since 2001, there has been no further discussion of the primacy of general principles of Union law over national law, such as their direct effect, at least not down to the legislative level.[72] Thus, they can be invoked against national administrations whenever they 'implement Union law'[73] or in situations 'governed by Union law'[74]. Consequently, in such a case, applicants could rely on the principle of legal certainty before the administrative court, and even on the principle of legitimate expectations. Classically, it is considered that the vehicle of Union law 'constitutes a strong incentive to consider their acculturation into the national legal order'.[75]

4.4. The enforcement of legal certainty in purely national cases

The general principle of the law of legal certainty was recognised in the *KPMG* ruling of 24 March 2006, handed down by the *Conseil d'Etat en Assemblée* (the solemn Council of State formation that decides on important cases or reversals).[76] The challenged decree aimed to strengthen the independence of 'statutory auditors' by approving their code of ethics, following the Enron affair. In particular, the applicants challenged the legality of the decree in the light of the principle of legal certainty. The judge then considered

that a new legislative or regulatory provision cannot apply to contractual situations in progress on the date of its entry into force, without thereby taking on a retroactive character (...); that, irrespective of compliance with this requirement, it is on the authority vested with the regulatory power to enact, for reasons of legal certainty, the transitional measures implied, if necessary, by a new regulation.[77]

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71 See, for example, for the question of abrogation of administrative acts, Council of State, 2006 Report, 283.

72 CE, *Syndicat national de l'industrie pharmaceutique*, n° 226514, 3 December 2001; A-L Valembois, 'La prévalence des principes généraux du droit communautaire sur le droit national' (2002) Actualité Juridique du Droit Administratif 1219.

73 CE, *SCI Résidence Dauphine*, n° 128516, 30 November 1994; CE Ass., *Fédération nationale des exploitants agricoles et autres*, n° 221274, 11 July 2001.

74 CE, *Mme Triboulet et Mme Brosset-Pospisil*, n° 217646, 6 March 2002.

75 Raimbault (118) 25.

76 See P Cassia, 'La sécurité juridique, un "nouveau" principe général du droit aux multiples facettes' (2006) Recueil Dalloz 1190 ff; F Moderne, 'Sécurité juridique et sécurité financière' (2006) Revue Française de Droit Administratif 485.

77 CE Ass., *Société KPMG et autres*, n° 228460, 24 March 2006. [own translation].

In the present case, failure to adopt transitional measures leads to the illegality of the decree. Thus,

in the absence of any transitional provision in the contested decree, the requirements and prohibitions resulting from the code would, in the contractual relations lawfully instituted prior to its intervention, cause disturbances which, because of their excessive nature in the light of the objective pursued, are contrary to the principle of legal certainty.[78]

This judgment thus marked the 'domestication' of the principle,[79] since the case did not fall within the scope of EU law. Inspiration from European solutions remained discreet in the ruling. However, it is worth noting that distinguished members of the Council of State (Jean-Marc Sauvé, former vice-president of the Council of State, and Bernard Stirn, former president of the litigation Section of the Council of State) expressly recognized the principle.[80]

One can consider that explicit recognition of legal certainty should not be a vector for deep evolutions, since French administrative law had progressively become more and more familiar with it. The transplantation process had obviously started earlier. The principle became latent because the French legal order is permeable to European legal developments and within the Member States of the Union. Nevertheless, official recognition of legal certainty as a general principle of law by the Administrative Supreme Court was awaited in order to consider it part of French administrative law. Since then, its consequences have gradually irrigated the French legal system.[81]

4.5. The follow-up to the *KPMG* case

It is always sensitive and complex to identify with certainty the developments brought about by the innovative enshrinement of a principle, since such references are rarely explicit. Above all, it should be stressed that the French administrative system did not wait until 2006 to take into consideration the acquired rights of citizens, in any case to better protect the individuals against the administration.[82] However, it is worth stressing that the *KPMG* case was a key step in confirming such trends and furthering these developments.

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78 CE Ass. *Société KPMG et autres*, n° 228460, 24 March 2006. [own translation].

79 Raimbault (n18) 28.

80 See for example B Stirn, 'Ouverture de la première table-ronde des entretiens du contentieux du Conseil d'Etat' 16 November 2018, available at https://www.conseil-etat.fr/actualites/discours-et-interventions/entretien-du-contentieux-du-conseil-d-etat-ouverture-de-la-1ere-table-ronde-par-bernard-stirn accessed 23 April 2021.

81 Pacteau (n21) 153.

82 P Soler-Couteaux, 'Réflexions sur le thème de l'insécurité du droit administratif ou la dualité moderne du droit administratif ' in *Gouverner, administrer, juger, Liber amicorum Jean Waline* (Dalloz 2002) 381 & 384. Historically, priority has been given to the instrumental dimension

Since 2000, there has been a significant movement in France to promote the stability of legal situations. First, we can mention the amendment of the rules related to the abrogation and withdrawal of administrative decisions.[83] Another interesting example is the modulation of the effects of a reversal of case law. Since the French system is based on the Romano-Germanic civil law tradition, case law is not a source of law as such. However, in practice, and especially in the context of administrative law – a judge-made law – administrative case law contributes to the evolution of applicable norms. As a result, a reversal of case law can have a significant impact on individual situations, and therefore especially on the situations of applicants who have brought a matter before the court and are at the origin of an appeal leading to the reversal of case law. In order to ensure a certain stability, the Council of State has traditionally adopted an incremental strategy, starting first with reversing its case law in dismissal judgments; i.e., confirming the legality of the administrative act in question.[84] Under this hypothesis, it is interesting to note that it is first of all the legal certainty on the side of the administration that is preserved. In a judgment of 14 June 2004,[85] the Council of State first of all confirmed the retroactive scope of its reversals of case law, considering that an applicant 'could not rely on a principle of legal certainty set out in Article 6 of the ECHR to maintain that the legality of the withdrawal of a permit should only have been assessed in the light of the case law established at the date it was pronounced'. However, in the *Tropic Signalisation* judgment, the Council of State admitted the contrary by basing this new practice directly on 'the imperative of legal certainty', and not on Article 6 (1) of the ECHR. Thus, 'subject to legal actions having the same object and already initiated before the date of reading of this decision', the new recourse open to 'competitors who have been ousted' against certain administrative contracts 'may only be exercised against contracts for which the award procedure was initiated after that date'.[86] It is interesting to note, however, that this decision was taken in the context of contractual litigation, which is a subjective dispute, as opposed to the objective dispute of an appeal against excessive power.

Furthermore, there has been a movement to promote better accessibility to law, noticeably through the requirement to publish administrative decisions and internal administrative acts, and through the recent codification process. Since the 1970s, written administrative law has been developed through the

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of administrative law, and concern for the protection of citizens has only been developing since the end of the 1970s with the first texts aimed at bringing citizens closer to the administration.

83 Articles L 242-1 ff. of the Code of relations between the public and administration.

84 See eg CE, *Nicolo*, n° 108243, 20 October 1989: the first case where the administrative judge agreed to review the compliance of a piece of legislation with the Rome Treaty, while rejecting the action since the legislation was considered compatible with the Treaty.

85 CE, *SCI Saint-Lazare*, n° 238199, 14 June 2004.

86 CE, Ass., *Société Tropic travaux signalisation*, n° 291545, 16 July 2007.

adoption of specific statutes related to the principles applicable to the administrative decision-making process and to the accountability of administrative power, such as access to administrative documents. In addition, a codification process has been completed, but it still focuses only on specific topics.[87] Codification was seen as a threat to the role to be played by the administrative judge (especially the CE),[88] specifically in procedural matters, through the development of general principles of law. There have been several attempts to codify administrative proceedings. The first (a rather limited one) was the decree of 28 November 1983 concerning the relationships between administrations and users, which was finally abrogated.[89] Second, Act N° 2000-321 of 12 April 2000[90] was also an effort to codify in one single act the requirements and the procedural guarantees applicable to the decision-making process, but it was not considered a proper codification due to its limited scope. Eventually, the Code of relations between the public and the administration was adopted in 2015. Interest in codification of administrative proceedings was renewed from 2012. Article 3 of Law N°2013-1005 of 12 November 2013 empowered the government to simplify the relationship between the administration and citizens through an ordinance.[91] It gave the government the power and the mission to adopt a Code that would gather

> *the general rules related to administrative proceedings applicable to the relations between the public and administrative bodies of the State and local entities, public establishment and bodies performing a public service task. (...) It gathers the general rules related to the regime of administrative acts. The codified rules are those which are in force at the date of the publication of the ordinance and, if needed, the rules already published but not yet in force at this date.*[92]

Two years later, the Code of relations between the public and the administration (*Code des relations entre le public et l'administration* – CRPA) was enacted

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87 Code général de la propriété des personnes publiques (General Code on the Property of Public Entities); Code des marchés publics (Public Procurement Code); Code général des collectivités territoriales (Local Authorities Code); Code de justice administrative (Code of administrative justice).

88 P Gonod, 'La codification de la procédure administrative' (2006) Actualité Juridique du Droit Administratif 489.

89 *Décret n°83-1025 concernant les relations entre l'administration et les usagers* of 28 November 1983.

90 *Loi n° 2000-321 relative aux droits des citoyens dans leurs relations avec les administrations* of 12 April 2000.

91 *Loi n° 2013-1005 habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens* of 12 November 2013.

92 *Loi n° 2013-1005 habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens* of 12 November 2013. [own translation].

by ordinance n° 2015-1341[93] concerning its legislative provisions and by decree n° 2015-1342[94] concerning its regulatory provisions. It is worth noting here that the Council of State was involved in this codification process,[95] which was also influenced by academics, and by European developments.[96]

It is generally considered that these developments on the principle of legal certainty contributed to a shift in the relationship between the administration and individuals, in the direction of a rebalancing in favour of individuals (or at least in the general direction of this rebalancing).[97]

5. The subsequent reactions of the judges, building the limits of transplantation process

The position of the Council of State eventually showed openness to the introduction and development of the principle of legal certainty in French administrative law. However, this does not mean that the principle has just been transposed, following the European or German conceptions. On the contrary, French public authorities have clearly kept control over the process by limiting its scope and sticking to an objective conception. Clearly, French administrative law does not worship the principle of legal certainty. Although the integration of this principle into the French administrative order has brought about changes, reflecting an acceptance of the principle, limits remain.

5.1. Resistance from the Constitutional Council

There has been no explicit recognition of the principle of legal certainty by the Constitutional Council (Conseil Constitutionnel), meaning that the principle of legal certainty has only a supra-regulatory value, and is not of constitutional value. Indeed, the Constitutional Council does not consider that it is binding on the legislator. However, rather classically, it is admitted that it

93 *Ordonnance n° 2015-1341 relative aux dispositions législatives du code des relations entre le public et l'administration* of 23 October 2015.

94 *Décret n° 2015-1342 relatif aux dispositions réglementaires du code des relations entre le public et l'administration* of 23 October 2015.

95 See J-M Sauvé, 'A la recherche des principes du droit de la procédure administrative', Intervention lors du colloque organisé par la Chaire Mutations de l'action publique et du droit public (MADP) de l'Institut d'études politiques de Paris au Conseil d'État, 5 December 2014, available at <https://www.conseil-etat.fr/actualites/discours-et-interventions/a-la-recherche-des-principes-du-droit-de-la-procedure-administrative> accessed 23 April 2021.

96 See, for a comparative work on administrative procedure: J-B Auby (ed), *Comparative Law of Administrative Procedure* (Buylant 2016); C Boutayeb, 'De l'influence inégale du Droit de l'Union européenne sur le Code' in G Koubi, L Cluzel-Métayer and W Tamzini (eds), *Lectures critiques du Code des relations entre le public et l'administration* (2018 LGDJ) 155.

97 Raimbault (118) 32.

is 'implicitly' taken into consideration. Thus, the Constitutional Council refers to requirements which are connected to legal certainty: non-retroactivity, accessibility of the law, stability (etc).[98] The legal certainty principle is even qualified as a 'clandestine principle' (freerider).[99] The decision of the Constitutional Council of 11 February 2011 is interesting with regard to assessing the position of the Council towards the principle. Indeed, it recognized an obligation imposed on the legislator to take into consideration 'the legal guarantees of constitutional requirements' while amending legislation.[100] In doing so, it limited the possibility of modifying existing legislation. Basically, this is the same requirement as the one recognized in the *KPMG* case. So, if the Constitutional Council did not take the opportunity to expressly recognize a constitutional principle of legal certainty, it was obviously a deliberative choice.[101] However, some have stressed that the Constitutional Council could not long remain insensitive to the foreign examples of other Constitutional courts, to EU law, and also to the risk of being less protective than the Council of State.[102] Moreover, there no longer seems to be any insurmountable obstacle to considering an evolution.[103] So, if we can talk about resistance of the Constitutional Council, the position is more formal, and this does not prevent the principle of legal certainty from being taken into account as a fundamental requirement. [104] This lack of formalisation does, however, have an important advantage. It allows the constitutional court to control its content and its consequences in terms of obligations, especially for the legislator.

5.2. The refusal to integrate the legitimate expectations principle

The main and notable resistance remains the lack of integration of the principle of legitimate expectations. Obviously, the principle of legitimate expectations cannot be assimilated to that of legal certainty, but beyond their conceptual proximity a similar integration process could have been followed. It is then a source of an obligation for public authorities to protect 'unless

98 See J Dellaux, 'Le principe de sécurité juridique en droit constitutionnel. Signes et espoirs d'une consolidation de l'ordre juridique interne et de l'État de droit' (2019) Revue Française de Droit Constitutionnel 665.

99 B Mathieu, 'Le principe de sécurité juridique : un principe constitutionnel clandestin mais efficient' in *Droit constitutionnel, Mélanges en l'honneur de Patrice Gélard* (Montchrestien 2000) 301.

100 CC, Decision n° 2010-102 QPC, *M. Pierre L.*, 16 July 2007 [4].

101 G Eveillard, 'Sécurité juridique et dispositions transitoires. Huit ans d'application de la jurisprudence KPMG' (2014) Actualité Juridique du Droit Administratif 492; Lamprini (n48) 302 ff.

102 Raimbault (n18) 563 ff.

103 Dellaux (n98).

104 L Azoulai, 'La valeur normative de la sécurité juridique' in L Boy, JB Racine, F Siiriainen (eds), *Sécurité juridique en droit économique* (Larcier 2008) 33.

there is an overriding public interest to the contrary, the well-founded expectations of private persons which they have created - by a previous act or action, even if illegal - under penalty of sanction by the judge'.[105] Indeed, its status as a general principle of Union law, also inspired by German law, has the consequence that it can be invoked before the French administrative court when Union law is implemented.

Here too, however, it is rather interesting to note that the increasing restriction of the conditions for withdrawal and termination is more a matter of legitimate expectations than of legal certainty. Similarly, it is interesting to note that for some years now there has been a growing framework for the practice of rescript, especially in tax matters, which corresponds to 'a formal position taken by the administration, which is opposable to it, on the application of a rule to a factual situation described fairly in the application submitted by a person and which does not require any subsequent administrative decision.'[106] In tax matters, it is also possible for a taxpayer to avail himself of the 'administrative doctrine' (which are rules developed by the tax administration itself), even if this doctrine is illegal.[107] However, there seems to be a certain mistrust of the principle of legitimate expectations, which would guarantee a lower level of protection than the national principle of non-retroactivity.[108]

The Constitutional Council has confirmed such a reluctance with regard to the principle of legitimate expectations. It has explicitly denied the existence as a constitutional norm of "a principle known as 'legitimate expectations'".[109] It would seem complicated to identify a constitutional basis for this principle[110], or else it is the *a priori* nature of the constitutionality review that has prevented a subjective dimension from being taken into account. However, it would seem that, more recently, the Constitutional Council could be the subject of greater openness[111] because of the introduction of an *a posteriori* constitutionality review (*question prioritaire de constitutionnalité*), accessible to individuals, whose purpose is the guaranteeing of constitutional rights and liberties.[112] It may be that the principle of legitimate expectations will be explicitly enshrined more rapidly in

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105 S Calmes, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français* (Dalloz 2001) 31; D Simon 'La confiance légitime en droit communautaire: vers un principe général de limitation de la volonté de l'auteur de l'acte?' in *Le rôle de la volonté dans les actes juridiques, études à la mémoire du professeur Alfred Rieg* (Bruylant 2000) 750.

106 See Council of State, 2006 Report.

107 Article L. 80-A of the Book on tax procedures.

108 Calmes (n105) 553.

109 CC, Decision 96-385 DC, 30 December 1996 [18].

110 F Moderne, 'A la recherche d'un fondement constitutionnel du principe de protection de la confiance légitime' in *Au carrefour des droits, Mélanges en l'honneur de Louis Dubouis* (Dalloz 2002) 595 ff.

111 B Delaunay, 'La confiance légitime entre discrètement au Conseil constitutionnel' (2014) Actualité Juridique du Droit Administratif 649.

112 Article 61-1 of the Constitution of 4th October 1958.

this way than the principle of legal certainty. Indeed, the principle of legal certainty can hardly be considered a right or a freedom, unlike legitimate expectations.[113] Moreover, it is interesting to note that the position of the Constitutional Council is very similar to that adopted with regard to the principle of legal certainty. While it does not expressly enshrine the principle, it is reflected in constitutional case law, in particular the principle of protection of legally acquired situations.[114]

The Council of State remains faithful to its traditional mistrust[115] and confirms that its 'case law has reserved for the principle of legitimate confidence only the minimum extension that may be required by the case law of the Court of Justice of the European Communities.'[116] In fact, it usually rejects a plea alleging a breach of legitimate expectations as inoperative where the contested act 'is not one of the acts taken by the French Government for the implementation of Community law'.[117] However, the Administrative Court of First Instance of Strasbourg admits that in 'failing to respect this principle of legitimate expectations in the clarity and predictability of legal rules and administrative action, the administration is liable for abnormal damage resulting from an unnecessarily sudden change in these rules or behaviour'.[118] Through this statement, inserted in a judgment with lengthy reasons, it enshrines the protection of legitimate confidence as a general principle of domestic law, vividly confirming the solutions outlined by some other lower courts.[119] The principle of legitimate expectations still appears to be an external principle for the French administrative system.

6. Conclusion

The characteristics of the French administrative system have consequences for the development and consideration of the principle of legal certainty. An analysis of the transplantation process reveals that it has been

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113 Dellaux (n98)

114 Valembois (n18); CC, décision n° 2005-530 DC, Loi de finances pour 2006, 20 December 2005; CC, décision n° 2016-604 QPC, Société Alinéa, 14 January 2017.

115 CE, *Entreprise personnelle transports Freymuth et Société mosellane de tractions*, n° 210944, 211162, 9 May 2001.

116 A Seban, 'Conclusions sur CE 9 mai 2001 Entreprise personnelle transports Freymuth et Société mosellane de tractions' (not published).

117 CE, *Association des élèves, parents d'élèves et professeurs des classes préparatoires vétérinaires et Melle Poujol*, n° 190768, 16 March 1998.

118 TA Strasbourg, *Entreprise Freymuth v. Ministre de l'Environnement*, n° 931085, 8 December 1994.

119 See TA Grenoble, *Caisse régionale de Crédit Agricole mutuel de Savoie*, n° 88-34940, 30 June 1993; CAA Bordeaux, *Ministre du Budget v. Banque Populaire Centre-Atlantique*, Req. n° 92BX00939, 22 February 1994; CAA Bordeaux, *Ministre du Budget v. Caisse régionale de Crédit Agricole mutuel du Lot*, Req. n° 92BX00716, 8 March 1994.

largely prepared, knowingly or unknowingly, to allow the principle of legal certainty to find at least a partial place in the French administrative system. The legal transplant is first and foremost a process. So, the idea is not foreign to the French system, but the real development lies in the fact that it can become a principle opposable to public authorities when they legislate or regulate a situation, and in its explicit recognition. Obviously, the occasional reluctance to use the words 'legal certainty principle' explicitly shows that explicit recognition is a way to make the transplant process visible. Unsurprisingly, as far as administrative law is concerned, the process has been controlled, and kept under control, by the Council of State. Due to the still largely judge-made law dimension of administrative law, the positions of the Council of State and the Constitutional Council are essential milestones for assessing the integration of the principle of legal certainty. Nevertheless, the Europeanisation process, as well as academic work, have laid the foundations for integrating the principle, making its integration in the French administrative legal system seem unavoidable. The different factors impacting the transplant process have then structured the chronology of integrating the principle of legal certainty: time for preparation, reception, adaptation, and finally, resistance.

The transplant process can be regarded as successful, at least from the French point of view, since it has brought new dynamics into the conception of French administrative law and of the relationship between the administration and citizens. However, its integration has certainly only been made possible because of the way in which the administrative judge has had to shape it in order to adapt it to the French administrative system. Indeed, four main factors have been identified to explain why and how the principle of legal certainty in the French administrative system has been developed: the historical structure of administrative law, the Europeanisation process, the place of the Council of State in the development of French administrative law, and the ambivalent role of the actions of judicial authorities. The judge has played a decisive role in creating a link between an apparently unfavourable context and an exogenous principle of legal certainty. Such a statement may not be so surprising, for two reasons at least. First of all, because of the weight of the administrative judge in the development of French administrative law and of the Constitutional judge as far as constitutional law is concerned. So, the judge-made law dimension of administrative law is an especially important element for the transplant process of a foreign principle. Second, in the context of the European integration process, it is well-known that the national judge, noticeably under the impulse of the European Court of Justice, has been the cornerstone of the cross-fertilization process of legal principles within the European administrative space.[120] Never-

[120] G De Vergottini, *Au-delà du dialogue entre les cours. Juges, droit étranger, comparaison* (Dalloz 2013).

theless, one consequence of the central role of the judge is that the transplant process of a given principle may be hazardous, both from a temporal perspective and from that of content. Indeed, the integration of the principle in the internal legal order may be at the cost of adapting the principle, noticeably to internal constraints. So, the transplant process is key to analysing the cross-fertilization existing in the European administrative space, but also to understand the diversity inherent to it.