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INTRODUCTION: ARTICLE 267 TFEU, TODAY

Daniele Gallo* and Lorenzo Cecchetti†

This Special Issue, which focuses on the constitutional backbone of the preliminary ruling procedure in today's European Union (EU), is the result of the Jean Monnet Workshop entitled 'Article 267 TFEU, today', held at Luiss Guido Carli University on 10 June 2022. The Workshop brought several leading EU law experts to Rome. They presented their research on various constitutional facets of the preliminary ruling procedure and had the opportunity to discuss and exchange ideas on the most relevant developments in the field. Our sincere thanks go to the speakers, to Professor Robert Schütze for agreeing to chair the event, and to all the participants in the Workshop and in lively debate that followed.

The Workshop and the Special Issue have been organised and realised with the support of the Erasmus+ Programme, in the framework of the Jean Monnet Chair on 'Understanding EU Law in Practice: EU Rights in Action before Courts', held by Professor Gallo at Luiss University.[1] We would like to express our acknowledgements to the European Commission (Education, Audiovisual and Culture Executive Agency) for its support and co-funding, as the Special Issue is one of the resulting publications of the Jean Monnet Chair. Finally, we express our gratitude to the Editors of the European Journal of Legal Studies for the opportunity to publish this Special Issue.

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As the title of the Special Issue suggests, its main purpose is to shed new light on the content, scope, extent, and limits of Article 267 TFEU in today's Union and, in turn, on the nature of this procedure and the European Court of Justice (ECJ)'s role as a *sui generis* supranational court. Such role has been played first and foremost through the rulings rendered in the context of the preliminary ruling procedure, which has been defined as the 'keystone' of the EU judicial system,[2] the 'most important aspect of the work of the Court',[3] the 'jewel in the Crown' of the Court's jurisdiction,[4] and the 'genius' without which core principles, such as direct effect and primacy, could have not been conceived.[5] Indeed, the procedure enshrined in Article 267 TFEU has shaped and continues to shape profoundly the EU legal order and the relationship between the EU and the Member States. Moreover, this procedure shall not be seen simply as a tool used by the Court of Luxembourg to strengthen the evolution of EU law. In fact, the way Article 267 TFEU has been constantly interpreted, redesigned, and materially reformed over the decades is also a symptom of the dynamics underpinning such evolution. This transformative and mimetic nature of Article 267 TFEU explains the evergreen interest in the procedure despite the absence

[2] Case Opinion 2/13 *Accession to the ECHR* EU:C:2014:2454, para 176.

[3] L Neville Brown and Francis G Jacobs, *The Court of Justice of the European Communities* (Sweet & Maxwell 1977), 131.

[4] Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (7th edn, Oxford University Press 2020), 496; Jurian Langer, 'Article 267 TFEU: Celebrating the Jewel in the Crown of the Community Legal Architecture and Some Hot Potatoes', in Fabian Ambtenbrink *et al.* (eds) *The Internal Market and the Future of European Integration. Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019), 455.

[5] Joseph H H Weiler, 'Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual', in Antonio Tizzano, Juliane Kokott and Sacha Prechal (eds), *50ème anniversaire de l'arrêt Van Gend en Loos: 1963-2013: actes du colloque* (Publications Office of the European Union 2013), 11.

of any amendment to the Treaties since the 1950s, confirmed by the large number of studies published on the subject over the last few years.[6]

For these reasons, researching the most controversial issues underlying the preliminary ruling procedure ultimately serves as a sort of 'litmus test' for assessing the rationales and the perimeters of the European integration process, including its potential and weaknesses. To this end, we have selected six intertwined key issues for the proper functioning of the preliminary ruling procedure which have experienced several developments in recent years. The six selected subjects are embedded in two broader and topical challenges, to be deemed as the *fil rouge* behind the Special Issue. The first is the – to some extent – tense dialogue between the ECJ and national judiciaries, including the judges of last instance and the supreme/constitutional courts of Member States. This tense dialogue relates especially – albeit not exclusively – to the protection of fundamental rights. The second is the uncertainty as to the actual scope of the binding effects of the ECJ's preliminary rulings. These two constitutional challenges involve the inner logic implied in the preliminary ruling procedure, *i.e.*, ensuring the correct and uniform interpretation and application of EU law in the Union's multi-level, decentralised judicial system. Thus, they are crucial for the understanding of the cooperative federalism philosophy behind this procedure.[7]

[6] Amongst the major monographs on the preliminary ruling procedure published over the last few years, see, for instance, Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (3rd edn, OUP 2021); Jacques Pertek, *Le renvoi préjudiciel. Droit, liberté ou obligation de coopération des juridictions nationales avec la CJUE* (2nd edn, Bruylant 2021); Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Elgar 2021); Clelia Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection* (Larcier, 2020); and Fabio Ferraro and Celestina Iannone (eds), *Il rinvio pregiudiziale* (Giappichelli, 2020).

[7] Robert Schütze, *European Union Law* (3rd edn, Oxford University Press 2021), 357.

As to the structure of the Special Issue, the starting point is François-Xavier Millet's essay on the *CILFIT* conditions as they appear in the aftermath of the recent ruling in *Consorzio Italian Management II*.[8] Indeed, Millet's article investigates the relationship between the ECJ and the national courts of last instance regarding the duty to refer imposed on them by Article 267(3) TFEU. In particular, his contribution, while reflecting upon the meaning of such duty and of its corollaries in Union's present time, claims that the duty placed on the national courts of last instance to state reasons when deciding not to refer questions to the Court is a suitable means to guarantee the effectiveness of Article 267 TFEU.

The following contributions examine the question of the binding effects of the ECJ's preliminary rulings from four perspectives. Most notably, Giuseppe Martinico's article examines the issue of the binding effects of the preliminary rulings in the Member States' legal orders beyond the referring court. Despite the growing consensus in legal scholarship on the existence of such effects, the meaning of '*erga omnes*' in EU law is far from clear. It is precisely this issue that Martinico explores by linking the classic debate to the innovations introduced by the Lisbon Treaty and illustrating the reasons why the 'de jure' *erga omnes* effects of preliminary rulings of the ECJ have not been questioned due to such amendments. Martinico also explains why the duty to protect national identities under Article 4 (2) TEU has not been used by the ECJ as a ground for derogation from the obligation to follow the *erga omnes* effects under Article 267 TFEU.

Considering that the issue of the *erga omnes* effects is connected to that of the temporal effects,[9] Lorenzo Cecchetti's contribution examines the substantive and procedural conditions to be met – according to the ECJ's case law – to obtain a limitation of the temporal effects of the interpretative preliminary rulings. The article shows the difficulties in fulfilling these

[8] Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291.

[9] Gerhard Bebr, 'Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect' (1981) 18 Common Market Law Review 475.

conditions today since the ECJ arrogated to itself this power in the 1970s. Cecchetti suggests that the Court should relax its overly strict approach to the admissibility of the *ex nunc* exception to set a suitable balance between the effectiveness and uniformity of EU law and respect for the Member States' legitimate regulatory powers, legal certainty, and legitimate expectations.

The preliminary rulings' binding effects do not only concern the interplay between EU law and Member States' legal orders but also the status of the Court's judgments for subsequent case law. Daniel Sarmiento's article dives into the extent of the 'overruling technique' under Article 267 TFEU. The article analyses some 'classics' as well as some recent developments in the ECJ's jurisprudence and offers a taxonomy of the use of this technique and a reflection upon the constitutional significance of the Court's approach. Sarmiento argues that further transparency is needed, and ultimately invites the Court to introduce specific language when the Court undertakes an overruling.

The study of the binding effect of the preliminary rulings is completed by the article by Fernanda G. Nicola, Cristina Fasone and Daniele Gallo, which reviews and compares the effects of a declaration of unconstitutionality in the US by the Supreme Court of the United States (SCOTUS) with the interpretative preliminary rulings rendered by the ECJ where incompatibility between EU and national norms is *de facto* asserted and the duty to disapply arises. This comparative law analysis dwells on both the procedural tools and avenues of cooperation available to these two Courts, and the strategies and arguments used by State courts to react and resist the higher court's assessment. By examining proposals to better integrate the views and determination of the State courts into the activity of the 'federal'/EU court and vice versa, the comparative analysis reveals that, also due to the different models of judicial review between the two courts, the SCOTUS seems to favour a more decentralized enforcement of its rulings

vis-à-vis the ECJ, which has reserved to itself a significant leeway in directing, *in concreto*, the remedy of disapplication.

Lastly, the Special issue ends with Eleni Frantziou's systematic review of the preliminary rulings rendered between 1957 and 2023. The article offers a qualitative-quantitative analysis of the role of human rights in the preliminary reference procedure, filling a gap in the existing literature and providing the reader with new insights into the 'constitutional' and 'federal' role of the ECJ. In this respect, Frantziou's piece shows the remarkably steady increase in human rights-related preliminary references over the years and suggests that, rather than the popular narrative of contestation and dualism, a more cooperative and gradual model of incorporation of human rights within EU law has been at play.

The Special Issue is enriched by the concluding remarks made by Robert Schütze, which highlight the intimate link between Article 267 and the philosophy of cooperative federalism defining the European integration process as a whole.

FROM THE DUTY TO REFER TO THE DUTY TO STATE REASONS: THE PAST, PRESENT AND FUTURE OF THE PRELIMINARY REFERENCE PROCEDURE

François-Xavier Millet*

Although national courts of last instance are subject to a duty to refer under Article 267, paragraph 3, TFEU, the Court of Justice has significantly qualified that duty since Cilfit, thereby contributing to making failures to refer a widespread phenomenon. While reasserting a strict duty to refer is no realistic option in view of the workload of the Court, of the habits taken by national courts of last instance and also of the cooperative relationship that underpins the preliminary reference procedure, it was arguably imperative for the Court of Justice to alter its case-law in a way that would, at the same time, keep the flexibility offered by Cilfit, ensure that national courts of last instance do not unduly escape what formally remains of their duty to refer and devise suitable monitoring mechanisms and ultimately sanctions against unlawful failures to refer.

The Court of Justice has recently embarked on that path by clarifying the scope of the still relative duty to refer and, above all, by coming up with an absolute duty for national courts of last instance to state reasons when deciding not to refer questions to the Court. While that duty raises new challenges for the preliminary reference procedure, this paper claims that it is a most suitable means to guarantee the effectiveness of the duty to refer. By modifying the place of the parties to the main processing within the preliminary reference procedure, the duty to state reasons does not only enhance the latter's rights but it also heralds a new approach to the issue of the enforcement of the duty to refer.

Keywords: Court of Justice; Article 267 TFEU; National courts of last instance; Duty to refer; *Cilfit*; Duty to state reasons

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I. INTRODUCTION

The issue of Member States' compliance with EU law has always been key in the story of European integration. When reflecting more particularly on preliminary references and the authority of the Court of Justice of the European Union (hereinafter 'the Court' or 'the Court of Justice'), it is common to look downstream: do national courts comply with the judgments issued by the Court within the preliminary reference procedure? Ominous cases where a national court decides in all awareness not to comply with a preliminary judgment of the Court are usually resounding. The main

snubs of such breed are well-known.[1] However, cases of loud non-compliance represent the tip of the non-compliance iceberg. Most cases of non-compliance are actually silent, if not mute.[2] They can themselves be divided into two categories. First, when a national court does not comply with a Court's judgment and no one realises it: that is particularly so when, despite its goodwill, a national court is unable to apply or simply understand one of those sometimes-cryptic judgments, especially in complex and technical matters. As a result, the national court may adopt a solution which is at odds with the Court's judgments. Second, more upstream, when a national court does not comply at all with Article 267 TFEU: the former silences the Court itself by not offering it the opportunity to make a pronouncement on an issue of EU law that arose before the national court.

This paper focuses on the latter phenomenon: failures to refer. A failure to refer occurs when a national court does not refer questions whereas it is subject to the obligation to do so. Since first and second instance courts have only a faculty to refer under Article 267, paragraph 2, TFEU, failures to refer can therefore merely originate in national courts of last instance upon which Article 267, paragraph 3, TFEU imposes a duty to refer where a question concerning the interpretation, or the validity of EU law is raised before them.

[1] See the cases of non-compliance of the Czech Constitutional Court following Case C-399/09 *Landtová* EU:C:2011:415; of the Danish Supreme Court following Case C-441/14 *Dansk Industri* EU:C:2016:278; of the German Federal Constitutional Court following Case C-493/18 *Weiss* e.a. EU:C:2018:1000; of the Romanian Constitutional Court following Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia "Forumul Judecătorilor Din România" e.a.* EU:C:2021:393.

[2] See Michal Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts', in Maurice Adams, Johan Meeusen, Gert Straetmans, Henri de Waele (eds), *Judging Europe's Judges* (Hart 2013) 197-234.

Although national courts of last instance are subject to a duty to refer in such circumstances, failures to refer have become a widespread phenomenon.[3] While some national courts of last instance have a good record of preliminary references to the Court of Justice, others feature an abnormally low number of references.[4] That phenomenon may be explained by various political and sociological reasons.[5] Those reasons range from sheer negligence (I do not bother with EU law) to the lack of sufficient knowledge about EU law (I do not really know what to do with that argument deriving

[3] More generally on the attitude of national judges vis-à-vis preliminary references and the practice of not referring cases, see Morten Broberg, Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice - Are Structural Factors (Part of) the Explanation?', (2013) 19 European Law Journal 488; Jasper Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Edward Elgar 2021); Tommaso Pavone, 'In This Bureaucratic Silence EU Law Dies': Fieldwork and the (Non-) Practice of EU Law in National Courts', in Mikael Madsen, Fernanda Nicola, Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 27-48.

[4] Measuring failures to refer on the part of national courts of last instance is a daunting task. No precise judicial statistics are available to that effect. However, it is possible to get a rough idea by carrying out a cross-analysis of various data provided by the Court of Justice, namely the total number of cases referred to the Court per Member State (while keeping in mind the overall size of the population in each Member State) together with the breakout between the cases referred by the courts of last instance as opposed to the other national courts; see Cour de Justice de l'union Européenne, *Rapport annuel 2022 Statistiques judiciaires de la Cour de justice* (CURIA 2022), 23-27. In the official statistics it appears that Belgian, German, Italian, Dutch, Austrian or Portugal courts of last instance have a good record of preliminary references while French, Spanish, Hungarian or Romanian courts of last instance do not. See also Chantal Mak, Elaine Mak, Vanessa Mak, 'De verwijzende rechter. Rechtspolitieke verandering via prejudiciële vragen van lagere rechters aan het Europese Hof van Justitie' (2017) Nederlands Juristenblad 1724.

[5] On the various reasons underpinning the decision of national courts (not) to refer, see Krommendijk (n 3), 77-109; Niels Fenger, Morten Broberg, *Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021), chapter 6.

from EU law), pragmatism, sometimes combined with overconfidence (I think I know what EU law means and I can avoid further delay and settle the issue myself) or distrust towards the Court's authority (I do not want to take the risk of asking questions to the Court for fear the latter reaches an outcome that I do not like).

Beyond those reasons, failures to refer would arguably not be that widespread if the Court of Justice itself had not legally contributed to them ever since *Da Costa*[6] and, above all, in the by now venerable *Cilfit* judgment.[7] While the duty to refer is worded in absolute terms in Article 267, paragraph 3, TFEU indeed, the Court interpreted it in a highly relative manner back in 1982. That judgment famously laid down three exceptions to the national courts of last instance's duty to request a preliminary ruling: a) when the question on EU law raised is irrelevant; b) when the EU law provision in question has already been interpreted by the Court (*acte éclairé*); c) when the

[6] Case 28 to 30/62, *Da Costa en Schaake NV et al*. EU:C:1963:2.

[7] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* EU:C:1982:335. Among the vast literature, see for example Gerhard Bebr, 'The Rambling Ghost of "Cohn-Bendit": Acte Clair and the Court of Justice' (1983) 20 Common Market Law Review 439-472; Haltje Rasmussen, 'The European Court strategy in Cilfit. Or: Acte Clair, of Course! But What does it Mean?' (1984) 9 European Law Review 242-259; Koen Lenaerts, 'La modulation de l'obligation de renvoi préjudiciel' (1983) Cahiers de droit européen 471; Federico Mancini, David Keeling, 'From CILFIT to ERT : the Constitutional Challenge facing the European Court' (1991) 11 Yearbook of European Law 1; David Edward, 'Cilfit and Foto-Frost in their historical context', in Miguel Poiares Maduro, Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart 2010) 173-184; Anthony Arnull, 'Judicial Dialogue in the European Union', in Julie Dickson, Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 199; Jacobien van Dorp, Pauline Phoa, 'How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture' (2018) 34 Utrecht Journal of International and European Law 73–87.

correct application of EU law is so obvious as to leave no scope for any reasonable doubt (the *acte clair* doctrine).

The *Cilfit* exceptions have been described by commentators such as Mancini, Keeling or Rasmussen as the result of a give-and-take.[8] When it comes to the third exception indeed, *Cilfit* granted a great deal of discretion to national courts of last instance while, at the same time, curtailing that discretion by setting out a few 'criteria'[9] that national courts have to look at to decide whether there is reasonable doubt.[10] By failing to impose on

[8] Mancini and Keeling (n 7), Rasmussen (n 7).

[9] Views have differed regarding the nature of the various elements set out by the Court as cumulative, 'to-be-ticked' criteria or a as general interpretive toolbox to assess the existence or absence of reasonable doubt as to the correct application of EU law. See Rasmussen (n 7); Hjalte Rasmussen, 'Remedying the Crumbling EC Judicial System' (2000) 37 Common Market Law Review 1071; Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 42. Following the judgments in Cases C-72/14 and C-197/14 *X and van Dijk* EU:C:2015:564 and Case C-160/14 *Ferreira da Silva e Brito* EU:C:2015:565, the general view nowadays is that they are not strict criteria to be fulfilled in all circumstances. See Alexander Kornezov, 'The New Format of The Acte Clair Doctrine And Its Consequences' (2016) 53 Common Market Law Review 1317; Agnè Limante, 'Recent Developments in the Acte Clair Case Law of the EU Court of Justice: Towards a more Flexible Approach' (2016) 54 Journal of Common Market Studies 1384-1397 ; Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291, Opinion of AG Bobek, para 69 ff.

[10] Those criteria were laid down in paragraph 16 to 20 of the judgment. According to the Court, 'before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice … The existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.' That entailed more specifically, first, a comparison of the different language versions ; second, the taking account of the specific terminology used by EU law and the fact that legal concepts do not necessarily have the same meaning in EU law and in the law of the

national courts of last instance a preliminary reference in all circumstances, the Court of Justice also managed to secure its own operability by avoiding an avalanche of preliminary references, to allow the settlement of disputes before national courts within a reasonable time and, last but not least, to ensure mutual trust between the Court of Justice and national courts of last instance.[11]

Forty years later, *Cilfit* seems so entrenched that it is probably illusory to think that the *acte clair* exception could be purely discarded and a strict duty to refer imposed now that the Court of Justice and national courts of last instance have become quite accustomed to it. However, that case-law should not be seen as 'the end of history' for the preliminary reference procedure. Three sets of structural and circumstantial reasons indeed plead for its refinement.

First, the duty to refer on the part of last instance national courts is of constitutional importance within the overall scheme of the Treaties.[12] Failures to refer – more specifically failures to comply with the duty to refer – are arguably as dangerous for the authority of EU law as banks' payment defaults are for global financial stability. As is well-known, the preliminary reference procedure, as the 'keystone of the EU judicial system,'[13] has greatly contributed to the gradual building up of the authority of EU law through

various Member States (reflecting the idea of autonomous EU law concepts); third, a comprehensive interpretation of EU law provisions in the light of their context, objectives and the EU's state of evolution at the date on which the provision in question is to be applied.

[11] On the various positive externalities generated by Cilfit, see Lorenzo Cecchetti, 'CILFIT 'Motionless Titan' Has Moved, Albeit Softly and With Circumspection: Consorzio Italian Management II' (REALaw.blog 21 January 2022), <https://realaw.blog/?p=898>, first accessed on 12 October 2022.

[12] See eg Pierre Pescatore, 'Interpretation of Community Law and the Doctrine of "Acte Clair"', in Bathurst et al. (eds), Legal Problems of an Enlarged European Community (Stevens and Sons 1972) 27-46.

[13] Opinion 2/13 *Accession of the EU to the Convention* EU:C:2014:2454, para 176.

the various doctrines and principles that the Court has come up with along the years. It is therefore somewhat disturbing that an EU law provision as pivotal as Article 267, paragraph 3, TFEU has been interpreted by the ultimate guardian of EU law as leaving an extensive, unmonitored discretion to national courts of last instance.

Second, emboldened by that wide discretion, national courts of last instance have increasingly done what pleases them, with little or no motivation at all when deciding not to refer questions to the Court. Arnull warned back in 1989 already about the risk of abuse inherent in that discretion.[14] Over the course of time, also because of the Court's own fluctuations in its approach to *acte clair,*[15] that abuse has gradually materialised. National courts indeed tend not to apply at all the *Cilfit* criteria when evaluating *acte clair*.[16] When they do, they often taken the liberty to substitute those criteria with their own standards and concepts. For example, while the French Council of State is of the view that it must refer only when facing a 'serious difficulty' in interpreting EU law[17] the Supreme Court of Cyprus only refers 'interpretive questions of general interest'.[18] Furthermore, some national legislators

[14] Anthony Arnull, 'The Use and Abuse of Article 177 EEC' (1989) 52 Modern Law Review 622.

[15] See *X and van Dijk* (n 9) and *Ferreira da Silva e Brito* (n 9).

[16] See Niels Fenger, Morten Broberg, 'Finding Light in the Darkness: On The Actual Application of the Acte Clair Doctrine' (2011) 30 Yearbook of European Law 180; Research Note No 19/004 of May 2019 of the Directorate-General for Library, Research and Documentation of the Court of Justice concerning the 'Application of the Cilfit case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law' <www.curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf>, first accessed on 12 October 2022.

[17] Conseil d'État (Council of State), judgment of 26 February 2014, n° 354603, FR:2014:354603.

[18] Cypriot Anotato Diskastirio Kyprou (Supreme Court), Proedros Tis Demokratias v Vouli Ton Antiprosopon, appeal 5/2016 of 5 April 2017.

themselves have adopted measures that limit referrals.[19] Such threats for the future of the preliminary reference procedure raise the issue of the necessary establishment of monitoring mechanisms whereby abuses of national courts could be identified.

Third and in relation to monitoring, there is the issue of the sanction attached to failures to refer. Until recently, the consequences deriving from such failures to refer were extremely circumscribed, if not inexistent, under EU law.[20] Things have radically changed, in the judgment of 2018 in *Commission v France*,[21] where the Court sentenced for the first time a Member State for non-compliance with the duty to refer by a court of last instance.

Certainly, there was no principled reason why an infringement judgment should not target the case-law of a court of last instance if the latter appeared in contradiction with EU law. The ensuing asymmetry between the loose character of the duty to refer deriving from *Cilfit* and the severity of the sanction now attached to the failure to comply with it is however puzzling. Indistinctively sanctioning national courts of last instance within infringement proceedings for their failure to refer indeed appears excessive

[19] See, for instance, the Polish and Romanian limitations on referrals and the way they have been addressed by the Court of Justice in respectively Case C-824/18 *A.B.* EU:C:2021:153, para 91; Case C-430/21 *RS* EU:C:2022:99, para 65 to 67.

[20] Morten Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' (2016) 22 European Public Law 243-256.

[21] Case C-416/*17 Commission v France* EU:C:2018:811. See Araceli Turmo, 'A Dialogue of Unequals – The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU' (2019) 15 European Constitutional Law Review 340; Stéphane Gervasoni, 'Repenser les termes du dialogue des juges' (2019) Actualité juridique du droit administratif 150; Anastasia Iliopoulou-Penot, 'La sanction des juges suprêmes nationaux pour défaut de renvoi préjudiciel' (2019) Revue française du droit administratif 139.

in the absence of an absolute duty to refer, where those courts enjoy so much discretion.

The Court of Justice came to such finding in a rather blunt and unqualified manner. While the Court in *Köbler* had meticulously carved out the conditions under which a finding of the violation of the duty to refer could occur for the purposes of Member State liability for national courts' wrongdoings, it did not, in *Commission v France,* take account of the specificity of the judicial function. The Court did not conduct either a separate assessment of the violation of the duty to refer in the light of the *Cilfit* criteria but conflated the finding of the violation of the duty to refer with that of the violation of a substantive EU law provision.[22] Although sanctioning failures to refer appears legitimate, sanctions should arguably be tailored to the loose character of the duty to refer that was promoted by the Court of Justice itself.

Against that background, while reasserting a strict duty to refer is no realistic option in view of the workload of the Court, of the habits taken by national courts of last instance and also of the cooperative relationship that underpins the preliminary reference procedure, it was arguably imperative for the Court of Justice to find new avenues that would, at the same time, keep the welcome flexibility offered by *Cilfit,* ensure that national courts of last instance do not unduly escape what formally remains of their duty to refer and find suitable monitoring mechanisms and ultimately sanctions against unlawful failures to refer.

Recent cases, in particular *Consorzio Italian Management II,* have offered the Court of Justice an opportunity to go back to *Cilfit* and address some of those contemporary challenges for the preliminary reference procedure. After setting out the tweaks brought to the assessment of *acte clair* **(II)**, I will analyse the main innovation of *Consorzio Italian Management II*, namely the duty for national courts of last instance to state reasons when deciding not

[22] Ibid., para 112.

to refer questions to the Court **(III)**. I argue that by modifying the place of the parties to the main proceedings within the preliminary reference procedure, the duty to state reasons does not only enhance the latter's rights but it also heralds a new approach to the issue of the enforcement of the duty to refer.

II. THE REFINED ASSESSMENT OF *ACTE CLAIR* IN THE COURT OF JUSTICE'S RECENT CASE-LAW

The Italian *Consiglio di Stato* has recently given to the Court of Justice several opportunities to amend its case-law on the duty to refer and its exceptions.[23] The Court of Justice has tinkered with the *acte clair* exception by slightly revising its evaluation in *Consorzio Italian Management II*[24] **(a)** followed by a couple of cases **(b)**.

1. Consorzio Italian Management II

Consorzio Italian Management II is the follow-up to *Consorzio Italian Management I*. In that case with two episodes, a temporary association of undertakings providing various services and the Italian railway infrastructure

[23] The reason why the Italian Council of State has appeared particularly preoccupied by the extent of the duty to refer of national courts of last instance mainly lies in the fact that, in Italy, failures to refer may trigger the civil liability of judges. There has thus been a recent trend for the Council of State to start systematically referring preliminary questions to the Court of Justice in order to avert the filing of actions for damages against them. See, to that effect, Case C-144/22 *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* EU:C:2022:1013, para 22.

[24] Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291. See Morten Broberg, Niels Fenger, 'If You Love Somebody Set Them Free : On the Court Of Justice's Revision of The Acte Clair Doctrine' (2022) 59 Common Market Law Review 711-738; Lorenzo Cecchetti, Daniele Gallo, 'The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: 'CILFIT Strategy' 2.0 and its Loopholes' (2022) 15 Review of European Administrative Law 29-61; François-Xavier Millet, 'Cilfit Still Fits' (2022) 18 European Constitutional Law Review 533-555.

manager concluded a public contract for the supply of cleaning services for national railway infrastructure. During the performance of that contract, the infrastructure manager refused the undertakings' request to review the contract price. That refusal was challenged before an Italian regional administrative court and, subsequently, before the *Consiglio di Stato* (the Italian supreme administrative court) on the grounds that Italian law, which allowed the exclusion of price review, was in breach of EU law.

That case gave rise to two successive preliminary references. In Case C-152/17, in its judgment of 19 April 2018,[25] a three-judge chamber found inadmissible most of the request for a preliminary reference for the non-applicability or lack of relevance of the EU law provisions raised by the referring court. The Court only offered an interpretation of Directive 2004/17 to the effect that the latter did not preclude national rules which do not provide for price review after a contract has been awarded in the sectors covered by that directive. Upon the applicants' further questions in relation to other substantive provisions of EU law in the matter of public procurement, the *Consiglio di Stato* referred Case C-561/19 six months later and asked a most welcome question regarding the scope of Article 267, paragraph 3, TFEU in the specific circumstances of the case.

In his Opinion,[26] Advocate General Michal Bobek conspicuously took the view that the case at hand was a good case not only to clarify *Cilfit* and its exceptions but to revisit them.[27] In view of both the (in)ability or reluctance of national courts of last instance to apply the *Cilfit* criteria and, above all, the type and degree of uniformity that should be aimed at the EU level,[28] he made a proposal to amend the duty to refer so that the scope of the latter

[25] Case C-152/17 *Consorzio Italian Management I* EU:C:2018:264.

[26] Opinion of AG Bobek (n 9).

[27] For ealier proposals in the legal scholarship to revisit the acte clair criteria, see eg Morten Broberg, 'Acte clair revisited: Adapting the acte clair criteria to the demands of times' (2008) 45 Common Market Law Review 1383-1397.

[28] Opinion of AG Bobek (n 9), para 180.

would match its macro-function, namely preventing judicial divergences across and within the Member States as far as the interpretation of EU law is concerned.[29] That proposal, which arguably did not depart from the *Cilfit* exceptions, in particular *acte clair*, but rather tried to streamline their application and make their outcome more predictable, consisted in the following three-pronged test: 'a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law is to refer the case to the Court of Justice provided that it raises (i) a general issue of interpretation of EU law (as opposed to its application); (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court of Justice (or with regard to which the referring court wishes to depart)'.[30] As regards more specifically the second condition, that AG Bobek developed most as a way to polish *acte clair*, the duty to refer was to become strict 'where there are two or more potential interpretations proposed before the national court of last instance'.[31]

Although the Court's judges had certainly a whole range of options in their hands, the Court decided to repeat in an (almost) unaltered manner the three classic exceptions to the duty to refer.[32] As far as the evaluation of 'reasonable doubt' is concerned, the Court restated the various criteria. It however brought a few clarifications regarding their evaluation.[33]

First, the Court made it clear that national courts of last instance are not required to examine each of the language version, but 'must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the

[29] Ibid., paras 132-133 and para 149.

30 Ibid., para 134.

[31] Ibid., para 157.

[32] *Consorzio Italian Management II* (n 24), para 33.

[33] Ibid., paras 40 to 43 and 45-46.

parties and are verified'.[34] Second, the Court insisted that the need to avoid interpretive divergences applies to both divergences 'among the courts of a Member State or between the courts of different Member States'.[35] Third, 'national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice'.[36] Fourth, the Court held that 'the mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible for the national court or tribunal concerned…, is not sufficient for the view to be taken that there is reasonable doubt as to the correct interpretation of that provision'.[37] Fifth, it is now the interpretation of EU law (rather than its application) that must leave no scope for reasonable doubt.[38]

When looking in detail at each of the five clarifications brought in by *Consorzio Italian Management II*, it is beyond doubt that they have an added value inasmuch as they facilitate the assessment of the existence of *acte clair*. However, most of them generate their own interpretive issues and do not make the outcome of that assessment significantly more predictable. To take just two examples,[39] as far as the comparative evaluation of language versions is concerned, the Court did not explain in detail what is exactly expected from national courts although assumingly sufficient to look at one or two foreign versions. Likewise, it remains uncertain whether *lower* courts' interpretive doubt is relevant for a national court of last instance to determine whether an EU law provision is clear. On the one hand, the Court has altered *Cilfit* by indicating that the interpretation in issue should be equally obvious

[34] Ibid., para 44.

[35] Ibid., para 49.

[36] Ibid., para 40.

[37] Ibid., para 48.

[38] Ibid., para 33.

[39] For further development on the outstanding problems deriving from *Consorzio Italian Management II* (n 24), see Millet (n 24) 545-547.

to the Court and to the national courts of last instance.[40] On the other hand, the Court has not been specific when stating that national courts of last instance should be vigilant when there are divergences 'among the courts of a Member State or between the courts of different Member States.'[41]

2. Orders of 15 December 2022

The Court of Justice has also had a couple of other occasions to further clarify the scope and intensity of the duty to refer in similar cases raising the same legal issue. In its orders of 15 December 2022,[42] the Court brought clarification in two respects.

First, the Court extensively relied on *Consorzio Italian Management II* to confirm the relative nature of the duty to refer and its three exceptions. It however carved out a situation whereby the duty to refer becomes actually strict, namely when the national court of last instance wishes, in the wake of *Association France Nature Environnement*,[43] to avail itself of the possibility to maintain certain effects of national acts that are incompatible with EU law.[44] Because such faculty is to remain a strict exception to the immediate disapplication rule, national courts cannot indeed enjoy their usual leeway to decide whether to refer. In order to escape their duty to refer, they must provide a very detailed assessment that includes analysis of the case-law of other national courts of last instance.[45] It remains that that scenario is quite circumscribed to the extent that it only concerns the situation whereby a

[40] *Consorzio Italian Management II* (n 24), para 40.

[41] Ibid., para 49.

[42] *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* (n 23) paras 48 and 50. See also Case C-597/21 *Centro Petroli Roma* EU:C:2022:1010, paras 51 and 58.

[43] Case C-379/15 Association France Nature Environnement EU:C:2016:603, paras 51-52.

[44] *Società Eredi Raimondo Bufarini Srl – Servizi Ambientali* (n 23) para 50.

[45] Ibid., para 51.

national court contemplates to provisionally keep applying an unlawful national act.

Second, the Court of Justice gave further guidance on the practical evaluation of *Cilfit*'s general criterion for a national court of last instance to be 'convinced that the interpretation of EU law would be equally obvious to the Court and to the other supreme courts in the Member States'.[46] The Court made it clear that the analysis of the 'obviousness to all' must be conducted in an objective manner, without looking into the many competing interpretations that other courts may adopt.[47] Through that limited clarification, the Court further secured the discretion of national courts of last instance when deciding whether to refer questions to the former.

III. The new duty to state reasons: a breakthrough for the preliminary reference procedure

Although the latest clarifications regarding the evaluation of reasonable doubt should certainly not be overlooked as they make the outcome of that key assessment somewhat more predictable, they should not be overestimated either. It is conspicuous that the Court did not want to do away with *acte clair.* Again, that is not a problem per se. What is arguably of utmost importance nowadays is rather to find means to prevent abuses by national courts of last instance of the wide, largely unmonitored discretion that *Cilfit* has awarded them.

In that regard (and irrespective of whether that breakthrough and its implications were fully thought through by the Court), the Court of Justice has found a clever manner in *Consorzio Italian Management II* to limit those abuses while sticking to the wide discretion that it introduced in *Cilfit*: obliging national courts of last instance to state reasons when they

[46] *Consorzio Italian Management II* (n 24), para 40; *Cilfit* (n 7) para 16.
[47] Ibid., paras 48-49.

intentionally fail to refer questions to the Court.[48] According to the Court, which echoes AG Bobek's proposal to impose on national courts of last instance a new, 'correlating duty to specifically and adequately state reasons'[49] for not referring questions of EU law to the Court,[50] it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that a national court of last instance that is of the view that it does not have to refer because the situation at hand falls within one of the three exceptions to the duty to refer must state the reasons for its decision not to refer.[51]

Accordingly, in the absence of a strict duty to refer, national courts of last instance are now under a strict duty to establish that they fall within one of the three *Cilfit* exceptions to the duty to refer in order to ground their decisions *not* to refer. Arguably influenced by the case-law of the European Court of Human Rights ('the ECtHR'), that duty aptly strengthens the effectiveness of the duty to refer. It also raises new challenges regarding the practicalities of the duty to state reasons and the issue of the most suitable remedy in the context of a duty that enhances the place of the parties to the main proceedings within the preliminary reference procedure.

3. The influence of the ECtHR

Although the Court of Justice did not cite the ECtHR case-law in its judgment, it would be hard to deny the latter's influence on the former as far as that new duty to state reasons is concerned. That duty was indeed originally devised by the ECtHR within those situations in which it had to examine refusals of national courts to refer a case to the Court of Justice, both

[48] For earlier scholarly proposals to that effect, see Kornezov (n 9); Jasper Krommendijk, '"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason Their Refusals to Refer' (2017) 42 European Law Review 46-62.

[49] Opinion of AG Bobek (n 26), para 178.

[50] Ibid., paras 135 and 168.

[51] *Consorzio Italian Management II* (n 24), para 51.

in relation to the application of the Bosphorus presumption[52] and, autonomously, with regard to Article 6(1) of the Convention. It is in that second situation that the ECtHR has specifically derived a duty to state reasons for national courts of last instance from Article 6(1) of the Convention.

In *Ullens de Schooten* v *Belgium*, the ECtHR took the view that national courts of last instance which refuse to refer to the Court of Justice a preliminary question on the interpretation of EU law that has been raised before them are obliged, under Article 6(1) of the Convention, to give reasons for their refusal, not in general but in the very light of the three exceptions provided for in the *Cilfit* case-law of the Court of Justice.[53] However, the ECtHR did not find any violation of Article 6(1) in that particular case since the obligation to state reasons had been fulfilled.

In *Dhabi* v *Italy*,[54] the ECtHR sentenced for the first time a state for the wrongful failure to refer a case to the Court of Justice. In that case, a Tunisian national lawfully working in Italy sought to obtain payment by the Italian authorities of a family allowance under the association agreement between the Union and Tunisia. Upon challenging the refusal before the Italian courts, the applicant asked the latter to refer the case to the Court of Justice for an interpretation of the association agreement. His application was dismissed in first instance, on appeal and finally before the court of cassation both on the merits and as regards the request for a preliminary ruling that the applicant had filed.

Against that background, the ECtHR did not only conclude that there had been a violation of article 14 of the Convention in conjunction with Article

[52] *Bosphorus* v *Ireland*, App No 45036/98 (ECtHR 30 June 2005); *Michaud* v *France* App No 12323/11 (ECtHR, 6 December 2012).

[53] *Ullens de Schooten and Rezabek* v *Belgium* App No 3989/07 and 38353/07 (ECtHR 20 September 2011), para 62.

[54] *Dhahbi* v *Italy* App No 17120/09 (ECtHR 8 April 2014). For a recent confirmation, see *Georgiou* v *Greece* App No 57378/18, point 25 (ECtHR 14 March 2023).

8. It also held that Italy breached Article 6(1) of the Convention on account of the fact that the Court of Cassation did not state any reasons for not referring the case to the Court of Justice, or even mention the fact that the applicant had filed a request for a preliminary ruling.[55]

4. Making effective the duty to refer by proceduralising it

With the introduction of that ECtHR-inspired duty to state reasons, the Court of Justice has found an appropriate way to make up for the wide discretion of the national courts of last instance that has been largely untouched by the Court in *Consorzio Italian Management II*. The three exceptions to the duty to refer, in particular *acte clair*, have not only been solemnly confirmed but they have found a new function. In full accordance with the ECtHR case-law, it is not only expected from national courts of last instance to state reasons in a general way. They must specifically do it in the light of those three exceptions. By obliging national courts of last instance to enter into an argumentative exercise explaining why they consider a referral superfluous, the Court of Justice has proceduralised the duty to refer. Thereby, it has enhanced the latter's effectiveness: there is no absolute duty to refer but there is an absolute duty to state reasons for national courts of last instance in order for the latter to establish that they have remained within the boundaries of their discretion. It follows, first, that failures to refer can no longer be looked in isolation but in conjunction with failures to state compelling reasons; and second, that national courts of last instance are accountable under EU law for such failures.

Most interestingly, the duty to state reasons also bears constitutional consequences regarding the very nature of the preliminary reference procedure. It is rather well-known that that procedure was conceived of as an objective procedure. The Court of Justice has always consistently held that there is no subjective right for the parties to the main proceedings to a

[55] Ibid., paras 32-33.

preliminary reference under EU law.[56] Arguably, recognising such right would not only go against the intention of the drafters of the Treaties but it would also entirely change the nature of the preliminary reference procedure and the respective roles of the Court of Justice and national courts of last instance. The ECtHR has always respected that situation by holding that there is no such right under the Convention either.[57]

The duty to state reasons however alters the nature of the preliminary reference procedure. The duty to state reasons is itself classically associated with private parties as a corollary of an individual's right to defense. Far more than a mere procedural tool, it thus introduces a strong element of subjectivation by enhancing the place of the parties to the main proceedings. Their involvement is further secured in Consorzio Italian Management II where it transpires that national courts of last instance, although not bound by the parties' arguments, should take them seriously and engage with them to come to its decision as to whether to refer. For instance, a national court of last instance 'must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified'.[58] Further, where a court of last instance 'is made aware of the existence of diverging lines of case-law', it 'must be particularly vigilant in its assessment of whether or not there any reasonable doubt'.[59]

[56] Preliminary references do 'not constitute a means of redress available to the parties to a case pending before a national court or tribunal' and are 'completely independent of any initiative by the parties' (*Consorzio Italian Management II* (n 24) paras 53-54).

[57] In *Ullens de Schooten* v *Belgium* (n 53) para 57, the ECtHR explicitly refused to recognise on the basis of the Convention any 'right to have a case referred by a domestic court to another national or international authority for a preliminary ruling'.

[58] *Consorzio Italian Management II* (n 24) para 44.

[59] Ibid., para 49.

It follows that arguments raised by the parties to the main proceedings have a necessary impact on the duty to state reasons inasmuch as it is expected from national courts of last instance to explicitly engage with those very arguments within their statement of reasons to explain that the parties were wrong in considering that an EU law provision was not clear. Accordingly, although it primarily remains an objective cooperation mechanism between courts, the preliminary reference procedure has undergone an unexpected reorientation towards the parties.

5. *Forthcoming challenges for the duty to state reasons*

With the duty to state reasons the Court is now confronted to new challenges inherent therein. First, there is the question of the scope and extent of the statement of reasons: what is to be exactly expected from national courts of last instance within their statement of reasons **(1)**? Second, there is the question of monitoring and compliance: who is to monitor whether national courts of last instance comply with the duty to state reasons and what shall be the sanction for not complying therewith **(2)**?

A. *Modus operandi*

Regarding the modus operandi of the duty to state reasons, now that the Court has durably sealed the fate of *Cilfit*'s exceptions to the duty to refer, it is logical that the duty to state reasons be tailored to those exceptions. Both duties share the same scope and national courts are now to systematically justify themselves in the light of the three exceptions to the duty to refer (and the guidance provided by the Court). National courts of last instance should therefore explain *in concreto* which one of those three situations applies to the case at hand to justify their decision not to refer.

As regards the first exception, as to whether the EU law question raised is irrelevant for the purposes of settling a case, stating reasons should be relatively straightforward: the national court is to explain why that provision

is inapplicable in the factual circumstances of a case so that it is obviously not needed to ascertain its true meaning.[60]

Should the question appear potentially relevant, arguing the second and third exceptions is for its part somewhat trickier. To prove that the second or third exception come into play, national courts of last instance will be under a heightened level of scrutiny since they will have to explain why they can interpret EU law themselves without endangering the latter's uniform interpretation.

In that respect, national courts must either make argument based on the most relevant case-law of the Court or demonstrate that the EU law provision in issue is clear. Each of those situations raises its own set of difficulties.

Within the first scenario (corresponding to *acte éclairé*), what kind of argument may exactly be made? An easy case is the one where a national court of last instance takes the view that a previous judgment (or jurisprudential line) does apply, since it should cite and engage with that judgment in order to duly explain why that case-law applies to the case at hand and what solution derives from it. A more uncertain case is the one where a national court of last instance is fully aware of the Court's case-law but is of the view that it is not appliable to the factual situation at hand. In an ideal world, such 'distinguishing' technique, which is the result of the (negative) application of EU law to the national context, should be allowed since it does not challenge the *interpretation* of EU law. In practice, however, the national court will have to provide a detailed statement of reasons in such a scenario to prove its point. Admittedly, the line may be thin between 'true' and 'false' departures from previous case-law, that is failing to apply a previous judgment either because the national court simply does not want to (contestation of the Court's judgment, thus true departure) or because it

[60] The best example to that effect is the specific situation at hand in *Consorzio Italian Management II* (n 24) itself since the substantive provisions of EU law bore no connection with the case as the Court held in the remainder of the judgment.

considers it too different to be relevant (distinguishing, thus false departure). Unlike Advocate General Bobek,[61] the Court of Justice however did not expressly impose to comply with the duty to refer when a national court of last instance departs from the Court's case-law, which leaves the issue open. It is however to be expected, especially in the light of the judgment in *Commission* v *France*,[62] that the Court will prove demanding vis-à-vis national courts of last instance so that the latter sufficiently explain: a) why the situation at hand is different from a situation dealt with in a previous judgment; b) how EU law is then irrelevant (first exception to the duty to refer), or why EU law is clear as far as the situation at hand is concerned (third exception to the duty to refer). It follows that a national court of last instance will thus fall back on the two other exceptions to the duty to refer and cannot simply rely on the Court's case-law to dismiss it.

Within the second scenario (corresponding to *acte clair*), it will not be straightforward in practice for a national court of last instance to show that the interpretation of the EU law provision in issue 'does not leave scope for any reasonable doubt'.[63] Although such task will undoubtedly be easier to carry out thanks to the clarifications that were brought in by the Court, it has been explained above how those clarifications generate their own uncertainties. More generally, as it stands, the *acte clair* exception to the duty to refer still expects too much from those 'mortal national judges not possessing the qualities, time, and resources of Dworkin's Judge Hercules',[64] namely to think just like the Court of Justice and apply the latter's methods of interpretation consisting in looking at the text (in the light of other language versions), context and purpose of the provision in issue. On the

[61] Opinion of AG Bobek (n 26), para 164.

[62] In that judgment, the Court found a violation of Article 267, paragraph 3, TFEU by the French State because the Conseil d'Etat had departed from a previous Court's judgment regarding the UK (see para 111). It would appear that that departure might have been a false one within the terminology adopted herein.

[63] See *Consorzio Italian Management II* (n 24), para 39 ff.; *Cilfit* (n 7) paras 16 and 21.

[64] Opinion of AG Bobek (n 26) para 104.

one hand, national courts should certainly be more acquainted with those methods nowadays. On the other hand, expecting them, for the mere purpose of deciding on whether they must refer a case to the Court, to interpret EU law in the way the Court does is paradoxical since it ultimately suggests that the latter's interpretive guidance would anyhow not be needed.

Be it as it may, because the *acte clair* exception remains blurred in its contours, the statement of reasons in that regard cannot be overly strict. Arguably, the expected level of detail of the statement of reasons will vary from one situation to another, depending on the perceived 'threat' on the authority of EU law. Yet again, the ECtHR standard as a minimum standard under EU law, in accordance with Article 52(3) of the Charter,[65] provides further guidance as to what should be the intensity of the review of that statement of reasons. The ECtHR has indeed proved rather reasonable in its assessment of the duty to state reasons. Hence, a summary reasoning suffices when a case raises 'no fundamentally important legal issues or had no prospects of success'.[66] Further, *in concreto*, the reasons for the rejection of the request for a preliminary ruling under the *Cilfit* criteria can be deduced from the reasoning of the remainder of the decision given by the court in question (or from reasons considered implicit in the decision rejecting the request)'.[67] In more difficult or important cases, the ECtHR expects national courts of last instance to explicitly refer to the three *Cilfit* criteria and explain which of those criteria was used as the basis for deciding not to transmit the case to the Court of Justice.[68] Clearly, those are minimum requirements and the Court of Justice will probably might somewhat higher expectations,

[65] See Article 52(3) of the Charter.

[66] *Sanofi Pasteur* v *France* App No 25137/16 (ECtHR 13 February 2020), para 70 and the case-law cited.

[67] Ibid.

[68] Ibid., paras 73 to 79. See also *Bio Farmland Betriebs* v *Romania* App No 43639/17 (ECtHR 13 July 2021).

including when it comes to *acte clair*.[69] It is notably to be expected, in relation with the subjectivation of the preliminary reference procedure induced by the duty to state reasons, that national courts of last instance will have to engage with the specific arguments made by the parties within their requests for a preliminary ruling.

B. Enforcing the duty to state reasons

Last but not least, there is the enforcement issue. Although it constitutes a breakthrough in itself, the duty to state reasons – and, together with it, the duty to refer – could quickly become a dead letter, should it remain unenforced. Arguably, the duty to state reasons will not be that easy to enforce simply because monitoring it closely is impossible. There is indeed no task force within the Commission or within the Member States in charge of systematically supervising national courts of last instance that would ensure that the latter have duly engaged with requests for a preliminary ruling.

With the discovery of the duty to state reasons, there has been a shift in the focus from the duty to refer to the duty to state reasons that has necessary consequences at the enforcement level. What is now to be enforced in the first place is the duty to state reasons indeed as an absolute duty that does not tolerate exceptions. As a logical consequence, a national court of last instance is unlikely to be sanctioned for non-compliance with the duty to refer in isolation, as it was in *Commission v France*, but for non-compliance with the duty to refer in combination with the failure to state reasons.

That shift is bound to have an impact on how infringement proceedings operate in such circumstances. With the new duty to state reasons, it is indeed primarily the failure to comply with that duty that could give rise to

[69] In the two abovementioned orders of 15 November 2022, the Court however held that national courts do not have to conduct a detailed assessment establishing that the meaning of an EU law provision is equally obvious to the Court and to other Member States' courts.

findings of infringement. The sanction should logically hit only those situations where a national supreme court has made no effort to motivate their decision not to refer, or where that motivation is preposterous. Assumingly, infringement proceedings will then be launched only against national courts of last instance in the exceptional circumstances of either a repetitive, systemic lack of statement of reasons by a national court of last instance, or a gross and intentional misrepresentation of the situation at hand by a national court of last instance made up to eschew its duty to refer, in other words an egregious breach of the duty to refer that cannot find any justification. Such limitation of the scope of infringement proceedings appears appropriate in view of the specific nature of the judicial function, the discretion left to national courts of last instance by *Cilfit* and the accompanying uncertainty inherent in the scope of the duty to refer, all overlooked in *Commission v France*.

Now, the shift from the duty to refer to the duty to state reasons and the ensuing subjectivation of the preliminary reference procedure give new salience to the legal remedies where private parties are primarily involved. Arguably, parties to the main proceedings are already key enforcement actors of the duty to refer before the ECtHR and those constitutional courts of the Member States,[70] which both monitor the statement of reasons, albeit on their own terms and legal basis. With a duty to state reasons grounded in EU law the parties to the main proceeding now occupy centre stage under EU law also.

In particular, parties to the main proceedings are to become a prominent actor for the enforcement of the duty to refer by the lower courts of the

[70] See Clélia Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' (2015) 16 German Law Journal 1663.

Member States. In spite of *Köbler*[71] that opened up the possibility of liability proceedings against a Member State for the action of the national courts of last instance, it was up to now virtually impossible to trigger Member State liability purely on the basis of a failure to comply with the duty to refer in view of the highly relative nature of that obligation and the fact that there is no subjective right to be granted a request for a preliminary reference.[72] That situation has now changed with the duty to state reasons. The latter arguably makes it easier for the parties to the proceedings to obtain damages.[73] Should the Court establish (which would only be logical) the existence of a subjective right for the parties to the main proceedings to obtain a statement of reasons from the duty to state reasons, those parties could then rely before the competent, lower national court of law on the fact that that right has been violated by a national court of last instance by a faulty statement of reasons for not referring a case to the Court of Justice.[74] As a consequence, they could possibly claim that they suffered loss of opportunity or moral damage from the combination of the failure to state reasons and the failure to refer.[75]

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[71] Case C-224/01 *Köbler* EU:C:2003:513, para 55, where the Court held that non-compliance with the duty to refer was but one factor within the assessment of a sufficiently serious breach of a right-conferring EU law provision.

[72] Precisely, in *Köbler* (n 71), the Court found no violation of the duty to refer.

[73] For a slightly less optimistic view, see Imelda Maher, 'The CILFIT Criteria Clarified and Extended for National Courts of Last Resort Under Art. 267 TFEU' (2022) 7 European Papers 1, 265, 271.

[74] Somewhat ironically, a lower national court would then be assessing whether its supreme court made a suitable evaluation of *acte clair* while, potentially, the latter court would have disregarded the interpretive doubt raised by the former court (or another lower court). Such situation confirms that interpretive doubt coming from lower courts should not be dismissed as irrelevant by courts of last instance.

[75] Again, the ECtHR case-law is instructive for that matter. While the Strasbourg Court sometimes considers that the mere finding of a violation of Article 6(1) of the Convention by a failure to refer constitutes just satisfaction, it has also awarded

IV. Conclusion

Ever since *Cilfit*, the Court of Justice has interpreted the duty of national courts of last instance to refer in a highly relative manner. In recent judgments, in particular *Consorzio Italian Management II*, the Court of Justice slightly refined its classic case-law on the famous exceptions to the duty to refer. Beyond the welcome tweaks that made the assessment of *acte clair*, the Court found a clever way to keep the wide discretion offered by *Cilfit* to national courts of last instance while ensuring that the latter do not abuse of that discretion: 'a national court of last instance that is of the view that it does not have to refer because the situation at hand falls within one of the three exceptions to the duty to refer must state the reasons for its decision not to refer.'[76]

Influenced by the case-law of the ECtHR, that duty to state reasons enhances the effectiveness of the duty to refer through the latter's proceduralisation. While there is no absolute duty to refer, there is now an absolute duty to state reasons for national courts of last instance to establish that they have remained within the boundaries of their discretion. That evolution bears consequences at the constitutional level regarding the very nature of the preliminary reference procedure. The duty to state reasons indeed alters the nature of that procedure by enhancing the place of the parties to the main proceedings: national courts of last instance must explicitly and duly engage, within their statement of reasons, with the specific arguments made by the parties in their requests for a preliminary ruling.

With the duty to state reasons, the preliminary reference procedure is to face new challenges: what is to be exactly expected from national courts of last instance within their statement of reasons and, above all, who is to monitor

damages in such case (see, respectively, *Sanofi Pasteur* v *France* (n 66) and *Bio Farmland Betriebs* v *Romania* (n 68), with regard to the moral damage that resulted from the failure to refer).

[76] See *Consorzio Italian Management II* (n 24), para 51.

whether national courts of last instance comply with the duty to state reasons and what shall be the sanction for not complying therewith? Monitoring national courts of last instance's failures to refer has indeed become paramount in the context of a rise of the contestation of EU law. Although it constitutes a breakthrough in itself, the duty to state reasons – and, together with it, the duty to refer – could quickly become a dead letter, should it remain unenforced.

Arguably, enforcing the duty to state reasons is however no easy task to the extent that a close monitoring is simply impossible. In that context, it is crucial that monitoring and the sanctions attached to non-compliance with the duty to refer remain in tune with the highly relative nature of the duty to refer. With the shift from the duty to refer to the duty to state reasons, failures to refer can no longer be looked in isolation but in conjunction with failures to state compelling reasons.

That change has necessary consequences at the enforcement level. First, it follows that a national court of last instance is unlikely to be sanctioned in the future for non-compliance with the duty to refer in isolation, as it was in *Commission* v *France*, but rather for non-compliance with the duty to refer in combination with the failure to state reasons. Second, in line with the subjectivation of the preliminary reference procedure induced by the duty to state reasons, the parties to the main proceedings arguably have a subjective right to obtain a statement of reasons. Those parties could then turn to the competent lower court of law in the Member States to trigger the *Köbler* liability in case of a faulty statement of reasons for not referring a case to the Court of Justice. Although the parties to the main proceedings remain – understandably so – without a right to a preliminary reference, they end up significantly and unexpectedly better off with the new duty for national courts of last instance to state reasons when they decide not to refer questions to the Court of Justice.

RETRACING OLD (SCHOLARLY) PATHS. THE *ERGA OMNES* EFFECTS OF THE INTERPRETATIVE PRELIMINARY RULINGS

Giuseppe Martinico*

In this article, I shall look at a classic topic of European Union law: that of the erga omnes *effects of the interpretative decisions of the European Court of Justice under Article 267 TFEU. I shall divide the article into four parts. In the first part I shall recall the very sophisticated, old, perhaps even dusty, debate on the matter. In the second part I shall deal with the arguments of those who deny that decisions of invalidity under Article 267 TFEU can have* erga omnes *effects. After that, I shall apply some of the arguments demonstrating the* erga omnes *effects of the decisions of invalidity to the interpretative rulings rendered under Article 267 TFEU. Finally, I shall look at some novelties introduced by the Lisbon Treaty that could impact on the subject of this piece.*

Keywords: *Erga omnes*; Article 267 TFEU; Court of Justice; Interpretative Decisions

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I. THE *ERGA OMNES* EFFECT: ONLY A THEORETICAL DEBATE?

Do the judgments rendered in the preliminary ruling procedure under Article 267 TFEU have *erga omnes* effects? In this article, I shall deal with this research question. In doing so, first I shall look at the scholarly debate involving commentators with different backgrounds (public international law scholars, EU lawyers, constitutional and comparative lawyers, and scholars of procedural law),[1] considering some elements that might lead to a partial rethinking of that discussion in the second part of the article.

The concept of *erga omnes* effects 'has been referred to in many different meanings and contexts, causing considerable confusion about its contours',[2] so it is perhaps useful to clarify what I mean by it. Generally speaking,

> in the context of international adjudication, 'erga omnes' is typically used to describe effects of judicial decisions that affect third parties. In that sense, 'erga omnes effects' are contrasted to 'inter partes effects', notably the duty of parties to comply with the outcome of a decision.[3]

Because this piece deals with rulings stemming from Article 267 TFEU, by the formula *erga omnes* (from the Latin meaning literally 'towards all') I refer to the possibility that judgments of the European Court of Justice (ECJ) may generate effects towards judges other than the referring court of the case and, consequently, towards subjects other than the parties involved in the case before the referring court itself.

Today many scholars consider this issue settled. The debate is regarded as purely or mainly theoretical because today many scholars, the Advocates

[1] For a very updated overview of this interdisciplinary debate see: Emanuele Cimiotta, *L'ambito soggettivo di efficacia delle sentenze pregiudiziali della Corte di giustizia dell'Unione europea* (Giappichelli 2023) 56-102.

[2] Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights (2017) 28 European Journal of International Law 819, 821.

[3] Christian J Tams, Alexandre Belle, 'Erga Omnes Effects of Judicial Decisions: International Adjudication' (2021) Max Planck Encyclopedias of International Law, available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3733.013.3733/law-mpeipro-e3733, accessed 23 March 2023.

General and the ECJ itself have no difficulties recognising that the implications of the decisions of the ECJ go beyond the judge *a quo*.[4] For example, Morten Broberg wrote that,

> when rendering a preliminary reference ruling, the Court of Justice provides an authoritative interpretation of EU law – and in practice this interpretation is binding *erga omnes*, i.e. on all and in all respects.[5]

On that occasion Broberg cited the *International Chemical Corporation* case in a footnote. The irony in this is that, in *International Chemical Corporation*, the ECJ *never explicitly said* that preliminary ruling judgments have *erga omnes* effects. In that decision the Luxembourg Court said that:

> Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void *is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give*. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier.[6] (emphasis added)

This is of course a *de facto erga omnes* effect, although the ECJ did not use this formula in the wording of its decision. That case was the result of some preliminary questions raised by the Tribunale di Roma. The first of these

[4] See for example, Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrem*s EU:C:2019:1145, Opinion of AG Saugmandsgaard Øe or Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* EU:C:2019:340, Opinion of AG Bobek.

[5] Morten Broberg, 'Judicial Coherence and the Preliminary Reference Procedure' (2015) 8 Review of European Administrative Law 9, 10.

[6] Case 66/80 *International Chemical Corporation v Amministrazione delle finanze dello Stato* EU:C:1981:102.

questions explicitly mentioned the *erga omnes* effects. The referring court asked,

> Under Article 177 of the Treaty, is a declaration that a Community regulation is null and void effective *erga omnes* or is it binding only on the court *a quo*?[7]

The attention paid to the words used by the ECJ reveals that actually the issue of the *erga omnes* effects is much more complex. Evidence of this is the very sophisticated Opinion given by Advocate General Reischl in *International Chemical Corporation*[8] and, already in 1977, AG Warner's Opinion in the *Manzoni* case.[9] In the latter, AG Warner had argued that 'the subject is […] one of which there has been much learned discussion'.[10]

Against this background, I shall divide the article into four parts. In the first part I shall recall this very sophisticated and old debate. In the second part I shall deal with the arguments of those who deny that decisions of invalidity under Article 267 TFEU can have *erga omnes* effects. After that, I shall apply some of the arguments that demonstrate the *erga omnes* effects of the decisions of invalidity to the interpretative rulings rendered under Article 267. Finally, I shall look at some novelties introduced by the Lisbon Treaty

[7] Case 66/80 *International Chemical Corporation v Amministrazione delle finanze dello Stato* EU:C:1981:102.

[8] 'It is well-known that academic opinion differs as to whether judgments given by the Court of Justice under Article 177 of the EEC Treaty declaring legal acts of the Community to be null and void are binding only inter partes or erga omnes as well. Since the Court is well acquainted with the academic argument on this issue' Case 66/80 *International Chemical Corporation v Amministrazione delle finanze dello Stato* EU:C:1981:16, Opinion of AG Reischl.

[9] Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* EU:C:1977:152.

[10] Case 112/76 *Renato Manzoni v Fonds national de retraite des ouvriers mineurs* EU:C:1977:133, Opinion of AG Warner. Among the honourable mentions of important Opinions of Advocates-General we have on this topic, for example, Case 16/65 *Firma G Schwarze v Einfuhr* EU:C:1965:106, Opinion of AG Gand and Case 238/78 *Ireks-Arkady GmbH v Council and Commission* EU:C:1979:203, Opinion of AG Capotorti.

to ascertain whether they may affect the question of the recognition of *erga omnes* effects.

In the concluding section I will be arguing that all decisions rendered in the preliminary ruling procedure have *erga omnes* effects. I would go even further and say that even decisions concerning the interpretation of EU law rendered by the Court outside Article 267 may have *erga omnes* effects, by virtue of the special mission assigned to the Court of Justice by the Treaties. In this vein, interpretative rulings are also sources of EU law.[11]

II. A VERY OLD DEBATE

In this section I shall first map the (copious) existing literature on the subject, identifying three macro-groups of authors (pro *erga omnes* effects; pro *inter partes* effects; pro *ultra-partes* effect). These three macro-groups will be sub-articulated in turn. This will allow the reader to have a complete mapping of the (multi-lingual) debate. In a second moment I shall clarify my position and support my thesis by addressing the objections that are usually made against the recognition of the *erga omnes* effects.

It is possible to sum up the scholarly debate in the field by recalling Georges Vandersanden and Ami Barav,[12] who identify three groups of scholarly views on the subject of the *erga omnes* effects of the decisions of the ECJ with particular regard to the preliminary interpretative rulings.

A first group of authors acknowledge the *erga omnes* effects of such rulings, though focusing on different arguments and premises.[13] On this basis we can

[11] Denys Simon, *Le systéme juridique communautaire* (Presses universitaires de France 1997) 234; Giuseppe Martinico, 'Le sentenze interpretative della Corte di giustizia come forme di produzione normativa' (2004) 9 Rivista di Diritto Costituzionale 249.
[12] Georges Vandersanden and Ami Barav, *Contentieux Communautaire* (Bruylant 1977).
[13] Alberto Trabucchi, 'L'effet erga omnes des décision préjudicielles rendues par la Cour de justice des Communautés européennes' (1974) 10 Revue trimestrielle de droit européen 87. See also: Giorgio Floridia, 'Forma giurisdizionale e risultato normativo del procedimento pregiudiziale davanti alla Corte di giustizia' (1978) 13 Diritto comunitario e degli scambi internazionali 1.

distinguish different sub-groups of scholars. For instance, in an important article published in the *Revue trimestrielle de droit européen*, Alberto Trabucchi argues in favour of the *erga omnes* effects in light of some important principles of what was known at the time as 'Community law' namely that of legal certainty, equality in its meaning of non-discrimination and, finally, the principle of the *effet utile*. According to Trabucchi, the Court of Justice's ruling has an effect that goes beyond the individual case, reducing the already limited margin of interpretation enjoyed by national courts. However, this does not mean that the judgment and the interpretation given are immutable. Indeed, the national court, if it considers it appropriate, may ask the ECJ to intervene again, in a hermeneutical fashion possibly leading to a new solution. In particular, Trabucchi recalls the case law of the ECJ according to which 'the fact that judgments delivered on the basis of references for a preliminary ruling are binding on the national courts does not preclude the national court to which such a judgment is addressed from making a further reference to the Court of Justice if it considers it necessary in order to give judgment in the main proceedings'.[14] In a nutshell, Trabucchi's thesis is mainly based on the special structure and abstract nature of the preliminary ruling procedure, which would end up recognising a special authority to the interpretation given by the ECJ without impeding the possibility for changes in its case law. In this sense, Trabucchi distinguishes between authority and immutability of the interpretation of the ECJ.

Another strand of scholars seems to recognise *erga omnes* effects of the ECJ's interpretative decisions under Article 267 TFEU in light of the concept of judicial precedent as developed in common law systems. In this sense, scholars have sometimes understood *Da Costa* as 'the seed to a system of precedent in the EC-legal order'.[15] Whether we should accept this conceptualisation depends on what we mean by precedent. There is of

[14] Case 14/86 *Pretore di Salò v X* EU:C:1987:275.

[15] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2003) 440.

course a doctrine of judicial precedent in EU law, but it is not a binding precedent as one cannot find all the pillars of the *stare decisis* in EU law,[16] namely the prevalence of unwritten sources of law, and a hierarchy of courts, for instance as designed by the Judicature Acts of 1873 and 1875 in the UK:

> It is certainly clear that, at its current state of development, Community law does not contain an elaborate system of rules defining the force and binding character of past decisions, such as exists in England.[17]

I shall not dwell on this debate because it is the subject of Daniel Sarmiento's contribution in this special issue, but I can anticipate that there are other reasons to support the *erga omnes* effects of interpretative rulings. However, I believe that we can learn something from this discussion. As Rupert Cross and James Harris[18] notice, while precedent relates to the *ratio decidendi* of the judgment (the judge's reasoning in point of law that prompted him/her to issue a certain ruling), *res iudicata* relates to the *decisum* (the ruling it contains). Hence the need to distinguish the effect of the decision from the point of view of a subsequent dispute involving different parties (*ratio decidendi*) and the effect with respect to the parties to the dispute itself (*res iudicata*). This distinction allows me to include in this first group of scholars also those who base the *de iure erga omnes* effects of interpretative judgments on the concept of 'autorité de la chose interprétée':[19]

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[16] 'These decisions are the best evidence for the proposition that the Community legal system has a concept of stare decisis or at least is developing one. It is certainly clear that, at its current state of development, Community law does not contain an elaborate system of rules defining the force and binding character of past decisions, such as exists in England', John J Barceló 'Precedent in European Community Law', in Neil MacCormick and Robert S Summers (eds.), *Interpreting precedents* (Aldershot 1997) 407, 416.

[17] Barceló (n 16) 416. Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 307.

[18] Rupert Cross and James Harris, *Precedent in English Law* (Clarendon 1961) 101–103.

[19] For instance Jean Boulouis, 'À propos de la fonction normative de la jurisprudence: remarques sur l'œuvre jurisprudentielle de la Cour de justice des Communautés européennes', in *Mélanges offerts à Marcel Waline : le juge et le droit public* (LGDJ 1974)

> This concept initially purported to describe the specific authority of preliminary rulings which, it was suggested, could not be *res judicata* (because they did not decide cases) and could not have an autonomous normative value (because judicial decisions cannot be a source of law): the *erga omnes* impact of such judgments was therefore due to the fact that the interpretation of a provision by the ECJ was integrated into the written norm.[20]

However, the concept of 'chose interprétée' has recently been criticised by certain EU lawyers[21] and I agree with that scholarship that tends to distinguish between the normative effects of the decision and the concept of *res iudicata.*[22] The debate on *res iudicata* in EU law has fascinated procedural law scholars over the years and much has been written about the possibility of referring to *res iudicata* in the supranational legal system. This debate revolves around an old case of the Court of Justice, the *Wünsche* case,[23] in which the Luxembourg Court argued that,

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149-162. More recently see Araceli Turmo, *L'autorité de la chose jugée en droit de l'Union européenne* (Bruylant 2017) 376.

[20] Araceli Turmo, 'National Res Judicata in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law' (2021) 58 Common Market Law Review 361, 369. Gallo wrote that this would lead to a 'a res iudicata with a law making rather than a jurisdictional nature', Daniele Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa* (Giuffrè 2018) 72-73.

[21] Turmo (n 20) 369: 'This approach is unconvincing for a number of reasons, notably: the normative value of preliminary rulings in no way differs from that of other CJEU judgments, such rulings do not only interpret written provisions but have in fact created several principles and rules of EU law, and the ECJ has explicitly indicated that preliminary rulings are res judicata. The concept has since been expanded to refer to almost any kind of judicial law making, especially in EU law, and remains popular across French-language scholarship, probably in large part because it avoids importing the vocabulary of stare decisis and of precedents. However, it also continues to be presented as an alternative to res judicata applicable to preliminary rulings and thus to muddy the waters in any analysis of the impact of such rulings on the main proceedings and beyond'.

[22] Turmo (n 20) 385.

[23] Case 345/82 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* EU:C:1984:166. On this decision see: Gerhard Bebr, 'Commentary of Case 69/85,

> it follows that a judgment in which the Court gives a preliminary ruling on the interpretation or validity of an act of a Community institution *conclusively determines a question or questions of Community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings*.[24] (emphasis added).

Although interesting, this decision has remained fairly isolated in the case law of the Court of Justice, yet this debate was echoed again more recently after AG Bobek's Opinion in the *Hochtief Solutions* case.[25]

Wünsche Handelsgesellschaft v. Federal Republic of Germany, Order under Article 177 (EEC) of the Court of justice of 5 March 1986' (1987) 24 Common Market Law Review 719.

[24] Case 345/82 *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* EU:C:1984:166, para 13.

[25] Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* EU:C:2019:340, Opinion of AG Bobek, paras 59-62: 'It is settled case-law that a preliminary ruling of the Court is binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings. Article 267 TFEU requires the referring court to give full effect to the interpretation of EU law provided by the Court. Beyond that type of binding effect of a preliminary ruling, which could be classified as inter partes, the case-law of the Court only ever explicitly confirmed the erga omnes binding force of declarations of invalidity of EU-law provisions. However, the same inter partes logic also fully extends to any subsequent judicial stages within the same main proceedings. Thus, if the guidance from this Court was requested by, for example, a first-instance court, then a court of appeal or a supreme court being seised later of the same case would also be bound by the guidance issued by the Court in that case. To my mind, that is an extension of the inter partes binding effect, because what is being resolved is still the same case with the same facts and legal questions posed. It is not the (by its nature 'looser') erga omnes effect in other cases concerning other facts and parties but interpreting the same legal provisions of EU law. That notably means, in practice, that if the interpretative statement contained in a preliminary ruling requires the national court to complete a certain type of assessment, that assessment must then be carried out in order to ensure the correct implementation of that judgment and, thereby, the proper application of EU law. That is a fortiori the case when the Court explicitly leaves it, in the operative part of the judgment, to the referring court to verify certain elements in order to establish the compatibility of national law with EU law'.

At the same time, it is necessary to stress how problematic the concept of *res iudicata* is in comparative law,[26] since there are systems that admit the possibility of overcoming the *res iudicata* in the light of their internal remedies. Moreover, the possibility of using the concept of *res iudicata* in EU law has been questioned by other scholars,[27] for the reason that in the preliminary ruling procedure there are no parties from a procedural point of view and Article 267 TFEU would govern a procedure provided with a general interest.[28] To conclude the analysis of the first group of scholars (pro *erga omnes* effects), it is necessary to recall that some authors, commenting on the language used by the Court ('*dit pour droit*'), emphasise that such rulings would amount to an authentic interpretation of the Court as such characterised by a general and abstract value, the result of an incorporation with the provision being interpreted.[29]

A second group of scholars deny that decisions rendered under Article 267 can have *erga omnes* effects. Luigi Ferrari Bravo in Italy,[30] for instance, distinguishes between the authority of the judgment and its legal effects, acknowledging, however, that the Court's decisions have a sort of mysterious force going beyond the scope of action of the referring court. Ferrari Bravo, in rejecting the *erga omnes* effects of the interpretative rulings, relies on the distinction between interpretation and application of Community law at that time. According to Ferrari Bravo, the existence of a previous interpretative decision on the point would lead the judge to

[26] Nicolò Trocker, Entry: 'Giudicato (diritto comparato e straniero)', *Enciclopedia giuridica* (Treccani 1989) Vol 15 1.

[27] Georges Vandersanden, 'De l'autorité de chose jugée des arrêts préjudiciels d'interprétation rendus par la Cour de justice des communautés européennes' (1972) 25 Revue critique de jurisprudence belge 508 ; Antonio Briguglio, Entry 'Pregiudiziale comunitaria', in *Enciclopedia giuridica* (Treccani 1997) Vol 23 1, 11.

[28] Cimiotta (n 1) 78.

[29] André Pepy, 'Le rôle de la Cour de Justice des Communautés Européennes dans l'application de l'article 177 du Traité de Rome' (1966) 1 Cahiers de droit européen 484. See also Massimo Condinanzi and Roberto Mastroianni, *Il contenzioso dell'Unione europea* (Giappichelli 2009) 232. On this debate see: Cimiotta (n 1) 78.

[30] Luigi Ferrari Bravo, 'Commento sub art. 177', in Rolando Quadri, Riccardo Monaco and Alberto Trabucchi, *Commentario CEE* (Giuffrè 1965) III 1310.

consider the question itself as non-existent. In other words, this decision would operate as a factual element, by contributing to killing the doubt, which is the first condition for the preliminary ruling mechanism to be triggered (indeed the logical pre-condition of the procedure). In this case, therefore, the previous judgment would intervene as an element of fact excluding the doubt. The argument starts from a problematic premise: the existence of a clear difference between interpretation and application seems untenable since the preliminary questions are quite often shaped by the referring court in light of the factual background of the case and this inevitably will condition the Luxembourg Court in its interpretative task.[31]

Other authors reject the *erga omnes* effects of the interpretative decisions under Article 267 TFEU by arguing that these decisions would bind only the referring court. Nevertheless, they recognise a kind of 'radiation effect' that these decisions would have and in order to explain the latter they rely on the idea of judicial precedent.[32] This is for instance the case of Pierre Pescatore, according to whom,

> beyond the legal authority of the Court's judgements – which, like all judicial decisions, are strictly binding only in relation to the particular subject matter – preliminary rulings have a radiation effect which makes them directives of interpretation observed throughout the Community.[33]

A third group of scholars, instead, recognises interpretative preliminary rulings as having greater authority than that relating exclusively to the case in which the question was raised, without, however, going so far as to acknowledge the *erga omnes* effects.[34] It is for instance the case of Guido Berardis, who distinguishes between the decisions of annulment (endowed

[31] Floridia (n 13) 15; Cimiotta (n 1) 95.

[32] Pierre Pescatore, 'Il rinvio pregiudiziale di cui al 177 del Trattato C.E.E. e la cooperazione fra Corte di giustizia e giudici nazionali' (1986) 100 Foro italiano IV 26, 41.

[33] Pierre Pescatore, *The Law of integration* (Kluwer 1974) 100.

[34] Vandersanden and Barav (n 12) 312-315; Georges Vandersanden, 'De l'autorité de chose jugée des arrêts préjudiciels d'interprétation rendus par la Cour de justice des communautés européennes' (1972) 25 Revue critique de jurisprudence belge 508.

with *erga omnes* effects) and the decisions of invalidity endowed – according to him – with a mere *ultra partes* effect.[35]I have tried to summarise this complex debate in the following table:

Pro ERGA OMNES EFFECTS	**Pro INTER PARTES EFFECTS**	**Pro ULTRA PARTES EFFECT**
Alberto Trabucchi (considering the special structure and abstract character of the preliminary ruling procedure and in light of some important principles of Community law)	Luigi Ferrari Bravo (the previous decision of the ECJ operates only as a factual element that contributes to removing the interpretative doubt)	Guido Berardis (in light of the distinction between decisions of annulment - provided with *erga omnes* effects - and decisions of invalidity - characterised by a mere *ultra partes* effect)
Paul Craig and Gráinne de Búrca (*stare decisis*)	Pierre Pescatore (these decisions would bind only the referring court)	
Jean Boulouis (in light of the 'autorité de la chose interprétée')		
André Pepy (in the light of the incorporation of the Court's authentic interpretation into the rule)		
Giorgio Floridia (although the preliminary ruling procedure has only a jurisdictional form, it actually contributes to the production of a legislative result).		

[35] Guido Berardis, 'Gli effetti delle sentenze pregiudiziali della Corte di giustizia delle Comunità europee' (1982) 20 Diritto comunitario e degli scambi internazionali 245, 261.

From this tripartition, one can see all these scholars admit that, *de facto*, interpretative rulings under Article 267 TFEU have effects going beyond the case of the referring court.[36] What then prevents this *de facto* authority exercised by the Court's interpretation from having legal effects?

In part, the denial of these legal effects depends on a frequent distinction being made between decisions of invalidity and those of interpretation under Article 267 TFEU. The former, for some authors, would have an effect *erga omnes de iure*,[37] whereas this would not be the case for interpretative judgments. In part, however, this denial is based on another distinction between decisions of invalidity pursuant to Article 267 TFEU and decisions of annulment pursuant to Article 263 TFEU. Indeed, there are also scholars who deny the *erga omnes* effects of decisions of invalidity under Article 267 TFEU.[38] In order to justify this distinction, scholars[39] mention the risk of circumventing the difference between the preliminary ruling mechanism and the action of annulment and recall the well-known *TWD Textilwerke*[40] case, in which the Court of Justice had sought to avoid frustrating the time limit in an action for annulment by allowing the validity of a supranational act to be questioned by means of a preliminary reference. Another case

[36] D'Alessandro openly writes of a *de facto* extra-procedural effectiveness (going beyond the national trial from which the referring question to the Court of Justice originated) of the Luxembourg Court's interpretative rulings. Elena D'Alessandro, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di giustizia: oggetto ed efficacia della pronuncia* (Giappichelli 2015) 292.

[37] For instance Adelina Adinolfi, *L'accertamento in via pregiudiziale della validità degli atti comunitari* (Giuffrè 1997).

[38] Ivo Braguglia, 'Effetti della dichiarazione d'invalidità degli atti comunitari nell'ambito dell'art. 177 del Trattato CEE' (1978) 16 Diritto comunitario e degli scambi internazionali 667, 681.

[39] For instance, Maurice Lagrange, 'L'action préjudicielle dans le droit interne des États membres et en droit Communautaire' (1974) 10 Revue trimestrielle de droit européen 268.

[40] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* EU:C:1994:90.

which is frequently recalled by these authors is *Petroni*,[41] in which the Court of Justice did not declare inadmissible the questions referred for a preliminary ruling by the judges *a quibus*, as it would have done had they been EU acts annulled under Article 263 TFEU.[42]

The argument distinguishing between the effects of the annulment decisions and those of invalidity under Article 267 TFEU can be challenged on the following grounds: first, in the *Petroni* case the Court of Justice confirmed the invalidity of the supranational measure.[43]

Second, in cases like *Roquette Frères*[44] and *Société des produits de maïs*[45] the Court of Justice seemed to question the perfect impermeability between these two types of procedures. Indeed, the Court of Justice itself later returned to this point, among others, in *Accrington*[46] and *Eurotunnel*[47] and even admitted that it could extend some tools designed for the decisions of annulment to invalidity decisions. It is necessary now to deal with another possible objection, according to which decisions of invalidity and those of annulment would have different legal consequences. However, one should take into account the case law of the ECJ confirming the institutions' obligation to intervene following the decision of invalidity in order to remove the consequences of the measure declared invalid; it is the case of

[41] Case 24/75 *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS)* EU:C:1975:129.
[42] Cimiotta (n 1) 65-66.
[43] 'Article 46 (3) of Regulation No 1408/71 of the Council is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under national legislation alone', Case 24/75 *Teresa and Silvana Petroni v Office national des pensions pour travailleurs salariés (ONPTS)* EU:C:1975:129.
[44] Case 145/79 *SA Roquette Frères v French State - Customs Administration*, EU:C:1980:234. Giovanni M Ubertazzi, 'Gli effetti ratione temporis delle sentenze pregiudiziali in materia di validità degli atti comunitari' (1985) 23 Diritto comunitario e degli scambi internazionali 75.
[45] Case 112/83 *Société de Produits de Maïs* EU:C:1985:86.
[46] Case C-241/95 *The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef* EU:C:1998:444.
[47] Case C-408/95 *Eurotunnel and others v SeaFrance* EU:C:1997:532.

decisions such as *Moulins et Huileries de Pont-à-Mousson* and *Ruckdeschel*.[48] In these rulings, the Court admitted the possibility of the application by analogy of Article 266 TFEU.[49] On this basis the Luxembourg Court also clarified that the necessary measures to be adopted to remedy the invalidity of an EU law measure can result in repealing the latter:

> '*In that regard, it must be recalled that, where the Court rules, in proceedings under Article 267 TFEU, that an act of the European Union is invalid, its decision has the legal effect of requiring the institutions concerned to take the necessary measures to remedy that illegality, as the obligation laid down in Article 266 TFEU in the case of a judgment annulling a measure applies in such a situation by analogy to judgments of the Court declaring an act of the European Union to be invalid* […] In order to fulfil that obligation, the institutions concerned are required to have regard not only to the operative part of the judgment of annulment or invalidity, but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the act annulled or declared invalid […]. Nevertheless, it should be recalled that, first, Article 266 TFEU requires the institutions which adopted the act annulled to take the necessary measures to comply with the judgment annulling or declaring invalid its measure'[50] (emphasis added).

[48] Case 124/76 and 20/77 *SA Moulins & Huileries de Pont-à-Mousson et Société coopérative Providence agricole de la Champagne contre Office national interprofessionnel des céréale* EU:C:1977:161.

[49] Article 266 TFEU: 'The institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'.
This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340'.

[50] Joined Cases C-283 and 284/14 *CM Eurologistik* EU:C:2016:57, paras 48-52.

Another option to deal with the invalidity declared under Article 267 TFEU consists of recognising a right to compensation for the damages caused by the inaction of the institution.[51]

In my view, decisions of annulment and invalidity are two sides of the same coin and indeed, although the structure of the two control mechanisms is different, *quoad effectum* they are analogous, and this represents an important component for the acknowledgement of the *erga omnes* decisions for the interpretative rulings under Article 267 TFEU as well.

Indeed, having made it clear that both invalidity decisions and annulment decisions – although products of a different procedures – have *erga omnes* effects, why should we exclude *erga omnes* effects for interpretative decisions? After all, Article 267 TFEU does not distinguish – in terms of effects - between these two types of decisions.

Morten Broberg and Niels Fenger, by focusing on the decisions of invalidity, recall some elements that can be taken into account to recognise *erga omnes* effects to the interpretative decisions, on the basis of their declaratory nature, taking into account the rationale of Article 267 TFEU which aims at guaranteeing uniform interpretation of EU law. Moreover, they argue,

> in several respects the Court of Justice has shown that it attaches general validity to its own preliminary rulings. The Court has held that national courts can rely on a preliminary ruling in another case declaring an EU act invalid, despite the fact that the national courts are themselves prevented from declaring EU acts invalid.[52]

[51] Joined Cases C-283 and 284/14 *CM Eurologistik*, EU:C:2016:57, see in particular paras 49 and 56.
[52] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2021) 407.

III. WHY THE ARGUMENT OF DE FACTO *ERGA OMNES* EFFECTS DOES NOT DO JUSTICE TO THE FRAMEWORK OFFERED BY EU LAW

Following this overview of various theories in the literature, I will now turn to why it is not only interpretative judgments under Article 267 TFEU that have *de iure erga omnes* effects. From a legal point of view there are several important elements that contribute to the shaping of these effects. The first two factors in this respect are Article 99 of the Rules of Procedure of the Court of Justice and the wording of the *CILFIT* decision. Article 99 of the Court's Rules of Procedure reads:

> Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.[53]

To a certain extent this norm mirrors the flexibility required by *CILFIT* where the Court argued that:

> Although the third paragraph of article 177 of the EEC Treaty unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court every question of interpretation already given by the Court *may however deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case or where previous decisions to the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical*. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of article 177, remain entirely at liberty to bring a

[53] Article 99 of the Court's Rules of Procedure.

> matter before the Court of justice if they consider it appropriate to do so.[54] (emphasis added).

This piece is not going to dive into *CILFIT* and its recent developments,[55] as they will be considered by François-Xavier Millet's article included in this special issue. Nevertheless, *CILFIT* and Article 99 of the Rules of Procedure confirm the existence of an *erga omnes* effect of the interpretative decisions of the ECJ and, on a closer inspection, they are not limited to the rulings stemming from Article 267 TFEU. This is in my view evident since the wording of Article 99 refers to the 'existing case law' in general, but also in *CILFIT* the Court added 'irrespective of the nature of the proceedings which led to those decisions'. This means that even those interpretative decisions that do not derive from Article 267 TFEU enjoy the *erga omnes* effects described above. Also worth mentioning is the ECJ's practice of contacting the referring court, transmitting to it the text of one or more judgments that would have resolved similar or identical questions and asking whether it therefore intends to maintain or withdraw its request for a preliminary ruling.[56]

From these elements, we can find evidence that the *erga omnes* effects in question consist in the transformation of the position of the court of last instance from a legal situation configurable in terms of obligation (a situation of *agĕre debēre*, of necessity) to one qualifiable in terms of discretion. The *erga omnes* effect in other words consists in 'relaxing the mandatory reference rule'.[57]

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[54] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335.

[55] Case C-561/19 *Consorzio Italian Management and Catania Multiservizi and Catania Multiservizi* EU:C:2021:799.

[56] Case C-692/19 *B v Yodel Delivery Network Ltd* EU:C:2020:288, para 21; Case C-153/19 *DER Touristik* EU:C:2020:412, para 25.

[57] Jeffrey C Cohen, 'The European Preliminary Reference and U. S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 American Journal of Comparative Law 421, 439.

Against this background, the existence of a previous decision produces a situation of limited interpretative space for the referring judge who, in the case at stake, can either follow the existing case law of the ECJ or induce a change in such a jurisprudence by asking the ECJ for a new interpretation. This may happen if, for example, the national court considers that the context has changed and therefore the time has come for a rethink by the Court of Justice or if it believes that the doubt relevant to its case is different. It could be said that, in the presence of a ruling by the Court on the point, the already limited hermeneutical 'margin of appreciation' (*lato sensu*) of national courts (even those not of last instance) is even more reduced.

In this sense the *erga omnes* effects of the interpretative judgments of the ECJ do not result in blocking the interpretative activity of the ECJ. First, because this would risk killing the rationale of the preliminary ruling procedure based precisely on the cooperation between national courts and the Court. Understanding the *erga omnes* effects in a too rigid manner would be contrary to the Court's own idea of interpretation. Another frequent objection to the acknowledgment of the *erga omnes* effects of the interpretative rulings of the Court of Justice is the one according to which recognising *erga omnes* effects to interpretative rulings would risk petrifying or fixing the interpretation of the ECJ. In my view, this is an absurd argument that would undermine the rationale of the preliminary ruling procedure and confirmation of that can be found in cases such as the already mentioned *Da Costa*[58] and *CILFIT*[59] for instance. The reason why this would be absurd lies within the importance of Article 24 of the ECJ's Statute, according to which the ECJ 'may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings'. The recognition of these effects does not necessarily lead to a

[58] Case 28/62 *Da Costa en Schaake NV and a. v Administratie der Belastingen* EU:C:1963:6.
[59] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335.

hardening of the Court's case law, and there is no shortage of famous *revirements* to prove this. Indeed, the Court itself, moreover, has shown that it does not consider itself rigidly bound by its previous decisions.[60] The change of perspective adopted in the *Kalanke*[61] and *Marschall*[62] judgments is also an example of this, much more recent evidence is offered by the combination of *Taricco*[63] and *M.A.S.*[64]

From this conclusion one can infer a few consequences. First of all, each legal system has its own sources, this is what constitutional lawyers have called the 'principle of relativity of the concept of legal source'.[65] However, comparative law scholars have tried to identify, looking at the principle of effectiveness, a notion of legal sources that could be adapted to various jurisdictions.[66] In this sense, adhering to a substantive notion of source of law, an act or fact capable of producing effects *erga omnes* may be said to be a source of law and that is why, it can be argued the interpretative judgments of the Court of Justice, regardless of the proceedings that gave rise to them, are sources of EU law, because they are in fact characterised by the same general character as the norm interpreted.[67]

It could be argued that the EU Treaties do not explicitly recognise the role of case law as a source of law. However, there is no provision in the European Treaties listing, by way of *numerus clausus*, the sources of EU law.

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[60] See Case C-384/17, *Link Logistic* EU:C:2018:810, then overruled by the ECJ in Case C-205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* EU:C:2022:168. See Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 European Law Open 576, 591.

[61] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* EU:C:1995:322.

[62] Case C-409/95 *Marschall v Land Nordrhein-Westfalen* EU:C:1997:533.

[63] Case C-105/14 *Ivo Taricco et al*. EU:C:2015:555.

[64] Case C-42/17 *M.A.S. and M.B*. EU:C:2017:936.

[65] Livio Paladin, *Le fonti del diritto italiano* (Il Mulino 1996) 21.

[66] Alessandro Pizzorusso, *Sistemi giuridici comparati* (Giuffrè 1998) 106.

[67] This is the notion of source of law that can be found in the works by Pizzorusso: Alessandro Pizzorusso, 'Le decisioni di accoglimento della Corte costituzionale', in Alessandro Pizzorusso, *La manutenzione del libro delle leggi ed altri studi sulla legislazione* (Giappichelli 1999) 123.

Indeed, although Article 288 TFEU lists regulations, directives, decisions and recommendations, it does not list other important sources such as the general principles of EU law – mentioned in Article 6 TEU – or the Charter of Fundamental Rights of the European Union – also referred to in Article 6 TEU. Moreover, the Court of Justice itself has shown that it equates a violation of EU law with a violation of its own case law for the purposes of the applicability of the *Francovich* doctrine.[68] Indeed, the sanction to member states for departing from ECJ case law without a new referral could result from state liability under the *Köbler*[69] and *Traghetti del Mediterraneo*[70] doctrine in case of a 'a manifest infringement of the applicable law' committed by the national court. As the Court said in *Traghetti del Mediterraneo*:

> With regard, finally, to the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled, as was pointed out in paragraph 32 of this judgment, that the Court held, in the Köbler judgment, that State liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.
>
> Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject'.[71]

[68] Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* EU:C:1991:428.
[69] Case C-224/01 *Gerhard Köbler v Republik Österreich* EU:C:2003:513.
[70] Case C-173/03 *Traghetti del Mediterraneo* EU:C:2006:391.
[71] Case C-173/03 *Traghetti del Mediterraneo* EU:C:2006:391, paras 42-43. See also Wattel: 'The combination of the two cases leads to the conclusion that if a national highest Court wants to avoid the real risk of making its government liable, it had better ask for a preliminary ruling – also ex officio – in basically every case involving a

Commentators have reflected upon the shortcomings of this judicial combo (*CILFIT* plus *Köbler*), arguing that the Court risks affecting the flexible equilibrium in its relationship with national judges.[72] I do not agree with this argument and consider instead the *Köbler* doctrine as evidence of the nature of the sources of law and of the interpretative rulings of the ECJ. Moreover, even national constitutional courts have acknowledged the *erga omnes* effects to the decisions of the ECJ. Some of the points made by Trabucchi have substantially been called upon by the Italian Constitutional Court (even though the Court did not use the '*erga omnes* formula') in its judgements 113/85[73] and 389/89.[74] On those occasions, the Corte Costituzionale's reasoning revolved around the recognition of the authority and position of the Court of Justice in the EU system, the idea that interpretative judgments declare the law and the *erga omnes* nature of their effects:

> 'Since under Article 164 of the Treaty it is for the Court of Justice to ensure that the law is observed in the interpretation and application of the Treaty, *it must be inferred that any judgment applying and/or interpreting a rule of Community law undoubtedly has the character of a declaratory judgment of Community law, in the sense that the Court of Justice, as the qualified interpreter of that law, authoritatively clarifies its meaning by its own judgments and thereby determines the scope and content of the possibilities of application.* When this principle is referred to a rule of Community law with 'direct effect'-that is to say, a rule from which persons operating within the legal systems of the Member States may derive legal situations that are directly protectable in the courts-*there is no doubt that the clarification or supplementation of the normative*

question of EC law possibly conferring rights on individuals which has not yet been addressed by the ECJ', Peter J Wattel, 'Köbler, CILFIT and Welthgrove: We can't go on meeting like this' (2004) 41 Common Market Law Review 177, 178.

[72] As Wattel argued 'Given Köbler, the Community must, vice versa, be liable under the same conditions for damages caused by manifestly erroneous judgments of the ECJ. If Köbler is not to be taken that seriously, then it is just another source of legal uncertainty and arrears for years', see Wattel (n 71) 190.

[73] Italian Constitutional Court, Judgment No. 113/1985.

[74] Italian Constitutional Court, Judgment No. 389/1989.

> *meaning made by a declaratory judgment of the Court of Justice has the same immediate effect as the provisions interpreted*'[75] (emphasis added).

Massimo Starita has pointed to something similar in the case law of the German Constitutional Court, stating that it,

> not only seems to assume that the CJEU preliminary rulings do have *erga omnes* effect, but also that this *erga omnes* effect extends to decisions which found that a certain EU act is valid and determines a duty for the European Institution to act in accordance with the parts of the judgment which determine the conditions under which that act has been considered to be valid.[76]

I shall return to these aspects in the last section of the contribution by looking at the consequences of the Charter of Fundamental Rights of the European Union on the relationship between constitutional courts and the Court of Justice.

IV. The Erga Omnes Effects of the Interpretative Rulings of the ECJ After the Lisbon Treaty

One might ask whether the innovations introduced by the Lisbon Treaty jeopardise the *erga omnes* effects of the Court of Justice's interpretative rulings.[77] I refer here in particular to the codification of the duty to respect the national identity of the Member States in the light of Article 4 (2) TEU. This could in theory represent an exception to the *erga omnes* effects of Court of Justice decisions. From the perspective of the Court of Justice or from the systematic reading of the Treaty provisions, however, this provision does not change much. This is essentially for two reasons: first, the continuity existing between this provision and the old Article 6 TEU; second, the way in which the Court of Justice has so far interpreted Article 4 (2) TEU.

[75] Italian Constitutional Court, Judgment No. 389/1989.
[76] Massimo Starita, 'Openness Towards European Law and Cooperation with the Court of Justice Revisited: The Bundesverfassungsgericht Judgment of 21 June 2016 on the OMT Programme' (2016) 1 European Papers 395, 402.
[77] I would like to thank Giacomo Di Federico for making me think about this.

Starting with the first point, von Bogdandy and Schill[78] described Article 4 (2) TEU[79] as one of the most important novelties of the Lisbon Treaty, reading this provision as an exception to primacy provided for under EU law itself.[80] Before proceeding further, it is worth remembering that this is only one of the possible readings of this clause. Indeed, scholars have clarified the genesis of Article 4 (2) TEU by exploring the *travaux préparatoires* of the second Convention and emphasising similarities and differences with Article I-5 of the Treaty establishing a Constitution for Europe. In her seminal article Guastaferro stressed the importance of the so-called 'Christophersen clause':[81]

[78] Stephan W. Schill and Armin von Bogdandy, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 Common Market Law 1417.

[79] Article 4 TEU: '1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

[80] 'In our view, this (compared to the Maastricht Treaty) revised identity clause can help to reconceptualize the relationship between EU law and domestic constitutional law and guide the way to a more nuanced understanding beyond the categorical positions of the ECJ on the one side, which supports the doctrine of absolute primacy of EU law even over the constitutional law of Member States, and that of most domestic constitutional courts on the other, which largely follow a doctrine of relative primacy in accepting the primacy of EU law subject to certain constitutional limits', see Schill and von Bogdandy (n 78) 1418.

[81] The 'Christophersen clause' was envisaged in the first paragraph of Article I-5 of the Constitutional Treaty, devoted to the 'Relations between the Union and the Member States'. The second paragraph enshrined the principle of sincere cooperation, according

> Indeed, the current formulation of the identity clause stems from the works of the European Convention drafting the Treaty establishing a Constitution for Europe. In particular, the clause was conceived within working group V on 'complementary competence', which was explicitly set up to avoid the interferences between functional and sectorial competences (ie between competences based on aims and competences based on fields).[82]

Claes also clarified that the identity clause was understood as a provision about competences,[83] or in the words of Guastaferro, it 'was conceived as an instrument to undermine the creeping encroachment of EU powers upon sensitive areas related to national identity and sovereignty'.[84] These considerations contextualise Article 4 (2) TEU and confirm the need for a systematic reading of this clause. Indeed, the fact that Article I-5 of the Treaty establishing a Constitution for Europe preceded Article I-6 – the codification of the primacy clause – has been recalled by Claes to question

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to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks of the Constitutions. Article I-5(1), of the Constitutional Treaty stated: The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security', Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflict: The Ordinary Functions of the Identity Clause' (2012) 31 Yearbook of European Law 263, 285. See also Monica Claes, 'National Identity: Trump Card or Up for Negotiation?', in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013) 109, 121: 'In comparison to the version of the Constitutional Treaty, the only change to the wording of the provision -other than that 'the Constitution' has been reworded to 'the Treaties'- is the addition of the final sentence concerning national security, which does not seem to add much to the preceding sentence. Yet, wording aside, what has also changed is the context: the primacy provision in the next clause has been deleted from the corpus of the Treaty and has been downgraded to a Declaration to the Treaty. While this may not decisively change the meaning of the identity clause taken on its own, the fact that the obligation imposed on the EU to respect national identities is no longer counterbalanced by the statement of primacy, does affect its stature'.

[82] Guastaferro (n 81) 264.

[83] See also, Claes (n 81) 119.

[84] Guastaferro (n 81) 286.

von Bogdandy and Schill's reading of the clause and to avoid the use of Article 4 (2) TEU.[85]

As anticipated earlier, my point here is that this provision does not represent a complete innovation, the model of Article 4 TEU is undoubtedly represented by Article 6 TEU (pre-Lisbon version), which efficaciously described the closeness between common constitutional traditions and national constitutional principles. In that provision these two kinds of legal sources (common constitutional traditions and national constitutional principles) were mentioned in two subsequent paragraphs.[86]

Looking at the pre-Lisbon version of Article 6, it suffices to recall the reference made in Article 6 (2) to the common constitutional traditions, and the reference to the 'national identities' of its Member States in Article 6 (3). It is possible to argue that, within this legal context, by the formula 'national identities', the relevant domestic players tend to mean the constitutional identities of the Member States, that is the counter-limits, as defined by national constitutional courts. By adopting this approach (which is, again, only one of the possible readings of this clause) in this sense one can say that

[85] Claes (n 81) 119.

[86] Article 6 (Pre -Lisbon version): '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Article 4 of the TEU has just expressly codified such an interpretation by referring to 'constitutional structure'. The only relevant change that I can see consists in the 'decoupling' provided in the wording of the TEU between the concept of common constitutional traditions (now Article 6 TEU) and that of national constitutional identity (now codified in Article 4 (2) TEU), while in the previous version of the TEU these two concepts were dealt with in the same place, Article 6, in its paragraph 2 (common constitutional traditions) and paragraph 3 (national identity) respectively.[87]

These considerations in my view mitigate the innovative impact of Article 4 (2) TEU on the activity of the ECJ and on the effects of its rulings. My second argument has to do with the way in which the provision has been interpreted so far by the Court of Justice. As Guastaferro noted, the Luxembourg Court has interpreted this provision mainly as 'a rule of interpretation of existing internal market grounds for derogation',[88] instead of an autonomous ground of derogation.[89] Thus, the ECJ has traced the novelty back to its judicial toolbox, avoiding referring to the case law of national courts. Moreover, the ECJ has ruled out that Article 4 (2) TEU

[87] Article 6(2) and (3) TEU (pre-Lisbon version): 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The Union shall respect the national identities of its Member States'. See the way in which AG Poiares Maduro tried to use Article 6 (3) TEU in *Rottmann* (Case C-135/08 *Rottmann* EU:C:2009:588, para 25) and *Michaniki* (Case C-213/07 *Michaniki* EU:C:2008:544, paras 31-33).

[88] Guastaferro (n 81). See, for instance, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* EU:C:2010:806.

[89] This interpretation finds confirmation in the most recent case law of the Court of Justice. On this see: Roberto Mastroianni, 'La Corte costituzionale si rivolge alla Corte di giustizia in tema di 'controlimiti' costituzionali: è un vero dialogo?' *Federalismi. Rivista di diritto pubblico italiano, comunitario e comparato*, 2017 <www.federalismi.it> accessed 23 March 2023.

could be interpreted as removing certain matters from the scope of Union law.[90]

Finally, there are silent cases, such as *Weiss*[91] and *M.A.S.*,[92] in which it seems that the ECJ has tried to avoid referring to this provision while dealing with the questions posed by the German and Italian Constitutional Courts. More recently, the ECJ has relied on Article 4 (2) TEU in a case raised by the Latvian Constitutional Court[93] and on that occasion used it to interpret Article 49 TFEU.[94] In another recent case the ECJ has clarified that 'that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of the obligations under, in particular, Article 4 (2) and (3) and the second subparagraph of Article 19(1) TEU, which are binding upon it, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court'.[95]

This approach has been counterbalanced by that endorsed at national level, where both courts and political actors regained the identitarian terminology sometimes even manipulating the original wording of Article 4 (2) TEU. Indeed, the use that national constitutional courts might make of Article 4 (2) TEU is a different matter, but that does not depend on Article 4 (2) *per*

[90] Giacomo Di Federico, 'Identità nazionale e controlimiti: l'inapplicabilità della 'regola Taricco' nell'ordinamento italiano e il mancato ricorso (per ora) all'art. 4, par. 2, TUE' *Federalismi. Rivista di diritto pubblico italiano, comunitario e comparato*, 2019 <www.federalismi.it> accessed 23 March 2023.

[91] Case C-493/17 *Weiss and Others* EU:C:2018:1000.

[92] Case C-493/17 *Weiss and Others* EU:C:2018:1000; Case C-42/17 *M.A.S. and M.B* EU:C:2017:936.

[93] Case C-391/20 *Boriss Cilevičs* EU:C:2022:638.

[94] 'In the light of all the foregoing considerations, the answer to the questions referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued.', Case C-391/20 *Boriss Cilevičs* EU:C:2022:638, para 87.

[95] Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)* EU:C:2022:99, para 70.

se as much as on the state of the relationship between constitutional courts and the Court of Justice at this stage.

Against this background, it is unsurprising that national identity under Article 4 (2) TEU has been under siege as it were, *per se*, a 'dirty word',[96] a bad concept that would inevitably lead to the disintegration of the EU. This leads us to the point having to do with national constitutional courts, whose role has changed after the entry into force of the Charter of Fundamental Rights understood as a binding document in 2009.

Make no mistake, the relationship between national constitutional courts and the Court of Justice has always been a complicated love affair, but there are certain trends that make this relationship perhaps even more intricate today. On the one hand, after the entry into force of the Lisbon Treaty many constitutional courts have finally chosen to use the preliminary ruling procedure[97] and this has been a very important turning point. On the other hand, even though conflicts of interpretation have always characterised this relationship, at least since the 1970s after *Internationale Handelsgesellschaft*,[98] the state of affairs has not improved lately. There are several reasons for this:

[96] As Lusting and Weiler have outlined, identity 'is not a dirty word if it is seen as a social feature which corresponds to positive dignitarian yearnings of the human condition and equally positive social features of individual responsibility and collective solidarity'. See Doreen Lusting and Joseph H.H. Weiler, 'Judicial review in the contemporary world—Retrospective and prospective' (2018) 16 International Journal of Constitutional Law 315, 346.

[97] In order to function this institutional channel must be properly managed on both sides, by the national constitutional courts and by the ECJ. In this regard it should be highlighted that the choice not to refer can have consequences at the EU level, as demonstrated by Case C-160/14 *Ferreira da Silva* EU:C:2015:565 and Case C-416/17 *Commission v France* EU:C:2018:811), and also at the national level when Article 267 TFEU is considered to be instrumental to the effective protection of Article 6 ECHR (e.g. Austria and Germany). This does not detract from the fact that independently of legal constraints, constitutional courts should follow the suggestion formulated by A.G. Wathelet in the latter case and if necessary to make a second reference to the Court of Justice.

[98] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.

on the one hand, the legacy of problematic cases like *Mangold*[99] (of which *Ajos* is a more recent example),[100] on the other hand, the politicisation of constitutional courts 'captured' by the political power in Hungary and Poland. Moreover, the application of the *ultra vires review* should of course be mentioned, with the cases - different from each other - of the German and Czech Constitutional Courts.[101] Added to this set of reasons, however, is also the binding nature of the Charter, which has led some constitutional courts to try to centralise the compatibility check between national legislation and the fundamental rights provisions codified in the Charter with clauses corresponding to national constitutional provisions.[102]

The Charter, therefore, has not only produced convergence between the constitutional courts and the Court of Justice, but has also been a bone of contention, especially in those systems characterised by a centralised constitutionality review, where the application of the *Simmenthal* mandate[103] to conflicts involving the Charter has been seen as problematic by the constitutional courts, because it could pave the way for forms of diffuse judicial review of legislation in disguise.[104]

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[99] Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709. On this case see: Christa Tobler, 'Putting Mangold in Perspective: in Response to Editorial Comments, Horizontal Direct Effect – A Law of Diminishing Coherence?' (2007) 44 Common Market Law Review 1177.

[100] *Dansk Industri (DI) acting for Ajos A/S v The estate left by A*, case no. 15/2014 also analysed by Mikael R. Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS' *Verfassungsblog*, 30 January 2017 <https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/> accessed 23 March 2023.

[101] 2 BvR 859/15, para 127; Czech Constitutional Court (Pl. ÚS 5/12).

[102]Austrian Constitutional Court, U 466/11-18, U 1836/11-13; Italian Constitutional Court, Judgement No. 269/2017. The radical reading of this judgment has been mitigated by other decisions of the Italian Constitutional Court which are much more compatible with the *Simmenthal* doctrine, namely Italian Constitutional Court, Judgements Nos. 20/2019 and 63/2019 and 117/2019.

[103] Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49.

[104] Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and its Aftermath' (2019) 15 European Constitutional Law Review 731.

What does all this have to do with the *erga omnes* effects of Court of Justice rulings?

In order to avoid losing centrality in the interpretation of constitutional norms corresponding to those of the Charter of Fundamental Rights, some constitutional courts, such as the Austrian[105] and Italian constitutional courts,[106] for example, have tried to distinguish between the *erga omnes* effects of their decisions of unconstitutionality and the outcome of the (*inter partes*) disapplication of domestic legislation that might result from the interpretative rulings of the Court of Justice. This is a point that might lead, for example, the Italian Constitutional Court to rethink its case law of the 1980s in which it recognised the *erga omnes* effects of Court of Justice rulings. This is a possibility due to the changing structure of EU law caused by the entry into force of the Charter of Fundamental Rights. One could already detect this trend looking at a decision given by the Italian Constitutional Court in 2022[107] in which it seemed to depart from the *Lexitor* decision of the ECJ.[108]

Article 16 of Directive 2008/48/EC (devoted to credit agreements for consumers) can hardly be seen as provided with direct effect. Because of that, since disapplication was not a remedy available, the national referring court decided to involve the Constitutional Court (by raising a question of

[105] Case C-112/13 *A v. B* EU:C:2014:2195, para 24.

[106] Italian Constitutional Court, Judgement No. 269/2017, para 5.2., official translation available at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf>. In particular, the Italian Constitutional Court seemed to limit judges' power to directly apply the rights of the Charter, since they are 'a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents' and therefore 'violations of individual rights posit the need for an erga omnes intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure'.

[107] Italian Constitutional Court, Judgement No. 263/2022.

[108] Case C-383/18 *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo* EU:C:2019:702. See also the recent Case C-555/21 *UniCredit Bank Austria AG* EU:C:2023:78.

constitutionality) which chose to centralise the question of compatibility between that provision and the national constitution. While it can be argued that the Italian Constitutional Court should have referred to the ECJ to clarify the existence of direct effect, I think that this case is very special as commentators have already pointed out given that *Lexitor* could not impose a harmonised reading of Article 16 of the directive independently of the relevant national legal framework.[109] Probably, the reason why the Italian Constitutional Court decided not to refer a preliminary question to the ECJ was due to the potential added value of a decision of the ECJ. In the words of the Italian Constitutional Court

> It is true that no recourse can be made to any conforming interpretation of the provision introduced in 2021 and at issue in this case, and, by the same token, the provision cannot be disapplied, given that Article 16(1) of Directive 2008/48/EC does not have direct effect in horizontal disputes, and, therefore, courts may not disapply the provision of national law that conflicts with it. Nor can it be denied that, if the conflict between the national legal system and the Directive cannot be allayed either by reference to a conforming interpretation or by disapplication of the national provision (where horizontal cases are concerned), the private parties suffering damages can make use only of the civil liability of the State for either failure to fulfil its obligations or incorrect transposition of the Directive.[110]

Indeed, even if the ECJ had recognised the direct effect of that provision, the latter could not have been used due to the absence of horizontal direct effect for directives.[111] In this sense the decision of the Italian Constitutional Court to declare the Italian legislation unconstitutional could be seen as a way of remedying the ambiguity of the European case law on directives and giving

[109] Cimiotta (n 1) 244.

[110] Italian Constitutional Court, Judgement No. 263/2022, official translation available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%20263%20del%202022%20EN.pdf accessed 23 March 2023.

[111] See the enlightening considerations of AG Bot in the Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* EU:C:2009:429, Opinion of AG Bot, paras 58-63.

justice to the concrete case. This combination of factors – and the absence of the Charter of Fundamental Rights in *Lexitor* – makes this case different from a potential *revirement* of the Italian Constitutional Court in its case law concerning the *erga omnes* effects of the interpretative decisions of the ECJ.

In conclusion, I see no basis for a necessary rethinking of the case law analysed in this article.

V. Final Remarks

In this essay I have argued that preliminary interpretative rulings have an *erga omnes* effect consisting in 'relaxing the mandatory reference rule'.[112] When presenting and defending this idea, I have retraced a long scholarly debate. In so doing, I first offered an overview of a long-standing debate, identifying three macro-groups of authors. In a second moment I clarified my position (in favour of the acknowledgement of the *erga omnes* effects) and supported my thesis by addressing the objections that are usually made against the acknowledgement of the *erga omnes* effect.

This article makes the following contributions. Firstly, I recalled the reasons for upholding the *erga omnes* effects of judgments of invalidity. Secondly, I dealt with the counter-arguments of those who distinguish between the effects of judgments of annulment under Article 263 TFEU and judgments of invalidity under Article 267 TFEU. Thirdly, after showing why preliminary rulings on invalidity must be seen as having *erga omnes* effects I moved to the interpretative judgments by analysing the case law of the Court of Justice. Finally, I explored whether the duty to protect national identities under Article 4 (2) TEU can be used as a ground for derogation from the obligation to follow the *erga omnes* effects under Article 267 TFEU.

As stated in the introduction, the aim of this piece was twofold: it aimed to map the literature, bringing to the attention of English-speaking readers considerations that had been developed in other languages, and to ascertain whether the novelties introduced by the Lisbon Treaty had induced

[112] Cohen (n 57) 439.

significant changes. In my view, the topic is therefore still interesting although I and many other scholars think the question addressed in this article was settled years ago by the case law of the ECJ. For a scholar working on EU law and comparative law the topic is worth revisiting first of all, because research of this kind involves dealing with an enormous literature to which scholars from different languages and disciplinary backgrounds have contributed, and secondly, because the case law of the Court of Justice is by definition dynamic and open to change.

THE SCOPE *RATIONE TEMPORIS* OF THE INTERPRETATIVE RULINGS OF THE ECJ: SHOULD THE TEMPORAL LIMITATION STILL BE A STRICT DEROGATION FROM RETROACTIVE EFFECTS?

Lorenzo Cecchetti*

This article investigates the European Court of Justice's practice of limiting the temporal effects of its interpretative preliminary rulings in EU law, focusing on two main aspects. First, it examines the rationale behind the ex tunc *rule and the substantive and procedural conditions for limiting temporal effects. Second, it explores the major open issues in this regard, namely the Court's over-strict practice in applying those conditions and the old-fashioned rule-exception mindset.*

Three main arguments are put forward. First, it is suggested that Court's over-strict practice has essentially nullified the possibility to meet the conditions set in its case law, departing from the spirit and the approach adopted in its earliest judgments and clashing with the rationale and purpose of the preliminary ruling procedure. Second, it is claimed that it is high time for the Court to relax its approach towards the exceptionality of the temporal limitation of interpretative preliminary rulings, and three proposals to proceed forward are offered. Third, it is argued that such a relaxation would better serve the interests of the cooperative federalism rationale underpinning the preliminary ruling procedure and would greatly match the Court's constitutional and federal function.

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Keywords: Temporal Effects; Interpretative Preliminary Rulings; Preliminary Reference Procedure; Article 267 TFEU; European Court of Justice; Cooperative Federalism

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I. INTRODUCTION

The relationship between 'law' and 'time' is certainly not an easy one. Time is an implicit element of any legal norm,[1] which has its own 'temporal sphere of validity'.[2] Moreover, such relationship is Janus-faced: law shapes time, and, in a circular fashion, is impacted by the passing of time.[3]

[1] Richard H S Tur, 'Time and Law' (2002) 22 Oxford Journal of Legal Studies 463.

[2] Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1945) 45.

[3] See, *e.g.*, Sofia Ranchordás and Yaniv Roznai (eds), *Time, Law, and Change. An Interdisciplinary Study* (Hart 2020); Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019).

These considerations hold true for 'case law' too. In general, as to their temporal effects, judicial decisions can have *ex tunc* (or retroactive), *ex nunc* or *pro futuro* effects.[4] Each category has its merits and its drawbacks so that, at national level, despite of the specific rule set out in the constitutional framework, national constitutional courts generally seek to attain a certain degree of flexibility.[5] Indeed, limitations to the temporal effect of judgments aimed at protecting the legitimate expectations of individuals[6] are not new to the constitutional courts of some Member States[7] nor to the Anlo-Saxon legal tradition.[8]

As regards the European Union (EU) legal order, the Court of Justice (ECJ)'s interpretative preliminary rulings have, in principle, *ex tunc* effects.

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[4] Sarah Verstraelen, 'The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity' (2013) 14 German Law Journal 1687. *Pro futuro effects* have been advocated, for instance, by AG Jacobs, see Case C-475/03 *Banca Popolare di Cremona* ECLI:EU:C:2005:183, Opinion of AG Jacobs, paras 84-86. Cf. Roman Seer, 'The Jurisprudence of the European Court of Justice: Limitation of the Legal Consequences?' (2006) 46 European Taxation 470.

[5] Verstraelen (n 4) 1688.

[6] *Ibid*., 1681.

[7] Examples are the German *BVerfG* and the Austrian *VfGH* (where, however, the rule is the *ex nunc* effect), see Verstraelen (n 4) and Gaetano Silvestri, 'La Corte costituzionale italiana e la portata di una dichiarazione di illegittimità costituzionale', Paris, 16 April 2013, available online at https://www.cortecostituzionale.it/documenti/relazioni_internazionali/Parigi20130 4_Silvestri.pdf . For a comparative study of the temporal effects of judicial decisions, see Eva Steiner (eds), *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer 2015); and Patricia Popelier, Sarah Verstraelen, Dirk Vanheule, and Beatrix Vanlerberghe (eds), *The Effects of Judicial Decisions in Time* (Intersentia 2014).

[8] See, *e.g*., Supreme Court of the United States, *Brown v Board of Education* 347 US 483 (1954) and 349 US 294 (1955). In this vein, see Derrick Wyatt, 'Prospective Effect of a Holding of Direct Applicability' (1975-1976) 1 European Law Review 399; and Walter van Gerven, 'Contribution de l'arret Defrenne au développement du droit communautaire' (1977) 13 Cahiers de droit européen 131.

Why do they normally have retroactive effects? Should the Court reconsider its well-established 'rule-exception mindset' in this regard?

As is well known, the answer to the first question lies in the so-called 'declaration theory', according to which interpretative preliminary rulings only state the meaning, the scope, and the effects that a pre-existing positive law has, so that such interpretation shall reach back in time to when the interpreted law was adopted.[9] I will briefly outline the reasons behind this general rule below. At the outset, it is worth noting that the issues analysed in this article are thus inextricably linked to the reflections on the binding effects of the preliminary rulings[10] offered in other contributions to this special issue.[11] Indeed, both analyses concern the binding scope of such a ruling.

This article most specifically aims to contribute to the reflection on the second question, specifically addressing whether the temporal limitation of the interpretative preliminary rulings' effects should continue to be regarded as a strict exception to the general rule of retroactive effects. To this end, building on the academic reflection highlighting the need for a certain degree of flexibility to deviate from the general rule set in the treaties,[12] the article posits that Court's practice has, in essence, nullified the possibility of meeting the conditions set in its case law, departing from the spirit and the approach adopted in its earliest judgments and clashing with the rationale and purpose of the preliminary ruling procedure. The article also claims that

[9] Robert Schütze, *European Union Law* (3rd edn, Oxford University Press 2021) 403.

[10] As soon highlighted by Bebr, see Gerhard Bebr, 'Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect' (1981) 18 Common Market Law Review 475.

[11] See Giuseppe Martinico, 'Retracing Old (Scholarly) Paths. The *Erga Omnes* Effects of the Interpretative Preliminary Rulings' and Daniel Sarmiento, 'The Overruling Technique at the Court of Justice of the European Union', both in this special issue.

[12] See, for instance, Verstraelen (n 4); Case C-292/04 *Meilicke* ECLI:EU:C:2005:676, Opinion of AG Tizzano; and Case C-292/04 *Meilicke* ECLI:EU:C:2005:676, Opinion of AG Stix-Hackl.

it is high time for the Court to relax its approach towards the exceptionality of the temporal limitation of interpretative preliminary rulings. Indeed, a relaxation would better serve the interests of the cooperative federalism rationale underpinning the preliminary ruling procedure[13] and would greatly match the Court's constitutional and federal function,[14] to which the flexibility to deviate from the general *ex tunc* rule is of pivotal importance.[15] With regard to 'cooperative federalism', it suffices to recall here that, according to this philosophy – which is deemed applicable to the EU legal system as well – sovereignty is shared between the 'federal' and the 'national' levels without being hermetically confined – depending on the sector under consideration – within the exclusive realm of competence of either of the

[13] Schütze (n 9) 357. See also Pierre Pescatore, 'Il rinvio pregiudiziale di cui al 177 del Trattato C.E.E. e la cooperazione fra Corte di giustizia e giudici nazionali' (1986) 100 Foro italiano V 26; and Trevor C Hartley, *The Foundations of European Community Law* (2nd edn, Oxford University Press 1988) 246.

[14] Pierre Pescatore, 'La Cour en tant que jurisdiction fédérale et constitutionnelle', in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963* (Heymanns Verlag 1963) 520; Andreas M Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 Common Market Law Review 127; Francis G Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?', in Deirdre Curtin and David O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O'Higgins* (Butterworths 1992); Jens Rinze, 'The Role of the European Court of Justice as a Federal Constitutional Court' (1993) Public Law 426; Bo Vesterdorf, 'A constitutional court for the EU?' (2006) 4 International Journal of Constitutional Law 607; Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press 2009) 1-13; and Pierre-Emmanuel Pignarre, *La Cour de justice de l'Union européenne, juridiction constitutionnelle* (Bruylant 2021).

[15] Cf. Verstraelen (n 4) 1728-1730.

two levels of governance.[16] By 'constitutional and federal function', I instead refer to the ECJ's role in carrying out responsibilities akin to those of a constitutional nature within a *sui generis* legal order, which nevertheless has several similarities to those of a federal structure.[17] Indeed, not only is it called upon to rule on the allocation of powers among the various EU law institutions and bodies and to defend the rights and fundamental rights conferred upon by EU law, but it also acts as the 'supreme arbiter' between the central bodies of the Union and the Member States, thereby protecting both the common interests and the national prerogatives at once.[18]

The article is set out as follows: Section II outlines the main reasons behind the general *ex tunc*-effect rule and Section III gives an overview of the (substantive and procedural) conditions developed by the ECJ for limiting the temporal effect of interpretative preliminary rulings. Building on the considerations laid down in these two Sections, Section IV then analyses the major open issues in that regard, unravelling three conundrums that explains why the ECJ's strict approach to the temporal effect limitation appears to be in blatant contrast with the preliminary ruling procedure rationale and practice in todays' Union. Lastly, Section V offers some concluding remarks on the reasons why a more flexible approach is necessary and lays down three proposals to proceed forward with this relaxation.

[16] See Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009) 1-10, 5. Schütze's analysis is, moreover, inspired by the American academic reflection, see, for instance, Edward S Corwin, 'The Passing of Dual Federalism' (1950) 36 Virginia Law Review 1.

[17] The fact that the ECJ performs some constitutional duties cannot be doubted (see, for instance, Pescatore (n 14), Jacobs (n 14), Rinze (n 14), Vesterdorf (n 14), Hinarejos (n 14), and Pignarre (n 14)), although the use of the adjective 'constitutional' in relation to the Court has been questioned by some, see, *e.g.*, Donner (n 14).

[18] Pescatore (n 14) 522; Hinarejos (n 14) 5.

II. SETTING THE SCENE: THE GENERAL *EX TUNC*-EFFECT RULE OF INTERPRETATIVE PRELIMINARY RULINGS

As is well known, Article 267 TFEU remains completely silent on the temporal effect of interpretative preliminary rulings, despite the theoretical and practical importance of such a question. Consequently, the power to limit these effects is enshrined nowhere in the treaties, contrary to what stipulated in relation to the judgments declaring the invalidity of EU acts in Article 264 TFEU.[19]

Until the late 1970s, the retroactive effect of interpretative preliminary rulings was implicitly recognised.[20] The question then arises: when did the Court arrogate to itself, in exceptional circumstances, 'the power to declare what the law is as to the future but to leave the past untouched'?[21] This step forward, which is inherently linked to 'the mark of the legislative function',[22] has been made in *Defrenne II*.[23] The Court's reasoning on the temporal effect of the interpretative preliminary rulings has been subsequently elaborated

[19] Pursuant to this provision, when an act is declared 'void', the ECJ 'shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive'.

[20] See, for instance, Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[21] Eleanor Sharpston, 'The Shock Troops Arrive in Force: Horizontal Direct Effect of a Treaty Provision and Temporal Limitation of Judgments Join the Armoury of EC Law', in Loïc Azoulai and Luis Miguel Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 251, 259.

[22] Philip Allott, 'The European Court Ordains Equal Pay for Women' (1977) 36 The Cambridge Law Journal 7, 9; Charles J Hamson, 'Methods of interpretation – a critical assessment of the results' (1976) Reports of a Judicial and Academic Conference held in Luxembourg on 27-28 September 1976, II-15; L Neville Brown, 'Agromonetary Byzantinism and Prospective Overruling' (1981) 18 Common Market Law Review 509, 519,

[23] Case 43/75 *Defrenne II* EU:C:1976:56 455.

further in *Denkavit Italiana*[24] and *Salumi*,[25] and the general rule of *ex tunc*-effect has been confirmed in the well-established ECJ's case law.[26]

The general rule of *ex tunc*-effect is ultimately based on the nature and purpose of the preliminary ruling procedure,[27] which is 'to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts'.[28] It has been stressed that that general rule aims at avoiding difference in treatment between situations established before the Court's judgment and those occurring after the judgment.[29] *Pro futuro* judgments – according to which the interpretation given by the ECJ would not be applicable to the case at hand –, moreover, would significantly diminish the interest of referring to Luxembourg.[30]

Most notably, in *Denkavit Italiana* and *Salumi* the Court held that '[t]he interpretation which, in the exercise of the jurisdiction conferred upon it by

[24] Case 61/79 *Denkavit Italiana* ECLI:EU:C:1980:100.

[25] Joined Cases C-66, C-127, and C-128/79 *Salumi* ECLI:EU:C:1980:101.

[26] See, for instance, Case 24/86 *Blaizot* ECLI:EU:C:1988:74, para 27; Joined Cases C-367/93 to C-377/93 *Roders* ECLI:EU:C:1995:259, para 42; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, para 141; Case C-197/94 *Bautiaa* ECLI:EU:C:1996:59, para 47; Case C-262/96 *Sürül* ECLI:EU:C:1999:239, para 107; Case C-294/99 *Athinaïki Zythopoiia AE* ECLI:EU:C:2001:598, para 35; Joined Cases C-453/02 and C-462/02 *Linneweber und Akritidis* ECLI:EU:C:2005:89, para 41; Case C-209/03 *Bidar* ECLI:EU:C:2005:168, para 66; Case C-290/05 *Nádasdi* ECLI:EU:C:2006:636, para 62.

[27] Bebr (n 10) 491.

[28] *Denkavit Italiana* (n 24) para 15; *Salumi* (n 25) para 8.

[29] Michel Waelbroeck, 'May the Court of Justice Limit the Retrospective Operation of its Judgments?' (1981) 1 Yearbook of European Law 115, 120.

[30] See, *e.g.,* Thijmen Koopmans, 'Retrospectivity Reconsidered' (1980) 39 Cambridge Law Journal 287; Michael Lang, 'Limitation of the Temporal Effects of Judgments of the ECJ' (2007) 35 Intertax 230; Dominik Düsterhaus, '*Eppur Si Muove!* The Past, Present, and (possible) Future of Temporal Limitations in the Preliminary Ruling Procedure' (2017) 36 Yearbook of European Law 237, 247 ff.

Article [267 TFEU], the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force'.[31] Hence, 'the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation',[32] except for those legal relationships whose effects have been exhausted in the past if no legal proceeding has been initiated and no equivalent claim has been raised before the date of judgment.[33]

Although the Court also specified that the conditions according to which a dispute relating to the application of the interpreted rule continue to be governed by national procedural rules,[34] the legal consequences of such a general rule of *ex tunc*-effect may evidently be severe in many cases. This explains why, in some cases, the principle of effective judicial protection of rights conferred by EU law must be weighed in balance with reasons of legal certainty and of protection of legitimate expectations, which are indeed general principles of Union law.[35] As we are about to see, these principles –

[31] *Denkavit Italiana* (n 24) para 16; *Salumi* (n 25) para 9.

[32] *Ibid*.

[33] René Barents, *Directory of EU Case Law on the Preliminary Ruling Procedure* (Wolters Kluwer 2009) 250.

[34] *Ibid*., where it is affirmed 'provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied'. In exercising such national procedural autonomy, however, Member States will have to abide by EU law, see Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2014) 246.

[35] Case 13/61 *Bosch* ECLI:EU:C:1962:11, para 6; Case C-80/86 *Kolpinghuis Nijmegen* ECLI:EU:C:1987:431, para 13. In the same vein, see Francesco Martucci, 'Les principes de sécurité juridique et de confiance légitime dans la jurisprudence de la Cour de justice de l'Union européenne' (2020) Les cahiers du Conseil constitutionnel, available online; and Patricia Popelier, 'Law and Time in Two

or as AG Bobek put it, the 'foreseeability' of a certain interpretation of an EU law provision –[36] are central to the Court's reasoning on the exceptions to the general rule.[37]

Suffice it to think about the tax or social sectors, where *ex tunc* decisions will impinge on the redistribution of budget funds, previously planned and authorized by the national polities.[38] Yet, the same holds true for private undertakings and the operation of their businesses, as *Defrenne II* proves.[39] Indeed, in that case, the ECJ famously affirmed that the principle of equal pay contained in Article 119 of the Treaty of Rome (today, Article 157 TFEU) has direct effect even in the so-called horizontal situations: such a principle may be relied upon before the national courts which have a duty to ensure the protection of the rights which this provision vests in individuals[40] and does apply 'not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'.[41] As pointed out by some Member States, such direct effect would have certainly affected the financial situations of private undertakings and potentially drove some of them to bankruptcy.[42] The Court upheld these arguments as regards the past only, stressing the exceptional character of any limitation to the general rule

Dimensions: Legitimate Expectations in the Case Law of the Court of Justice of the European Union', in Ranchordás and Roznai (n 3). On the concept of legal certainty in the ECJ's case law, see also Maria Luisa Tufano, 'La certezza del diritto nella giurisprudenza della Corte di giustizia dell'Unione europea' (2019) 24 Il Diritto dell'Unione europea 767.

[36] Case C-574/15 *Scialdone* ECLI:EU:C:2017:553, Opinion of AG Bobek, para 179.

[37] See Sections III and IV (1).

[38] Ariane Wiedmann, 'Non-retroactive or prospective ruling by the Court of Justice of the European Communities in preliminary rulings according to Article 234 EC' (2006) 5/6 The European Legal Forum 196.

[39] *Defrenne II* (n 23) paras 69-75.

[40] *Defrenne II* (n 23) para 40.

[41] *Ibid*., para 39.

[42] *Defrenne II* (n 23) paras 69-70.

and setting out the conditions allowing such temporal limitation.[43] Most notably, it concluded that the principle of equal pay could not 'be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim'.[44]

III. THE CONDITIONS DEVELOPED BY THE ECJ FOR LIMITING THE TEMPORAL EFFECTS OF INTERPRETATIVE PRELIMINARY RULINGS

Against this backdrop, we can now turn our attention to those conditions according to which the temporal effect of interpretative preliminary rulings can be limited. These conditions can be divided into two categories, namely 'substantive factors' and 'procedural conditions'. The former consist of (a) the existence of a risk of serious difficulties,[45] and, most notably, the risk of serious economic repercussions due in particular to the large number of legal relationships entered into on which the ruling will impinge;[46] and (b) the

[43] *Ibid*., paras 71-75.

[44] *Ibid*., para 75.

[45] Case C-262/88 *Barber* ECLI:EU:C:1990:209, para 41; Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company* ECLI:EU:C:2014:249, para 109.

[46] See, for instance, *Defrenne II* (n 23) paras 69-71; *Blaizot* (n 26) para 30; Case C-57/93 *Vroege* ECLI:EU:C:1994:338, para 21; Case C-163/90 *Legros* ECLI:EU:C:1992:351, para 30; *Bautiaa* (n 26) para 48; *Roders* (n 26) para 44; Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 53; Case C-372/98 *Cooke* ECLI:EU:C:2000:551, para 42; Joined Cases C-177/99 and C-181/99 *Ampafrance* ECLI:EU:C:2000:562, para 66; Case C-437/97 *EKW and Wein* ECLI:EU:C:2000:130, para 57; Case C-366/99 *Griesmar* ECLI:EU:C:2001:621, para 76; *Bidar* (n 26) para 69; Case C-423/04 *Richards* ECLI:EU:C:2006:238, para 42; Case C-402/03 *Skov and Bilka* ECLI:EU:C:2006:12, para 51; Case C-313/05 *Brzeziński* ECLI:EU:C:2007:33, para 56; Case C-73/08 *Bressol* ECLI:EU:C:2010:181, para 91; Case C-2/09 *Kalinchev* ECLI:EU:C:2010:312, para 50; Case C-263/11 *Rēdlihs* ECLI:EU:C:2012:497, para 59; Joined Cases C-338/11 to C-347/11 *Santander* ECLI:EU:C:2012:286, para 59; Case C-92/11 *RWE Vertrieb* ECLI:EU:C:2013:180, para 59; Case C-82/12

existence of an objective and significant legal uncertainty regarding the interpretation of the EU law provision in question, so that those concerned are required to have acted in good faith.[47]

As regards the procedural conditions, it is well-established case law that (c) the burden of proof as to the fulfilment of the substantive criteria rests on the party requesting the limitation,[48] that (d) only the ECJ can modulate the temporal effects of its preliminary ruling[49] and that (e) such a limitation is

Transportes Jordi Besora ECLI:EU:C:2014:108, para 41; Joined Cases C-359/11 and C-400/11 *Schulz* ECLI:EU:C:2014:2317, para 57; Case C-110/15 *Microsoft Mobile* ECLI:EU:C:2016:717, para 60; Case C-101/16 *Paper Consult* ECLI:EU:C:2017:775, para 65; Case C-477/16 PPU *Kovalkovas* ECLI:EU:C:2016:861, para 52; Case C-385/17 *Hein* ECLI:EU:C:2018:1018, para 57; Case C-724/17 *Skanska* ECLI:EU:C:2019:204, para 56; Case C-210/18 *WESTbahn Management* ECLI:EU:C:2019:586, para 45; Case 274/18 *Schuch-Ghannadan* ECLI:EU:C:2019:828, para 61; Case C-287/19 *DenizBank* ECLI:EU:C:2020:897, para 108; Case C-321/19 *Bundesrepublik Deutschland* ECLI:EU:C:2020:866, para 55; Case C-413/20 *État Belge (Pilot Training)* ECLI:EU:C:2021:938, para 54; Case C-439/19 *Latvijas Republikas Saeima (Penalty Points)* ECLI:EU:C:2021:504, para 132.

[47] See, for instance, *Defrenne II* (n 23) paras 72-73; *Blaizot* (n 26) paras 31-33; *Vroege* (n 46) para 21; *Legros* (n 46) para 30; *Bautiaa* (n 26) para 48; *Roders* (n 26) para 44; *Grzelczyk* (n 46) para 53; *Cooke* (n 46) para 42; *Ampafrance* (n 46) para 66; *EKW and Wein* (n 46) para 57; *Griesmar* (n 46) para 76; *Bidar* (n 26) para 69; *Richards* (n 46) para 42; *Skov and Bilka* (n 46) para 51; *Brzeziński* (n 46) para 56; *Bressol* (n 46) para 91; *Kalinchev* (n 46) para 50; *Rēdlihs* (n 46) para 59; *Santander* (n 46) para 59; *RWE Vertrieb* (n 46) para 59; *Transportes Jordi Besora* (n 46) para 41; *Schulz* (n 46) para 57; *Microsoft Mobile* (n 46) para 60; *Paper Consult* (n 46) para 65; *Kovalkovas* (n 46) para 52; *Hein* (n 46) para 57; *Skanska* (n 46) para 56; *WESTbahn Management* (n 46) para 45; *Schuch-Ghannadan* (n 46) para 61; *DenizBank* (n 46) para 108

[48] See, among others, Case C-481/99 *Heininger* ECLI:EU:C:2001:684, para 53; *Bidar* (n 26) para 70; *Brzeziński* (n 46) paras 59-60; *Kalinchev* (n 46) paras 54-55; Case C-263/10 *Nisipeanu* ECLI:EU:C:2011:466, para 32; *Skanska* (n 46) para 56; *DenizBank* (n 46) para 109; *Bundesrepublik Deutschland* (n 46) para 55; *État Belge (Pilot Training)* (n 46) para 54; *Latvijas Republikas Saeima (Penalty Points)* (n 46) para 132.

[49] See, for instance, Case 309/85 *Barra* ECLI:EU:C:1988:42, para 13.

only permitted in the same judgment that interprets the EU law provision at stake, whereas the ECJ cannot *subsequently* limit the temporal effect of an interpretative preliminary ruling rendered beforehand.[50] In the remaining part of this Section, I will briefly outline these five conditions, listed from letter (a) to letter (e).

With regard to the first substantive condition, suffice it to recall that 'financial consequences' that might ensue for a Member State from a certain interpretative preliminary ruling cannot in themselves justify the limitation.[51] As stressed, this principle closely matches the established ECJ's case law on the justification of restrictions on the fundamental freedoms,[52] according to which objectives of a purely economic nature can never constitute an overriding reason in the general interest.[53] Nor can the temporal limitation be based on alleged administrative of practical difficulties.[54] To argue otherwise would mean that the most serious infringements would be treated more leniently since it is those infringements that are likely to have the most significant financial implications for Member States.[55] Furthermore, limiting the temporal effects of a judgment solely on

[50] See, among others, *Denkavit Italiana* (n 24) para 18; *Barra* (n 49) para 13; *Blaizot* (n 26) para 28; *Legros* (n 46) para 30; *Bosman* (n 26) para 142; *EKW and Wein* (n 46) para 57; Case C-292/04 *Meilicke* ECLI:EU:C:2007:132, para 36; Case C-267/06 *Maruko* ECLI:EU:C:2008:179, para. 77; Joined Cases C-581/10 and C-629/10 *Nelson and Others* ECLI:EU:C:2012:657, paras 92-94; *Latvijas Republikas Saeima (Penalty Points)* (n 46) para 133.

[51] *Roders* (n 26) para 48.

[52] Opinion of AG Stix-Hackl (n 12) paras 15-16.

[53] See, for instance, Case 352/85 *Bond van Adverteerders* ECLI:EU:C:1988:196, para 34; Case C-288/89 Gouda and Others ECLI:EU:C:1991:323, para 11; Case C-298/95 *SETTG* ECLI:EU:C:1997:282, para 23; Case C-120/95 *Decker* ECLI:EU:C:1998:167, para 39; Case C-158/96 *Kohll* ECLI:EU:C:1998:171, para 41.

[54] *Cooke* (n 46) para 43.

[55] *Roders* (n 26) para 48. This contradiction has been for instance stressed, in relation to the tax sector, by Frank Balmes and Martin Ribbrock, 'Die Schlussanträge in der

the basis of such 'financial consequences' or 'administrative difficulties' that might ensue for a Member State would diminish the judicial protection of the rights conferred by EU law.[56]

Secondly, in assessing the 'good faith' criterion, attention has been placed by the ECJ on the conduct of the EU institutions or other Member States[57] and on the 'novelty' of the interpretation of the law provided for by the Court itself.[58] For instance, in *Defrenne II*, the Court held that the fact that – in spite of the warnings given – the Commission did not initiate an infringement proceeding against the Member States that continue with practices contrary to Article 157 TFEU 'was likely to consolidate the incorrect impression as to the effects of Article [157 TFEU]'.[59] Moreover, as *Paper Consult* proves, when no 'objective and significant uncertainty as to the scope of EU law' exists, the institutions' attitude becomes of little relevance.[60]

Thirdly, the Court has instead stated little on the fact that the burden of proof rests upon the interested party, be it a Member State or a private company.[61] Hence, it seems possible to maintain that this criterion results from the application to the issue under investigation of two common procedural

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Rechtssache Meilicke—Vorschlag einer zeitlichen Begrenzung der Wirkung des Urteils "auf Zuruf" der Mitlgiedstaaten?!' (2006) 1 Betriebs-Berater 17, 19. See also Christian Kovács, *Die temporale Wirkung von Urteilen des EuGH im Vorabentscheidungsverfahren* (Nomos 2015).

[56] *Roders* (n 26) para 48.

[57] See, for instance, *Defrenne II* (n 23) paras 72-73; *Blaizot* (n 26) paras 32-33; *Cooke* (n 46) paras 44-46; *Bidar* (n 26) para 69; *Bressol* (n 46) para 93; *Hein* (n 46) para 58;

[58] See, *e.g.*, *Denkavit Italiana* (n 24) paras 19-21; *Blaizot* (n 26) para 31; *Roders* (n 26) para 49; *Bosman* (n 26) paras 143-145; Case C-104/98 *Buchner* ECLI:EU:C:2000:276, para 40; *Meilicke* (n 50) paras 38-40.

[59] *Defrenne II* (n 23) paras 72-73.

[60] *Paper Consult* (n 46) para 68.

[61] In the literature, see, for instance, Lenaerts, Maselis, Gutman (n 34) 248, where the Authors hold that '[t]he burden of proof is on the party requesting the limitation of the temporal effects of the Court's judgment to demonstrate with specific evidence that all of the requirements have been fulfilled; otherwise, the request is rejected'.

principles. First, the principle according to which the burden of proof rests on the one who asserts, not on the one who denies (from Latin: *onus probandi incumbit ei qui dicit, non ei qui negat*). Second, the so-called principle of proximity of evidence, according to which it is reasonable to assign the burden of proof to the party that is closest to the fact to be proven. Do these principles rightly match the rationale behind Article 267 TFEU? In the next Sections, I will reflect upon this question, taking in due consideration the changes in the Court's approach to these three conditions experienced over time.

The reasons behind the fourth condition, according to which it is for the ECJ alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down, are easy to grasp. The Court's monopoly of limitations intersects the most obvious preliminary procedure rationale, *i.e.*, the fundamental need for a general and uniform application of EU law across the Union.[62] According to the ECJ's established case law, Member States' courts, including Constitutional Courts,[63] cannot render not applicable in the main proceeding the interpretation provided by the ECJ to protect, on the basis of national law, alleged legitimate expectations.[64]

Lastly, what about the fact that restriction may be allowed only in the actual judgment ruling upon the interpretation sought? According to the Court, such a prohibition of temporal disjunction between interpretation and limitation of its effects 'guarantees the equal treatment of the Member States and of other persons subject to EU law, under that law, and fulfils, at the same time, the requirements arising from the principle of legal certainty'.[65]

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[62] *Barra* (n 49) para 13.

[63] See, for instance, Case C-314/08 *Filipiak* ECLI:EU:C:2009:719, paras 75-85; *Latvijas Republikas Saeima (Penalty Points)* (n 46) paras 130-137, which refer to Case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503, paras 61 and 67.

[64] Case C-441/14 *Dansk Industri* EU:C:2016:278, paras 28-43; *Hein* (n 46) paras 61-63.

[65] *Meilicke* (n 50) paras 36-37; *Latvijas Republikas Saeima (Penalty Points)* (n 46) para 133.

Is this a tenable position in light of the preliminary ruling procedure's rationale and practice? Some twenty years ago, Advocate Generals Tizzano and Stix-Hackl expressed some doubts about a rigid application of this procedural condition by the Court.[66] This is one of the aspects that I will specifically address in the upcoming Section.

IV. From theory to the Court's practice: Three misalignments are a problem?

Against this background, three major open issues deserve closer attention. Most notably, they concern, first, the correct understanding – and the actual application – of the two substantive criteria, namely the existence of a risk of serious difficulties and the existence of an objective and significant legal uncertainty.[67] Second, the theoretical assumptions – and the foundations – of the procedural conditions, namely the burden of proof, the Court's 'monopoly' of temporal limitations, and the prohibition of temporal disjunction between interpretation and limitation of its effects.[68] Third, it might be also questioned whether the 'exceptional nature' of the remodulation of the temporal effects of interpretative preliminary rulings can be defended today in the light of certain developments in the Court's jurisprudence.

Overall, these three open issues share a common element: they show a misalignment between, on the one hand, the (practical application of the) conditions for limiting the temporal effects of an interpretative preliminary ruling illustrated above and, on the other hand, the 'cooperative rationale'

[66] Opinion of AG Tizzano (n 12) paras 47-55; Opinion of AG Stix-Hackl (n 12) paras 20-28.

[67] See letters (a) and (b) above.

[68] See letters (c) and (e) above.

behind the preliminary ruling procedure,[69] which is based on mutual trust[70] and combines the central interpretation of Union law by the ECJ with the decentralised application of Union law by the national courts.[71] In other terms, its main function, *i.e.*, ensuring the correct and uniform interpretation and application of EU law in the Union's multi-level decentralised judicial system, is thus radically neglected by the Court's current practice.

Indeed, both the substantive and the procedural conditions are tailored to the specific situation of a single Member State, the one involved in the preliminary ruling procedure, although a limitation of temporal effects would affect all 27 Member States.[72] Also, the analysis of the ECJ's case law shows that its scrutiny has become more 'intrusive', thereby exacerbating the position of Member States (Subsection 1). Similarly, the burden of proof tends to be borne by the Member State from which the reference originates, which – as it happens in the context of EU free movement law – are put on the back foot[73] (Subsection 2). Lastly, the general *ex tunc-effect* rule and the criteria for its exception were first affirmed by the Court in a pretty difference 'world', as some recent developments in the ECJ's case law show (Subsection 3).

[69] Josse Mertens de Wilmars, 'Il potere giudiziario nella Comunità europea' (1976) 42 Foro Padano 27, 29.

[70] *Ibid*.

[71] Schütze (n 9) 359.

[72] Kovács (n 55). Conversely, according to AG Stix-Hackl, 'where a limitation on the temporal effects of a judgment is ordered, it only applies to the Member State to which it was granted. Thus, the territorial scope of exceptions to *ex tunc* effect is restricted', see Opinion of AG Stix-Hackl (n 12) para 14.

[73] Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 The Cambridge Law Journal 575, 576.

1. *On the assessment of the substantive conditions: the duty to provide 'specific information and data'*

The basics of the two substantive conditions have been illustrated in the previous Section. The analysis of the Court's *modus operandi*, however, gives us some new insights into the difficulties Member States face in meeting those conditions. Three major trends deserve to be highlighted.

First, since the substantive conditions are cumulative, hold equal legal status, and are completely separated from each other, one may wonder whether a specific order in the assessment has been set by the ECJ.

The answer is in the negative: the Court has not developed an established and comprehensive method to deal with the requests for limiting the temporal effects of its interpretative judgments. Its reasoning tends to bend towards the way in which the allegations are put forward by the Member States or other interested parties. Such an approach evidently responds to reasons of procedural efficiency. Therefore, where – as often occurs in practice – the risk of serious difficulties, and especially of serious economic repercussions, is claimed, the Court deals with this allegation, while the assessment of the good faith is deliberately considered not necessary[74] or not even mentioned.[75]

Similarly, there are several cases where good faith and the conducts of the EU institutions still play a decisive role,[76] thereby overshadowing the serious-risk criterion. Remarkably, this was precisely what happened in the

[74] *RWE Vertrieb* (n 46) paras 60-63; *Brzeziński* (n 46) paras 58-61; *Rēdlihs* (n 46) paras 61-64; *Kalinchev* (n 46) paras 52-56; *Schulz* (n 46) para 63.

[75] *Bilka* (n 46) paras 51-53; *Bressol* (n 46) paras 94-95; *Emerging Markets Series of DFA Investment Trust Company* (n 45) paras 109-113.

[76] For cases where the request was rejected on this basis, see *Buchner* (n 48); *Legros* (n 46); *Microsoft Mobile* (n 46) para 62; *Kovalkovas* (n 46) para 53; *Bundesrepublik Deutschland* (n 46) paras 56-59; *Microsoft Mobile* (n 46) para 67; *Paper Consult* (n 46) paras 68-69; *Kovalkovas* (n 46) para 53.

few cases where the requests were accepted by the Court.[77] This approach matches the Court's reasoning in the first rulings where a limitation of the temporal effects had been granted, namely *Defrenne II*, *Blaizot*, and *Barber*. There, the considerations on the good faith in light of the EU institutions' conduct appeared to be the crucial factor, while the allegations about the serious difficulties were formulated in general terms and were the object of a 'plausibility check' only.[78] By 'plausibility check', I refer to the fact that, in these three cases, the Court held that 'serious difficulties' that *might* result from the *ex tunc* effects of the interpretative preliminary ruling – due to a large number of legal relationships entered into – suffice to meet the first substantive condition.[79]

[77] Joined Cases C-25/14 and C-26/14 *UNIS* ECLI:EU:C:2015:821, paras 52-53.

[78] Most notably, in *Defrenne II*, where the Commission's inaction (failure to initiate infringement procedures against Member States for non-compliance with Treaty provisions) had engendered legitimate reliance of the Member States on the correctness of their own conduct, see *Defrenne II* (n 23) paras 72-74. Similarly, in *Blaizot*, the Court stated that '[t]he attitude […] adopted by the Commission might reasonably have led the authorities concerned in Belgium to consider that the relevant Belgian legislation was in conformity with Community law [so that] pressing considerations of legal certainty preclude any reopening of the question of past legal relationships', see *Blaizot* (n 26) paras 33-34. In *Barber*, it was the activity of the EU legislator that misled the Member States and the parties concerned, which – considering the exceptions incorporated in the secondary legislation – 'were reasonably entitled to consider that Article 119 [now Article 157 TFEU] did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere', see *Barber* (n 45) paras 42-43.

[79] See *Defrenne II* (n 23) paras 69-70; *Blaizot* (n 26) para 34; and *Barber* (n 45) para 44, where the Court held that the retroactive effects of the judgment, respectively, '*might* seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy'; '*might* have unforeseeable consequences for the proper functioning of universities'; and '*might* upset retroactively the financial balance of many contracted-out pension schemes'.

The second trend deserving closer attention precisely concerns the paradigm shift in this regard: broadly formulated allegations on serious risks are not sufficient anymore, and the plausibility check has been abandoned. A strong duty to state the reasons why the consequences of the judgments would be unbearable is placed upon the Member States and other interested parties. A similar duty is also envisaged in relation to the good faith criterion in some cases.[80]

What does this duty entail? General arguments are not sufficient; it is instead necessary to provide the Court with 'concrete and detailed evidence capable of demonstrating that its request is well founded'.[81] 'Specific information'[82] and data,[83] including the number of legal relationships established in good faith,[84] shall be produced. Thus, should Member States produce figures relating to the expected consequences of the judgment, a breakdown of those figures must be equally provided.[85]

In addition, it is worth noting that the allegations made by an interested party can be rebutted by the arguments put forward by other interested parties and that 'not all interested parties are equal'. Suffice it to recall the Court's reasoning in *Schulz*.[86] In this case, the energy providers (parties to the main proceedings) referred to serious consequences for the entire

[80] See *Santander* (n 46) para 61, where the French Government was considered to have failed 'to specify how the conduct of the Commission and other Member States may have contributed to such uncertainty. In any event, any argument alleging objective, significant uncertainty regarding the implications of European Union provisions cannot be accepted in the actions in the main proceedings'; and *Bundesrepublik Deutschland* (n 46) para 57-60.

[81] *DenizBank* (n 46) para 109; *Skanska* (n 46) para 58.

[82] *Schulz* (n 46) para 47.

[83] *Emerging Markets Series of DFA Investment Trust Company* (n 45) para 112; *Nádasdi* (n 26) paras 64-71.

[84] *État Belge (Pilot Training)* (n 46) para 55. In the same vein, see *Schulz* (n 46) para 58.

[85] *Kalinchev* (n 46) paras 53-55.

[86] *Schulz* (n 46).

electricity and gas supply sector in Germany and thus asked the ECJ to limit the temporal effects of the judgment.[87] In their written observations, they referred to the statistics of the federal network agency to substantiate their request and the alleged threat to the existence of energy and gas suppliers in Germany.[88] These data notwithstanding, the fact that the German Government admitted that it was not in a position to assess the actual consequences that the judgment to be delivered would have entailed for undertakings in the electricity and gas supply sector led the Court to conclude that the risk of serious difficulties had not been established.[89]

Despite the shift in the Court's approach towards a stricter assessment of this substantive condition, this increased rigor has not led to a greater significance of the serious risks criterion in allowing for a temporal limitation. Although the Court's approach seems stricter on the surface, from the ECJ's case law, it does not emerge that there is any overt, in-depth scrutiny of the concrete and detailed evidence, data, and figures in cases where such information has been provided. In other words, the increased burden of proof upon the parties interested in the limitation of the temporal effects has not been balanced with a corresponding emphasis on the duty to examine the detailed allegations made by those parties carefully nor to state the reasons why the data and figures provided are not convincing.

Lastly, the context of the case has proved to have an impact on the Court's assessment.

For instance, the possibility of proving the 'serious economic repercussions' has been ruled out when the ECJ's interpretative judgment grants the national judge a margin of discretion in evaluating the compatibility between national law and EU law.[90] Indeed, '[i]n those circumstances, the financial consequences […] cannot be determined on the sole basis of the

[87] *Ibid*., paras 54-55.

[88] *Ibid*., paras 55-56.

[89] *Ibid*., paras 59-63.

[90] *RWE Vertrieb* (n 46) paras 60-61; *Schuch-Ghannadan* (n 46) paras 63-65.

interpretation of European Union law given by the Court in the present case'.[91] These statements are an explicit acknowledgment of the fact that not all interpretative preliminary rulings are equal[92] and that the specificities of the ruling can have an impact on the possibility to limit its temporal effect.

Moreover, the Court has also stressed that the application of the case law illustrated above in the context of public procurement law requires taking into account 'the specific features of public procurement law and the very particular nature of the situation at issue in the main proceedings'.[93] Most specifically, considering that the EU legislation on public procurement empowers the Member States, under specific conditions, to restrict the right to initiate legal proceedings concerning contracts entered into in violation of EU law, 'the interest in preventing legal uncertainty may justify putting the stability of contractual arrangements already in the course of performance before observance of EU law'.[94]

The assessment of the substantive conditions is thus characterised by a strong duty to provide 'specific information and data' placed on the interested parties, with an impact on the possibility of meeting the burden of proof, as we are about to see.

2. *On the procedural criteria: a probatio diabolica?*

The burden of proof is the same for all interested parties who invoke the temporal limitation, whether it is the Member States, the referring court, the EU institutions, or the private parties in the main proceedings.[95]

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[91] *RWE Vertrieb* (n 46) para 60; *Schuch-Ghannadan* (n 46) para 64.

[92] See the taxonomy developed by Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 International Journal of Constitutional Law 737.

[93] *UNIS* (n 77) para 50.

[94] *Ibid*., para 51.

[95] *Schulz* (n 46) paras 54-64; *Skanska* (n 46) paras 53-59; *DenizBank* (n 46) paras 107-110.

Nonetheless, the governments of the Member States and the private parties in the main proceedings are not placed on an equal footing: as mentioned in the previous subsection, the governments' position can directly undermine the arguments put forward by the private parties.[96]

Moreover, if the Court's assessment takes the form of a 'plausibility check', several actors can contribute to meeting the burden of proof, as happened in earliest case law.[97] For example, *Defrenne II* was rendered upon a preliminary reference submitted by a Belgian court, but the (quite broad) allegations about the serious risks were put forward by the Irish and United Kingdom governments. In *Baber*, where the reference was made by a UK court, it is the Commission that requested to restrict the temporal effects of the judgment.[98]

The paradigm shift experienced in the Court's assessment of the substantive criteria impinges on the possibility for other interested parties to contribute to meeting the burden of proof. It is true that EU institutions and other Member States, to which all decisions to make a reference are notified,[99] are entitled to submit observations to the Court.[100] Yet, can one legitimately expect from other Member States, on the basis of an order for reference only, to exactly foresee the impact of a not-yet-issued preliminary ruling on their national legal orders? Are they placed in a suitable position to provide the Court with data and pieces of evidence able to support the Member State from which the reference originates in performing its duty to provide 'specific information and data'?

[96] *Schulz* (n 46) paras 59-63.

[97] *Defrenne II* (n 23) para 69.

[98] *Barber* (n 45) para 40.

[99] Article 23 (1) of the Statute of the Court of Justice of the European Union.

[100] Article 23 (1) of the Statute of the Court of Justice of the European Union; Article 96 (1) (b) of the Rules of Procedure of the Court of Justice, OJEU L 265, 29 September 2012, 1.

It can be questioned whether an order for reference issued by a (foreign) domestic court normally allows another Member State – and, *a fortiori*, other interested parties – to provide specific information and data about the effects of a *future* judgment in its legal order. Except where an established interpretation or a recent 'precedent' exist, to foresee and to *ex ante* demonstrate – with the degree of detailed required by the Court – the serious repercussions of the various interpretations that can follow from an order for reference seems a bothersome exercise.

On top of this, the deviation of the preliminary reference procedure from its original 'macro-function'[101] certainly impacts on the ability to meet the burden of proof in practice.[102] Indeed, the 'alternative use'[103] of the procedure, aimed at verifying the compatibility of national legal provisions or practices with EU law, rather than seeking the explanation of the meaning of a specific EU law provision, has become more commonplace and ordinary rather than exceptional.[104] The referred preliminary questions, and consequently the preliminary rulings, are increasingly tailored to the specific factual circumstances of the case,[105] making general abstract answers of limited value for the referring court.[106] In these 'outcome cases', the judicial

[101] Case C-561/19 *Consorzio Italian Management II* EU:C:2021:291, Opinion of AG Bobek, paras 132-133 and para 149.

[102] Such an alternative use also impacts on the possibility for last instance national courts to rely on the unwritten exceptions to the duty to refer, examined in another contribution to this special issue, see François-Xavier Millet, 'From the duty to refer to the duty to state reasons: The past, present and future of the preliminary reference procedure'.

[103] Antonio Tizzano, 'La tutela dei privati nei confronti degli Stati membri dell'Unione europea' (1995) 118 Il Foro italiano 13, 17.

[104] Opinion of AG Bobek (n 101) paras 132-133 and para 149.

[105] Lorenzo Cecchetti and Daniele Gallo, 'The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: 'CILFIT Strategy' 2.0 and its Loopholes' (2022) 15 Review of European Administrative Law 29, 56.

[106] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press 2021) 387 ff.

review conducted by the ECJ and the principles established therein are closely intertwined with the specific circumstances of each case.[107]

All considered, the common procedural principles by which the allocation of the burden of proof seems to have been inspired (*i.e.*, the principle according to which the burden of proof rests on the one who asserts and the principle of proximity of evidence) are essentially 'betrayed'. Moreover, the over-strict application of the substantive conditions and the evolution that the EU legal order has experienced over the last half-century[108] have essentially nullified the possibility of Member States and other interested parties to meet the conditions set in the Court's case law. Fulfilling these conditions amounts to a sort of *probatio diabolica* today.

These considerations urge us to briefly reconsider the other two procedural conditions, namely the Court's monopoly and the fact that a temporal limitation can be allowed only in the actual judgment ruling upon the interpretation of a certain EU law provision sought by the referring court. Indeed, these procedural conditions do not align well with the rationale and the *modus operandi* of the preliminary ruling procedure.

Due to the practical impossibility of meeting the burden of proof, in some cases, risks of serious difficulties and the need to protect legitimate expectations are likely to come to the fore only *after* the Court of Justice has rendered an interpretative preliminary ruling. In a 'Union of 27', characterised by a pervasive EU legal order and by an incessant process of EU law-making, it sounds naïve to believe that *Kirchberg* judges can take into account the impact that every interpretative ruling will have within the legal orders of the Member States, without the assistance of national actors. As history shows, the peculiarities and the constitutional traditions of the

[107] Tridimas (n 92).

[108] I will come back to the evolution of the EU legal order in Section V below.

national legal orders are not always easily noticeable by looking at them from Luxembourg.[109]

Now, in the making of a constitution for Europe, national courts have traditionally been 'mighty allies'[110] of the Luxembourg Court, and they continue to perform this role.[111] This is why, in exceptional circumstances, it is submitted that national courts might be best placed to balance effectiveness with reasons of legal certainty and of protection of legitimate expectations. In such situations, rather than neglecting their important role and treating them as 'enemies', the ECJ should entrust their national counterparts with this balancing operation, providing them with all necessary guidelines. This approach will require abandoning a rigid understanding of the 'Court's monopoly' in favour of an idea of a community of courts. The proposed step is not alien to the Union system, nor to the ECJ's case law, as *Österreichischer Rundfunk* shows, where the ECJ, while stating that the articles of the Directive in question had direct effect, concluded that it was for the national court to determine, in accordance with the principle of proportionality, whether it was necessary to set aside a national provision immediately.[112]

Finally, the prohibition of temporal disjunction between interpretation and limitation of its effects appears inconsistent with the ECJ's established case law on Article 267 TFEU. Indeed, it is important to note that the national court to which a previous preliminary ruling has been addressed can, even within the same national proceedings, seek further guidance from the Court

[109] Suffice to refer to the well-known 'Taricco saga', see Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555 and Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936.

[110] Giuseppe Federico Mancini, 'The making of a constitution for Europe' (1989) 26 Common Market Law Review 595, 597.

[111] Silvana Sciarra, 'Seventy years of the Court of Justice of the European Union. Judicial Activism and Judicial Wisdom' (2022) 27 Il Diritto dell'Unione europea 1.

[112] Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* ECLI:EU:C:2003:294. In this regard, see Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) European Law Open 576, 594.

before reaching a final decision.[113] Considering that the temporal scope of application is nothing but one of the elements of any legal norm, why should the temporal dimension be an exception from that general rule?[114] The correct application of a given judgment in the legal order of a specific Member State can undoubtedly fall within the concept of 'further guidance'. Is it reasonable to assume that a (duly motivated) temporal limitation of a previous interpretative ruling would amount to a fatal blow to the legal certainty in the EU legal order, while the ECJ has proved to use the overruling techniques in several cases?[115]

This is not the case. To this end, however, it would be opportune to regulate an *ad hoc* procedural mechanism suitable to this purpose, by amending the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice.[116] The comparative analysis with the United States – which is explored further in another contribution in this special issue –[117] supports this conclusion. Indeed, in the United States – to which early commentators in the EU have frequently referred to –,[118] the

[113] See, for instance, Case 69/85 *Wünsche* EU:C:1986:104, para 15; Case 14/86 *X* EU:C:1987:275, para 12; Case C-466/00 *Kaba* EU:C:2003:127 para 39; Case C-634/15 *Sokoll-Seebacher and Naderhirn* EU:C:2016:510, para 19; Case C-645/18 *NE I* ECLI:EU:C:2019:1108, and the following Case C-205/20 *NE II* ECLI:EU:C:2022:168; Case C-152/17 *Consorzio Italian management I* EU:C:2018:264, and the following Case C-561/19 *Consorzio Italian management II* ECLI:EU:C:2021:799.

[114] Opinion of AG Stix-Hackl (n 12) paras 23-28.

[115] For a taxonomy of ECJ's use of this technique, see Daniel Sarmiento, 'The 'Overruling Technique' at the Court of Justice of the European Union', in this special issue.

[116] See Section V below.

[117] See Fernanda G Nicola, Cristina Fasone and Daniele Gallo, 'Comparing the Procedures and Practice of Judicial Dialogue in the US and the EU: Effects of US Unconstitutionality and EU's Preliminary Interpretative Rulings', in this special issue.

[118] See, for instance, Wyatt (n 8); van Gerven (n 8); and Koopmans (n 30).

history of limiting the temporal effects of the Supreme Court's judgments originated precisely as a limitation on the temporal effects of a prior judgment.[119]

At this point, the striking contrast between the (strict application of the) conditions to limit the temporal effects of interpretative preliminary rulings and the rationale underlying this cooperation mechanism is self-evident. The last soldier standing seems to be the 'exceptional nature' assigned to the limitations on the temporal effects of interpretative preliminary rulings. Can this position still be defended?

3. A different tale of effectiveness and legitimate expectations is possible

The narrative of the limitation of temporal effects of interpretative preliminary rulings as a *strict* derogation from a general rule must be reconsidered. If the rule-exception mindset can be maintained, the strict application of the substantive and procedural conditions, such as the one illustrated above, is also inconsistent with the other strands of the case law of the ECJ, which – although they partly differ from the conditions for limiting temporal effects discussed so far – share with the topic at the centre of this analysis the fact that – exceptionally – the legal effects of the said interpretative rulings are temporarily suspended. The link between the temporal limitation of preliminary rulings according to the ECJ's case law described above and the scenario discussed here has been noticed by the literature[120] and stressed by AG Bobek in his Opinion in *Scialdone*.[121]

[119] See Supreme Court of the United States, *Linkletter v Walker* 381 US 618 (1965), concerning the temporal effects of *Mapp v Ohio* 367 US 643 (1961). See Koopmans (n 30) 288-289.

[120] See Thomas Beukers, 'Case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim, Judgment of the Court of Justice (Grand Chamber) of 8 September 2010' (2011) 48 Common Market Law Review 1985, 1988.

[121] Opinion of AG Bobek (n 36) para 180.

In a nutshell, this exceptional situation, based on the by analogy application of Article 264 TFEU, occurs when the disapplication of a national provision – found to be incompatible with the directly effective provision of an EU law directive interpreted in the judgment – would undermine the effectiveness of the directive rather than serving as a means to achieve its purpose. Examples can be found in specific areas of EU law, such as public monopolies on sports betting,[122] environment,[123] and electricity supply.[124] In this less explored and partly different scenario of 'temporal limitation', the legal effects of an EU law provision interpreted in a preliminary ruling are postponed by the Court until such time as compliant legislation is introduced.

In brief, in *Inter-Environnement Wallonie I*, the Court clarified that four cumulative conditions must be met: (a) the limited extent of the incompatibility between the national provision and the directive, which the Member State had otherwise correctly transposed; (b) the existence of an impossibility of promptly remedying the harm resulting from the disapplication of the incompatible national provision; (c) the legal vacuum that would result from the disapplication of the national provision would cause even greater harm (than the suspension of disapplication) to the objectives pursued by the directive; and (d) the suspension of disapplication must be temporary and limited in time, *i.e.*, to the time strictly necessary for the legislature to remedy the incompatibility.[125]

This strand of case law proves that, in some cases, the Court has followed unconventional pathways to preserve the effectiveness of EU law that also encompass additional, unorthodox limitations of temporal effects of interpretative preliminary rulings. Hence, the exceptions to the retroactive

[122] Case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503.

[123] Case C-41/11 *Inter-Environnement Wallonie I* ECLI:EU:C:2012:103; Case C-379/15 *Association France Nature Environnement* ECLI:EU:C:2016:603.

[124] Case C-411/17 *Inter-Environnement Wallonie II* ECLI:EU:C:2019:622.

[125] *Inter-Environnement Wallonie I* (n 123) paras 58-62.

effects are no longer confined to the application of the substantive and procedural conditions illustrated above. It thus follows that an over-strict application becomes meaningless, that the Court's harsh approach towards the Member States' allegations should be reconsidered and that the idea of these exceptions as a last resort, strict derogation from the general rule should be abandoned.

V. Conclusion: Why a more Flexible Approach is Necessary and how to Proceed

The overtly strict application of the substantive and procedural conditions for limiting the temporal effects of interpretative preliminary rulings, examined in the previous Sections, appears to be in blatant contrast with the preliminary ruling procedure rationale and practice. Indeed, such *modus operandi* shows no sign of the cooperative federalism rationale underpinning the preliminary ruling procedure. Quite the opposite, the line of jurisprudence under examination not only puts Member States' interests on the back-foot. The duty to provide specific information and data before the interpretative ruling coupled with an over-strict method of application of the procedural conditions, which disregards the half-century that has passed since the *Defrenne II* judgment, shows a sort of 'punitive intent'.[126]

In this regard, it is worth recalling two illuminating considerations that AG Tizzano – confronted with such restrictive approach by the Court – offered in *Meilicke*.

First, he rightly pointed out that the primary aim and purpose of the criteria laid down in the abovementioned case law are 'to ensure and, if possible, re-establish respect for the law'.[127] Hence, where this is not possible anymore, 'there is no reason to bring into play stricter criteria, which at that point would merely express punitive intentions, that is to say the intention to

[126] Opinion of AG Tizzano (n 12) para 42.
[127] *Ibid*.

'punish' the 'offender' for daring to breach [EU] law[, which] are completely foreign to the system'.[128] Conversely, it would be consistent with the EU law system 'to avoid adverse effects on the Member States where not strictly necessary'.[129]

Second, he noted that Member States are 'extremely complex and highly articulated structures [which] generally have serious difficulties in coping with the incessant and not always transparent Community legislation'.[130] Consequently, while the Commission and the Court should certainly pursue any breaches of EU law, it is however 'not right to fail to take [those difficulties] into account when the aims of the system can be pursued without the need for attaching penalties or in any case without making the already complicated situation of the State more difficult unnecessarily'.[131]

Besides, a more flexible approach is also necessary as the conditions illustrated above have been laid down in the 1970s, in an 'Europe of Nine', at a stage where the preliminary ruling procedure was not as 'trendy' as it is today, in relation to a treaty-centric Community legal order with limited competences and that relied upon negative integration.[132]

Considering the evolution of the EU legal order and of the European integration process over the last half-century, a relaxation will better serve the interests of cooperative federalism rationale underpinning the preliminary ruling procedure,[133] and will greatly match the Court's

[128] *Ibid*.

[129] *Ibid*.

[130] *Ibid*.

[131] *Ibid*.

[132] For a recent study on the phases of the negative integration (in relation to goods), see Jan Zglinski, 'The end of negative market integration: 60 years of free movement of goods litigation in the EU (1961–2020)' (2023) 30 Journal of European Public Policy 1. In general, see Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005) 143–161.

[133] Schütze (n 9) 357.

constitutional and federal function. Indeed, giving complete priority to effective judicial protection of rights conferred by EU law over legal certainty is expected to exacerbate the tense relationships between Luxembourg and Constitutional and Supreme courts of the Member States, as it happened in the past.[134] New, recent cases have placed these courts before similar issues,[135] as it is likely to happen in the near future. Now, considering the over-strict application of the above-mentioned conditions, what shall those courts do if risks of serious difficulties and the need to protect legitimate expectations come to the fore only after an interpretative preliminary ruling has been rendered by the Court? If any *ex-post* reassessment of the temporal effects of a preliminary ruling is ruled out by the case law at the centre of this article, the path of cooperation with the ECJ appears to be an uphill climb.

In light of the foregoing, it is high time for the Court to relax its approach to the exceptionality of the temporal limitation of interpretative preliminary

[134] See, *inter alia*, Case C-441/14 *Dansk Industri* ECLI:EU:C:2016:278, and the Danish Supreme Court's decision of 6 December 2016, No. 15/2014, available online. According to some Authors, the precedence given to the effectiveness of EU law in this judgment is 'unsatisfactory' and 'giving more prominence to the protection of legitimate expectations would permit the Court to take more nuanced views on controversial matters in substance', see Tim Maciejewski, Jens T Theilen, 'Temporal Aspects of the Interaction between National Law and EU Law: Reintroducing the Protection of Legitimate Expectations' (2017) European Law Review 708.

[135] In Italy, for instance, the need to ensure a stronger protection of legal certainty and legitimate expectations recently came under the spotlight in the aftermath of the interpretation of Article 16 of Directive 2008/48/EC (Consumer Credit Directive) provided by the Court in a preliminary ruling originating from Poland (*i.e.*, Case C-383/18 *Lexitor* ECLI:EU:C:2019:702). Indeed, the application of the '*Lexitor* principle' in the Italian legal system gave rise to divergences in both the judicial and public administration practices, which urged the Italian legislator to intervene. These issues ultimately led to some questions of constitutional legitimacy referred to the Italian Constitutional Court, answered with Judgment No. 263 of 22 December 2022.

rulings. Such a relaxation would better serve the interests of the cooperative federalism rationale underpinning the preliminary ruling procedure and greatly match the Court's constitutional and federal function, enhancing the ECJ's flexibility and thus enhancing it to strike an appropriate and case-by-case balance between the common Union's interests and the national prerogatives.[136] I thus put forward three proposals to realign the substantive and procedural conditions outlined above with the preliminary ruling procedure rationale and practice, which, to the best of my knowledge, have never been aired in the literature before. Two of these proposals concern what I have analysed in the previous Sections and can thus be implemented by the Court itself.

First, as to the assessment of the two substantive conditions, it seems necessary to place more emphasis on the protection of good faith and of legitimate expectations, while the assessment of the existence of a serious risk could get back to a 'plausibility check', as happened in earliest case law.[137] Indeed, in *Defrenne II*, *Blaizot*, and *Barber* – *i.e.*, the first rulings where a limitation of the temporal effects has been granted – the Court found that 'serious difficulties' that *might* result from the *ex tunc* effects of the interpretative preliminary ruling – due to a large number of legal relationships entered into – suffice to meet the first substantive condition,[138] while it was not necessary to provide specific information and data, including the number of legal relationships established in good faith, to demonstrate that the request is well founded, as the subsequent case law requires to do.[139]

[136] On the cooperative federalism philosophy and the ECJ's constitutional and federal role, see Section I above.

[137] See Subsections IV (1) and (2) above.

[138] See *Defrenne II* (n 23) paras 69-70; *Blaizot* (n 26) para 34; and *Barber* (n 45) para 44. In this regard, see Section IV (1) above.

[139] See again Section IV (1) above.

Second, only once a preliminary ruling has been rendered, its true consequences can be actually evaluated. As the case law stands today, before that moment, it seems impracticable to meet the burden of proof placed on Member States and other interested parties. I thus suggest getting rid of a rigid understanding of the 'Court's monopoly' as well as of the self-imposed procedural condition according to which any temporal limitation can be allowed only in the first judgment ruling upon the interpretation. Considering that this step forward could lead to an uncontrolled increase in requests for a preliminary reference, the Court should be scrupulous in defining the conditions under which it will be possible to use this procedure.

In the long run, moreover, it seems opportune an *ad hoc* amendment to the Statute of the Court of Justice of the EU and to the Rules of Procedure of the Court of Justice. This amendment, building on the procedures of 'interpretation' and 'revision',[140] should lay down a new procedure under which, within a given time-limit and where new, documented elements not taken into account in the interpretative preliminary ruling emerge, interested parties could submit a request to the Court to limit the temporal effects of a previous judgment. A filter-mechanism of these requests will certainly prove useful, even though the most sensitive aspect will be delimiting the conditions of 'novelty' and 'documentation' needed to rely on this special procedure. To be effective, such a procedure shall require a necessary joinder of parties, encompassing all Member States.

Although the recent request for amending the Statute[141] might not be the most appropriate forum to discuss this proposal, the conferral of preliminary

[140] See Articles 43 and 44 of the Statute of the Court of Justice of the European Union and Articles 158 and 159 of the Rules of Procedure of the Court of Justice.

[141] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the TFEU, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union. On this request, see Sara Iglesias Sánchez, 'Preliminary rulings before the General Court: Crossing the last frontier of the reform of the EU judicial system? (2022) EU Law Live, Weekend Edition No.

ruling competences on the General Court will probably shed new light on the need of adequate procedural pathways to guarantee the correct and uniform interpretation and application of EU law in the Union's multi-level decentralised judicial system. The proposal here briefly outlined moves towards this direction.

Meanwhile, for the reasons illustrated above, it is *high time* to abandon the idea that temporal limitations are strict derogations from the system of the treaties in today's Union.

125, available online; Antonio Tizzano, 'Il trasferimento di alcune questioni pregiudiziali al Tribunale UE' (2023) BlogDUE, available online; Chiara Amalfitano, 'The future of the preliminary rulings in the EU Judicial System' (2023) EU Law Live, Weekend Edition No. 133, available online.

THE 'OVERRULING TECHNIQUE' AT THE COURT OF JUSTICE OF THE EUROPEAN UNION

Daniel Sarmiento*

The 'overruling technique' has been used in the past by the Court of Justice of the European Union. Whilst the cases of explicit overrulings are very scarce, a broader range of indirect or tacit overrulings exist in the case-law. All these developments have taken place always in the context of preliminary ruling procedures, which confirm the importance of Article 267 TFEU, as well as the flexibility that this means of dialogue with national courts provides to the Court of Justice. The trend of overrulings shows that the search for consistency within a legal order is not a simple task, and courts attempt to minimize the derogation or departure from precedent, even by camouflaging such changes as natural or spontaneous developments in the case-law. In this contribution a theoretical framework will be provided to explain the practice of the Court of Justice when derogating precedent. A distinction will be proposed between trends that amount to overrulings: evolution, clarification and reconsideration. It will be argued that further transparency is needed when the Court undertakes an overruling, and several proposals will be made in this regard.

Keywords: Court of Justice of the European Union, Article 267 TFEU, Precedent, Stare Decisis, Overruling, Litigation, Legal Certainty

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I. INTRODUCTION

The Court of Justice of the European Union (hereinafter the 'Court' or the 'Court of Justice'), like any other constitutional or supreme court, has its own track-record of overrulings. Although the doctrine of *stare decisis* is not explicitly recognized in EU law nor in the Court's case-law, seventy years of practice confirm that the EU legal order is closely attached to the notion of binding precedent.[1]

[1] On the binding effects of the judgments of the Court of Justice and, in particular, of preliminary ruling judgments, see, in this issue, Giuseppe Martinico, 'Retracing Old

This feature turns the act of a judicial overruling into a rather expectational event, scarcely found in the seven-decade long history of the Court and reserved for well-justified occasions only. However, although it is true that the Court has been highly selective in overruling prior decisions, it is equally correct to say that the case-law hosts what could be termed as *covert* or *camouflaged* overrulings, judicial decisions which depart from prior case-law or rectify it as a result of legal developments, acting as if no derogation of judicial precedent had taken place.

In this contribution the 'overruling technique' at the Court of Justice will be analysed in a critical light. In practice, the overrulings in the case-law have always taken place in the context of the preliminary reference procedure. It will be argued that an overruling is a complex phenomenon that cannot be reduced to cases of explicit derogation of precedent. The practice of the Court of Justice confirms that an oversimplified approach towards judicial overrulings can create confusion when analysing the development of the case-law. As a result, a typology of overrulings will be developed, in which a distinction will be introduced between an *evolution*, a *clarification* and a *reconsideration* in the case-law. Several examples of the three types of overrulings will be provided, to argue that a certain degree of theoretical and terminological clarity from the Court of Justice would be welcome. This clarity is not only a demand for the sake of dogmatic thoroughness, but mostly for a guarantee of legal certainty. Several proposals will be made for future cases in which the Court might be tempted to overrule precedent, with the aim of providing a more transparent and manageable toolbox that improves the current *status quo*.

(Scholarly) Path. The *Erga Omnes* Effects of the Interpretative Preliminary Rulings'. Moreover, the binding character of the Court's rulings has also a temporal dimension that has been analysed in this issue by Lorenzo Cecchetti, 'The scope *ratione temporis* of the interpretative rulings of the ECJ: Should the temporal limitation still be a strict derogation from retroactive effects?'.

II. WHAT IS AN OVERRULING?

The reversal of precedent raises complex and delicate issues of legal certainty, coherence and *res iudicata*. One of the virtues of the law is to provide stability in legal relations, so that individuals can make decisions in an environment that provides foreseeable outcomes.[2] When judicial decisions overturn precedent, the change in the case-law produces a shift of expectations that can eventually frustrate foreseen outcomes planned in advance. A legal system that facilitates the reversal of precedent promotes instability in the law. On the opposite end, fixation to a static conception of the case-law, a strict conception of *stare decisis*, provokes an unnecessary rigidity within the legal order, to the point of frustrating any attempts to adapt the case-law to social reality or evolution in the legal system altogether. Too much rigidity in the case-law can lead to the overturning of precedents through constitutional or legislative amendment, thus undermining the authority of courts. In sum, neither a flexible nor a rigid vision of *stare decisis* seems to provide ideal results, leaving the most appropriate outcome somewhere in the middle ground.

This contribution will focus on the most standard scenario of an overruling: a judicial derogation enacted by the same jurisdiction that issued the repealed precedent. In the case of the Court of Justice, overrulings have always taken place in the context of preliminary reference procedures. But nothing precludes a broader conception of the overruling technique, particularly one in which the derogation is undertaken by a non-judicial body.[3] That may be the case of a precedent interpreting a piece of legislation that is superseded by the legislature itself, in disconformity with the interpretation that the courts made of the legislative provision. A similar situation can result in the

[2] On the role of legal certainty in the EU legal order, see Araceli Turmo, *Res Judicata in European Union Law. A Multi-Faceted Principle in A Multilevel Judicial System* (EU Law Live Press 2023) 28 ff.

[3] Alvaro Núñez Vaquero, *Precedentes: Una Aproximación Analítica* (Marcial Pons 2022) 329 ff.

case of constitutional amendments that derogate judicial precedent, as it has been the case on five occasions in the history of the Supreme Court of the United States ('SCOTUS').[4] From here on forward, the notion of "overruling" on which this contribution will operate is a concept based on judicial derogations undertaken by the same jurisdiction, and more specifically by the Court of Justice, acting as the highest court in the EU legal order.

The tensions inherent to the derogation of precedent have led courts to find a balanced approach that safeguards legal certainty with flexibility.

This is seen in the reluctance of courts, and specifically of higher courts, to assume neither of the two extremes, and opting for a balanced methodology in which very specific and exceptional departures coexist with a general trend of stability and subtle evolution. This balanced approach is best represented by the SCOTUS's approach towards *stare decisis* and its revocations, carefully confined to very specific circumstances in which a set of criteria are applied.[5] The SCOTUS will depart from precedent only in situations in which a variety of factors are taken into account: (1) the quality

[4] The precedents superseded by constitutional amendment are Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970), superseded by constitutional amendment, U.S. CONST. amend. XXVI; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), superseded by constitutional amendment, U.S. CONST. amend. XVI; Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874), superseded by constitutional amendment, U.S. CONST. amend. XIX; Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 452-54 (1856), superseded by constitutional amendment, U.S. CONST. amends. XIII and XIV; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 452 (1793), superseded by constitutional amendment, U.S. CONST. amend. XI. For a comparison between the US Supreme Court and the Court of Justice of the EU, see Fernanda G. Nicola, Cristina Fasone, and Daniele Gallo, 'Comparing the Effects of US Unconstitutionality and EU's Preliminary Interpretative Rulings: Disapplication, Resistance and Coordination Procedures', in this special issue.

[5] Brandon J. Murrill, 'The Supreme Court's Overruling of Constitutional Precedent' (*Congressional Research Service*, 24 September 2018) < https://sgp.fas.org/crs/misc/R45319.pdf > accessed 15 June 2023.

of the precedent's reasoning; (2) the workability of the precedent's rule or standard; (3) the precedent's consistency with other related decisions; (4) factual developments since the case was decided; and (5) reliance by private parties, government officials, courts, or society on the prior decision.[6] This cautious approach has led the SCOTUS to overturn a limited number of precedents in the course of time, but in a way that it provides the court with sufficient leeway to advance or regress the directions of the case-law and avoid excessive rigidity.[7]

The stability of precedent will also depend on the overall features of each legal system. The common law tradition, in which the structural role of precedent plays a more distinctive part than in continental systems, has additional incentives to pursue a strict doctrine of *stare decisis*, leaving situations of derogations of case-law to exceptional situations only. In continental systems in which the view of the judiciary is attached to the role of the judge as 'the mouth that pronounces the words of the law', legislative inroads into the task of the judiciary can facilitate the departure from precedent, fueling the legislator's agenda to prevail over the stability in the case-law. Notwithstanding such differences, the reality and practice show that both legal traditions have navigated towards a middle ground in which precedent is respected, whilst allowing for specific and exceptional situations of departure and change. It is the ways in which such departures and changes take place that are better explained by the context and culture surrounding each legal tradition. It is no surprise that in common law countries the courts tend to construe a methodology for the derogation of precedent, whilst in

[6] See Janus v. American Federation of State, County, and Municipal Employees, 585 U.S, No. 16-1466, slip op. at 34-35 (2018). For a recent example of an overruling of constitutional precedent, see Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al., 597 US, at pgs. 43 et seq. (2022)

[7] Murrill (n 5).

continental legal systems a tendency exists to refrain from theorizing on the matter.

Another feature playing an important role in the derogation of precedent, particularly in the case of departures from constitutional principle, is the degree of flexibility in the amendment of the Constitution or other higher norms. In cases of rigid Constitutions subject to strict amendment procedures, the role of high courts becomes crucial, as their task will frequently assume the debates that the rigidity of the political procedures will drive away from the political arena into the judicial fore. In the opposite end, a Constitution subject to flexible amendments and frequently reviewed through political debate and decision-making procedures, will contribute to a judiciary more prone to adhere to precedent, in the understanding that the political process can always review and amend the constitutional text. In the case of the EU, the rigidity is associated to the Treaties and to their review procedures, which are subject to a particularly high threshold of review, dependent on ratification procedures in all Member States, thus introducing a broad array of veto players, including domestic veto players (national courts, a regional parliament, a parliamentary commission, etc…). The Court of Justice's flexibility in its approach towards precedent can be explained in the backdrop of such a constitutional framework.

Another factor that will condition the approach towards precedent is the procedural context in which high courts decide on *stare decisis*. In unitary systems composed of a single law-making democratic body, the passage of time can contribute to provide stability, to which the legislative institutions can adjust and evolve in the course of time. In composite systems of federal or quasi-federal nature, in which a plurality of law-making institutions coexists, the role of precedent is a precious tool of certainty and stability for the federation and its unitary components.

Complexity and fragmentation in the legislative sphere require courts to be particularly more conscious of their unifying role as guarantors of precedent and legal certainty. In the case of a quasi-federal supranational organization

like the EU, the role of the Court of Justice is particularly relevant to guarantee the consistency of the federal rulebook, but also its effectiveness in all twenty-seven composite members of the European project.[8]

In sum, the stability of precedent is a complex feature that relies on several variables. Despite the fact that most western high courts make use of a balanced approach toward the departure from precedent, the way in which such practice has evolved depends on the variables mentioned above. In the case of the EU, its legal system is a hybrid between the common law and the continental tradition, but subject to a rigid 'Constitution' with pseudo-federal features, in which the preliminary reference and cooperation with national courts plays a relevant role. It is for these reasons that the Court of Justice's approach towards *stare decisis* does not have a direct parallelism with the approach of national courts.[9] As it will now be explained, *stare decisis* prevails in the EU case-law, but with cases that amount to derogations that also coexist with situations that are close, but not exactly within the confines of a formal departure from precedent. For this reason, an autonomous concept of the 'overruling' will be now introduced, with the aim of reflecting the specificities of the Court of Justice's approach towards the departure from precedent.

III. THE 'OVERRULING' TECHNIQUE: AN AUTONOMOUS APPROACH FROM EU LAW

There is no scarcity of analysis in the legal literature as to the different ways through which courts can depart from precedent. This richness reflects the complexity that the *stare decisis* doctrine can entail, at times complicated

[8] Marc Jacobs, *Precedents and Case-based Reasoning in the European Court of Justice* (Cambridge University Press 2014) 98 ff.

[9] Alec Stone Sweet, 'The European Court of Justice', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999); Mattias Derlen and Johan Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2019) 18 *German Law Journal* 687.

further by the context of the legal system and its peculiar features. The typology of overrulings can be different in a common law system, where the doctrine of *stare decisis* holds a very specific legal position, in contrast to continental legal systems, in which the role of legislation can supersede the status of the case-law. In the case of the EU's legal order, heavily conditioned by its quasi-federal structure and its two-tiered system between EU and national courts loosely held together through the preliminary reference procedure, the way in which overrulings are theorised require specific attention to the features of the EU's legal system. Furthermore, due to the fact that all overrulings have taken place in the context of preliminary reference procedures, this feature highlights the importance of judicial dialogue among court, including in the process of undertaking a judicial overruling of precedent.

In 2012, Takis Tridimas[10] proposed a typology of the overruling technique as applied to the EU legal order, according to which situations of (1) distinguishing precedent, (2) express overrulings and (3) implicit overrulings should be treated differently. In this authors' view, the distinguishing technique allows the Court to reject undertaking a formal departure from precedent by separating the facts of past cases with those of a case under consideration. The law becomes reliant on facts, thus allowing for different solutions which might depart on a point of law on the grounds of differences in fact. The express overruling is the unequivocal and explicit departure from precedent undertaken by the same court, whilst implicit overrulings reflect a change in the case-law without explicit recognition, although the *communis opinio* around the new development agrees on the fact that the case-law has moved on.

The distinction put forward by Takis Tridimas reflects in a clear way the basic toolbox of the Court of Justice's overruling technique. However, the

[10] Takis Tridimas, 'Precedent and the Court of Justice. A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 307 ff.

distinction between express and implicit overrulings is based on the will of the Court, and its decision to articulate an overruling in explicit terms or not, whilst the overruling as such is the same. Therefore, two variables must be introduced to portray in more detail the overruling toolbox: one that focuses on the intentions of the Court, and another pointing at the effects of the Court's decision.

By focusing on the *intentions* of the Court, a classification can distinguish between explicit, implicit and accidental overrulings, the first two in line with Tridimas' and Núñez Vaquero's[11] characterization of express and implicit overrulings. A new category is introduced to reflect the situation of accidental turns in the case-law, unintended by the Court, but confirming over the course a new approach in the case-law. No accidental overrulings have been located in the case-law of the Court of Justice, but nothing stops it from incurring in a practice of the kind in the future.

A second variable takes into consideration the *effects* of a specific line of reasoning of the Court. Seen in that light, overrulings can be revocatory or explanatory, the former intended to replace prior precedent by a new doctrine, whilst the latter is introduced to clarify past case-law, but with such scope and impact that the overall effect is to operate an overruling within the legal order. Revocatory overrulings reflect an orthodox approach towards the review of past precedent, whilst explanatory overrulings shed light on previous case-law, with the risk of introducing further complexity depending on the scope of the changes put forward, which at times can be more ambitious than originally intended.

The two variables (intention and effects) provide us with a typology of overrulings which will be used in this article. The combination of both variables produces a typology based on the *trend* perceived in the Court's case-law. Because in some cases the Court will not be undertaking an overruling in formal terms, the typology will reflect the trends that appear

[11] Núñez Vaquero (n 3) 356 ff.

in the case-law amounting to an overruling. The typology distinguishes between (1) evolution, (2) clarification and (3) reconsideration. These three trends can be analysed from the perspective of the two variables, resulting in the following scenarios:

Evolution

	Explicit	Implicit
Revocatory	Explicit Revocatory Evolution	Implicit Revocatory Evolution
Explanatory	Explicit Explanatory Evolution	Implicit Explanatory Evolution

Clarification

	Explicit	Implicit
Revocatory	Explicit Revocatory Clarification	Implicit Revocatory Clarification
Explanatory	Explicit Explanatory Clarification	Implicit Explanatory Clarification

Reconsideration

	Explicit	Implicit
Revocatory	Explicit Revocatory Reconsideration	Implicit Revocatory Reconsideration
Explanatory	Explicit Explanatory Reconsideration	Implicit Explanatory Reconsideration

In the following section this typology will be explored by focusing on cases in which the Court of Justice has made use of the different manifestations of overrulings. It will be argued that *evolution* and *clarification* are the standard approaches in the case-law of the Court of Justice, while *reconsideration* is an exceptional tool scarcely employed, but still in force and significant impact on precedent. This portrayal of the Court of Justice's overruling technique shows that there are no substantial differences with the approach used by other continental courts, not even with common law courts with well-established doctrines of *stare decisis*. The main difference is in the way in which evolution and clarification is used in the EU legal system, which is closely attached to the development of the EU's policies and the objectives-centered means of interpretation developed by the Court of Justice.[12]

IV. EVOLUTION

The case-law evolves in the course of time, as a result of constitutional change or social developments. Case-law is not a static and set body of rulings, but a continuous and organic set of rulings that reflect an

[12] Koen Lenaerts, José A. Gutiérrez-Fons, Les méthodes d'interprétation de la Cour de justice de l'Union européenne (Bruylant 2020).

understanding of the law and society. This evolution can drive the case-law into certain directions, resulting in trends that may eventually contradict precedent. When these developments take place, usually within a medium or long term, a feature that can eventually ensue is a gradual departure from precedent. By the time this development takes place, the abandonment of prior rulings can be considered as a natural or logical result, fully justified in terms of advancing the case-law. This way of building gradually in time towards an overruling is what will be categorized as *evolution*.

The case-law of the Court of Justice provides several examples of how an evolution can bring about changes of precedent. Such a result will generally derive from another evolution taking place in the law (legislation, Treaty reform, international treaties, etc…) or in society. Three examples will be provided, reflecting the interplay of the two variables mentioned above, in which intention and effects contribute to categorize the kind of overruling that the Court of Justice undertook in each case.

In its judgment in *Bidar*,[13] delivered in 2005, the Court of Justice was confronted with the issue of discriminatory treatment in the access of students to grants and subsidized loans, reserved only for students with legal residence in the host Member State. The previous position of the Court was well-defined, and it was characterized by its restrictive turn since the judgments in *Lair*[14] and *Brown*,[15] delivered in the late 1980's, in which the Court refused to recognize a right to non-discrimination on the grounds of nationality, with the argument that education policy fell within the remit of the Member States. According to the Court:

> 'it must be stated that at the present stage of development of Community law assistance given to students for maintenance and for training falls in

[13] Case C-209/03 Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills EU:C:2005:169.

[14] Case 39/86 Sylvie Lair v Universität Hannover EU:C:2988:322.

[15] Case 197/86 Steven Malcolm Brown v The Secretary of State for Scotland EU:C:1988:323.

> principle outside the scope of the EEC Treaty for the purposes of Article 7. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty'.[16]

Between the rulings in *Lair* and *Brown*, a significant development had taken place: the entry into force of the Maastricht Treaty, introducing the status of European citizenship and a new field of EU policy area in education and vocational training. When the issue of discrimination in access to allowances in University education reached the Court in a post-Maastricht context, it didn't take the Luxembourg judges much effort to depart from their prior judgments in *Lair* and *Brown*, arguing that the Maastricht Treaty had shifted the constitutional parameter significantly. The Court took also comfort in the fact that the seminal Directive 2004/38 had been recently enacted, which included a new provision in Article 24, whereby a general prohibition on the grounds of nationality explicitly referred to students. In sum, and in order to justify the departure from *Lair* and *Brown*, the Court stated:

> 'In view of those developments since the judgments in Lair and Brown, it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article [18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs'.[17]

The judgment in *Bidar* is an example of an explicit revocatory evolution, whereby the Court of Justice openly departs from prior precedent, justified on the grounds of an evolution in the Treaties that provokes an evolution in the case-law. The revocatory effect is obvious, inasmuch *Lair* and *Brown* are no longer good law, and their role within the body of case-law has been

[16] Lair (n 14) para 15.

[17] *Bidar* (n 13) para 42.

neutralized to the point of irrelevance, superseded by a new binding precedent in the shape of the *Bidar* judgment. It is paradoxical that some years later the judgment in *Bidar* would itself become partly superseded by an implicit revocatory evolution in the case of *Förster*, where the Court restricted the scope of *Bidar* and provided support to a broad interpretation of Article 24(2) of Directive 2004/38, thus confirming that evolution in the case-law can take place by taking two steps forward and one step back.[18]

Another evolution in the case-law took place in a ruling that started in the case of *Trojani*,[19] followed by *Dano*[20] and, finally, *Communities of Northern Ireland*.[21] The three judgments are good proof of how an evolution with revocatory and explanatory overrulings can take place, some of them implicit and others explicit. In 2004, in the case of *Trojani*, the issue of access to social benefits in a host Member State was discussed, in a case concerning a French national holding no legal residence in the host Member State (Belgium) under the residence Directive, but authorized to remain in the country by the Belgian authorities. In those circumstances, the Court of Justice ruled that the decision of the host Member State to authorize the presence of the French national triggered the application of the non-discrimination provisions in the Treaty, thus precluding the Belgian authorities from denying access to social benefits on the grounds of nationality. Nine years later, in the case of *Dano*, the Court changed course, stating that equal treatment is conditioned to situations in which an individual is a legal resident pursuant to the conditions set in Directive 2004/38. The contrast between the two rulings shows how the overruling

[18] Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.

[19] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488.

[20] Case C- 333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.

[21] Case C-709/20 *CG v The Department for Communities in Northern Ireland* EU:C:2021:602.

takes place, with no reference whatsoever to the prior decision (*Trojani*) or to the fact that an evolution in the case-law was taking place:

In *Trojani*, the Court clearly stated that, when it comes to access to a social benefit by a national of another Member State,

> 'a citizen of the Union who is not economically active may rely on Article [18 TFEU] where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit'.[22]

In 2013, the statement in *Dano* points in exactly the opposite direction, by ruling as follows:

> 'It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'.[23]

The judgment in *Dano* is an example of an implicit revocatory evolution, in which no reference whatsoever is made to the ruling in the case of *Trojani*, but a clear departure from the said judgment is taking place in a move that is driving the case-law into a specific direction. This direction is coherent with other rulings of the Court taking a more restrictive approach towards immigration in the EU. However, eight years later another step in the evolution took place, this time in an *explanatory* function, as shown in the case of *Communities of Norther Ireland*. In this case, the Court of Justice restricted the effects of *Dano* by introducing the possibility of invoking the Charter of Fundamental Rights of the EU in situations in which there is no legal residence under Directive 2004/38, thus reducing the impact of *Dano* when risks of violations of fundamental rights emerge, particularly in the

[22] *Trojani* (n 19) para 43.

[23] *Dano* (n 20) para 69.

case of destitute individuals with minor children.[24] Once again, the clarification is implicit and there is no reference whatsoever to the fact that the judgment is severely curtailing the impact of *Dano*, but the progression shows how an evolution and clarification can, in the course of time, perform important changes in the case-law.

Another example of an evolution that carries together an overruling of past precedent can be found in *Banco Santander*,[25] a judgment in which the Court of Justice provided for the first time a holistic approach towards the definition of an "independent jurisdiction" pursuant to Article 267 TFEU. The case concerned the status of specialised tax tribunals in Spain, whose compliance with the requirements pursuant to Article 267 TFEU were questioned. In a prior ruling in the case of *Gabalfrisa*,[26] delivered in 2000, the Court of Justice confirmed that these tribunals complied with all the requirements to act as jurisdictions with the power to make preliminary references pursuant to Article 267 TFEU. The reason why the Court had to reconsider the situation was the result of development in the case-law in another field: the protection of the rule of law and judicial independence, in the context of Article 19 TEU. As a result of case-law in this area, mostly resulting from the worrying developments emerging in Poland and

[24] At paragraph 84 of the judgment in Communities of Northern Ireland, the Court of Justice, immediately after referring to *Dano*, introduces a caveat by adding the following paragraph: 'That said, as pointed out in paragraph 57 of the present judgment, a Union citizen who, like CG, has moved to another Member State, has made use of his or her fundamental freedom to move and to reside within the territory of the Member States, conferred by Article 21(1) TFEU, with the result that his or her situation falls within the scope of EU law, including where his or her right of residence derives from national law'. From that point onward, the judgment highlights the importance of fundamental rights and the specific situation of a destitute family with minor infants, with a reference to Article 1 of the Charter (dignity), to conclude that in those circumstances a refusal to provide social assistance would amount to a breach of Union law.

[25] Case C-274/14 *Banco Santander* EU:C:2020:17.

[26] Case C-110/98 *Gabalfrisa and others* EU:C:2000:145.

Hungary, the Court introduced high standards of judicial independence, higher than those required under Article 267 TFEU in the context of the definition of a 'jurisdiction' for the purpose of referring cases to the Luxembourg court. As a result, in the case of Banco Santander the Court departed from *Gabalfrisa* with the aim of providing coherence to the case-law as a whole, thus aligning the notion of 'independence' provided in Article 267 TFEU with the standards of independence required by Article 19 TEU in relation with Article 47 of the Charter.

The terms by which the Court departs from *Gabalfrisa* shows the effort to accommodate the case-law in the context of an evolution taking place, to which Article 267 TFEU must be aligned to:

> 'those considerations [in Gabalfrisa] must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU'.[27]

V. CLARIFICATION

In the process of developing its case-law, a high court can refine previous rulings and produce additional criteria that eventually lead to derogations to specific points or elements that make part of a precedent. There is no overruling in a strict sense, because the precedent remains in place. However, the new contribution provides a new insight that can amount to a derogation. In some cases, the derogation can be broad, to the extent that it may significantly neutralize the existing precedents. In some situations, the exception can be so broad that it can be perceived to be the rule itself, and in such cases the clarification can be considered to be an overruling.

[27] *Banco Santander* (n 25), para 55.

In the case of *Taricco*,[28] the Court of Justice was confronted with an Italian provision that reduced the period applicable to a statutory limitation in criminal proceedings. As a result of this rule, a good number of criminal proceedings on VAT fraud were closed in Italy, since they had been brought at a time that exceeded the new statutory limitations. The constitutional principle imposing the application of the most favorable rule to the accused resulted in the termination of criminal proceedings which left alleged criminal offences unresolved, including VAT fraud offenses. The Court of Justice ruled that such a situation breached Article 325 of the TFEU, a provision that imposes a legal duty on Member States to take all the necessary measures to combat fraud against the financial interests of the Union.

The Italian rule did not contribute to such aim and was consequently declared by the Court of Justice to breach Union law. This ruling caused a major upheaval in the Italian criminal system. Thousands of closed criminal proceedings, with extinguishing effects on the criminal liability of the accused under Italian law, were reopened to comply with the Court of Justice's ruling. Eventually the matter reached the Italian Constitutional Court and the case was referred again to the Luxembourg court. This time around, the stakes were considerably higher: in its order for reference, the Constitutional Court reminded the Court of Justice that, in the Italian legal order, the rules on statutory limitations in criminal proceedings were not provisions of procedure, but substantive rules that determine criminal liability and therefore subject to the principle of legality and the prohibition of retroactive criminal charges, principles protected by the Italian Constitution. The Court of Justice took good note of the challenges raised by the case and in the decision of *M.A.S and M.B,*[29] decided to take a step back from its prior ruling in *Taricco*.[30] In a very subsided tone and with an

[28] Case C-105/14 *Taricco and others* EU:C:2015:555.

[29] Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936.

[30] In this vein, see Daniele Gallo, 'The Taricco Saga: When Direct Effect and the Duty to Disapply Meet the Principle of Legality in Criminal Matters', in Paul Craig and Robert Schütze (eds), *Landmark Cases in EU Law* (Hart, Forthcoming).

effort to clarify its previous case-law, the Court stated that the principle of legality, as provided in the laws of the Member States, is also a rule subject to protection under Union law. Therefore, when a Member State provides such provision, Union law reinforces it and confirms its priority vis-à-vis the protection of the Union's own resources. In the Court's words:

> 'It follows […] that it is for the national court to ascertain whether the finding, required by paragraph 58 of the Taricco judgment, that the provisions of the Criminal Code at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union leads to a situation of uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue'.[31]

Clarifications can be the result of a lack of prior information. In preliminary reference procedures the Court of Justice relies on the information provided by national courts, including the national law applicable in the main proceedings. As a result, the interpretation provided by the Court of Justice can become highly conditioned by the contents of the order for reference drafted by the national court, which may not always be complete, or fully transparent as to the intentions of the referring court. In some cases, the information provided might be inaccurate, including the information on the national law. Defective orders for reference can ensue in an erroneous decision of the Court of Justice which might have to be rectified at a later point. When the correction arrives, the Court will not consider its decision to be an overruling, but the result of a prior misunderstanding as to the law or facts as provided by the referring court. However, the case-law has to incorporate two contradicting rulings, one superseding the other, as a means

[31] *M.A.S. and M.B.* (n 29), para 59.

of clarifying past case-law delivered on the basis of wrong assumptions, thus resulting in a development equivalent to an overruling.

This means of clarification can be found in the case of *Grupo Norte*,[32] a Grand Chamber judgment in which the Court was invited to clarify a previous judgment, delivered only several months earlier, in the case of *De Diego Porras*.[33] The crux of the matter boiled down to the Spanish rules on employer compensation for termination of fixed-term contracts. Under Spanish law, the contracts for fixed-term temporary workers would terminate with no compensation. Permanent workers enjoyed a more beneficial regime of compensation following the termination of their contracts. In *De Diego Porras* the Court of Justice, ruling in a chamber of three judges without an Advocate General's Opinion, stated that both categories of workers were in a comparable situation and such difference of treatment was not objectively justified, thus breaching the fixed-term contracts Directive. This decision relied on a variety of details provided by the national court that turned out to be incomplete and at times erroneous, leading the Court of Justice, the first time around, to come too quickly to certain conclusions that turned out to produce unexpected consequences. Spain's fixed-term contractual framework provided equal social protection for permanent and fixed-term workers. The only difference was the terms of compensation for termination, which in the case of fixed-term workers replacing permanent workers was not envisaged due to the very nature of the contract itself, while in the case of permanent workers it was subject to certain conditions depending on whether the employer complied with certain conditions. The Court of Justice did not focus on this last feature and came too fast to the conclusion that the situations were comparable, putting the Spanish system of fixed-term employment upside down, with huge

[32] Case C-574/16 *Grupo Norte Facility SA v Angel Manuel Moreira Gómez* EU:C:2018:390.

[33] Case C-596/14 *Ana de Diego Porras contra Ministerio de Defensa* EU:C:2016:683.

financial implications and causing considerable financial tensions within the social security regime.

Shortly after the ruling in *De Diego Porras* was delivered, a regional high court, immediately followed by the Spanish Supreme Court as well, referred the matter once again to the Court of Justice. The government of the Kingdom of Spain requested the case to be addressed by the Grand Chamber. The discomfort within the Spanish community of employment lawyers was clear, and the Court of Justice was invited to review its prior ruling in *De Diego Porras*.

In *De Diego Porras*, the Court found the situation between permanent and fixed-term workers fully comparable in the following terms:

> 'The very fact that that applicant held for seven consecutive years the same position of an employee who was on full-time exemption from professional duties in order to carry out a trade union mandate, leads to the conclusion not only that the interested party fulfilled the training requirements to take up the post in question, but also that she carried out the same work as the person she was called upon to replace on a permanent basis during this prolonged period of time, while being subject to the same working conditions."
>
> It must therefore be held that the fixed-term employment situation of the applicant in the main proceedings was comparable to that of a permanent worker'.[34]

Shortly after, and referring to the same categories of workers, now having been presented with the full picture of the Spanish framework and with a better understanding of the benefits involved in both contracts and the differences between the two, the Court of Justice came to exactly the opposite solution, without making a single reference to its prior judgment:

> 'In that respect, it should be noted that the payment of compensation such as that payable by Grupo Norte on termination of [the] employment contract — which was expected to occur, from the moment that contract

[34] *Ibid*., paras 43 and 44.

> was concluded, when the worker he replaced took full retirement — takes place in a significantly different context, from a factual and legal point of view, to that in which the employment contract of a permanent worker is terminated on one of the grounds set out in Article 52 of the Workers' Statute'.[35]

Grupo Norte is an example of an implicit revocatory clarification. The judgment reviews the case once again in light of new information, thus reaching a more detailed analysis that leads the Court of Justice to clarify its previous reasoning in *De Diego Porras*. However, the scope of the clarification is so profound that it is ensues in a revocation of prior precedent. This outcome was clearly voiced by Advocate General Kokott in her Opinion in *Grupo Norte*, where she points to the fact that an overruling or a clarification might have been needed in this case:

> 'The present case gives the Court an opportunity to expand specifically on this aspect, which, in my view, was somewhat neglected in de Diego Porras, and to reconsider its case-law on this point'.[36]

The 'reconsideration' at the invitation of the Advocate General led to an implicit revocatory clarification from the Court of Justice, providing a welcome clarification following a ruling hastily resolved based on incomplete information. While the judgment in *Grupo Norte*, when read without the knowledge of the existence of *De Diego Porras*, does not give any hints as to whether an overruling is taking place, the reality is that the Court is undertaking a clarification that derogates precedent.

Another clarification was provided in the case of *Cassa di Risparmio*,[37] in the context of the controversial case-law of the Court of Justice delivered in *TWD Textilwerke Deggendorf*.[38] This case-law precludes private applicants

[35] *Grupo Norte* (n 27) para 56.

[36] Case C-574/16 *Grupo Norte Facility SA v Angel Manuel Moreira Gómez* EU:C:2017:1022, Opinion of AG Kokott, para 53.

[37] Case C-222/04 *Cassa di Risparmio di Firenze and others* EU:C:2006:8.

[38] Case C-188/92 *TWD Textilwerke Deggendorf* EU:C:1994:90.

with standing to bring a direct action against an EU act, to request preliminary references of validity from national courts when they have previously not made us of the action of annulment. The rationale of this case law is straight-forward: if the Treaty provides a remedy and a time-limit to bring a direct action before Union courts, this remedy cannot be circumvented by way of the preliminary reference of validity. It is true that the Court has limited the *TWD* case-law to cases in which the applicant has a clear case of standing, but it is nevertheless a restriction in the right of access to justice of private applicants that has no explicit foundation in the Treaties. In *Cassa di Risparmio* the Court of Justice was confronted with the same situation, but in a case in which the preliminary reference of validity was not made upon a request of any of the parties, but ex officio by the referring court. In that situation, does the *TWD* apply or not?

The Advocate General approached the matter by using the 'distinguishing' technique, highlighting that the case at hand concerned a general act of the Commission addressed to a Member State, a circumstance that was different from the facts in the *TWD Textilwerke Deggendorf* case. However, the Court of Justice approached the matter differently, ignoring the features of the challenged act and focusing on the fact that the question had been raised by a national court of its own motion. Instead of distinguishing the facts from one case to another, the Court used a syllogistic reasoning by virtue of which an exception was introduced to the general precedent set by the *TWD Textilwere Deggendorf* ruling. The clarification was introduced as follows:

> 'The question was referred by the national court of its own motion. Consequently, it cannot be declared inadmissible by virtue of the case-law resulting from TWD Textilwerke Deggendorf'.[39]

Cassa di Risparmio is an example of an explanatory and explicit clarification, in which the Court of Justice introduces a derogation to a general and principled line of prior case-law, but with sufficient scope to consider it as a

[39] *Cassa di Risparmio* (n 37), paras 73 and 74.

partial overruling. As a result of this clarification, the *TWD Textilwere Deggendorf* can be eluded by having a national court raising a point of validity of its own motion, a feature that waters down considerably the restrictions imposed by the preexisting precedent.

VI. RECONSIDERATION

The third and most expressive form of overruling takes place when the Court of Justice derogates precedent in categorical terms resulting from a reflective process that can be termed as a *reconsideration*. Unlike evolution, situations of reconsideration are outright departures that reflect a change of criterion and a straight-forward rupture with past precedent following a reflective process within the Court. In the entire history of the Court of Justice there are only four occasions in which such departures have taken place.

The first case of a reconsideration can be found in the *HAG I* [40] and *HAG II* [41] cases, in which the Court struggled with the doctrine of common origin. At first, the Court stated that the holder of a trademark could not prohibit the marketing in its own Member State of goods lawfully produced by the proprietor of an identical trademark in another Member State if the two trademarks had a common origin. Seventeen years later, the Court reconsidered its previous position, in light of the evolution in the internal market and the development of trademark laws in that time. In fact, the Advocate General openly invited the Court to depart from *HAG I* and to do it explicitly, which the Court did. In an unusual reference to the discussions taking place before the institution, the Court announced the overruling of *HAG I* in the following terms:

> '*Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court' s judgment in Case 192/73 Van Zuylen v HAG [1974] ECR 731 to the reply to the question asked by the*

[40] Case 192/73 *Van Zuylen/Hag AG* EU:C:1974:72.

[41] Case C-10/89 *CNL-SUCAL/HAG* EU:C:1990:359.

> *national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods*'.[42]

Immediately after, the Court reversed its prior ruling in *HAG I* and rejected the doctrine of common origin in support of a criterion of consent. The judgment is carefully reasoned, as was the Opinion of Advocate General Jacobs. In addition, paragraph 10 of the judgment refers to the development of the case-law itself, but also to 'the general rules of the Treaty', in an implicit reference to the need to update the interpretation of primary law in light of current developments in the internal market, almost two decades since the inception of the judgment in *HAG I*.

This was the first occasion in which the Court departed explicitly from prior precedent as a result of a reconsideration within the institution. It did not undertake such a task lightly. The reference to the 'discussions before the Court' and the Opinion of Advocate General Jacobs are good proof of the intensity and force of the arguments in support of an explicit overruling. The Advocate General argued convincingly in support of an explicit departure to avoid any risks of legal uncertainty:

> 'That the Court should in an appropriate case expressly overrule an earlier decision is I think an inescapable duty, even if the Court has never before expressly done so. In the present case the arguments for expressly abandoning the doctrine of common origin are exceptionally strong; moreover, the validity of that doctrine is already, as I have suggested, in doubt as a result of the intervening case-law. To answer Question 1 in the affirmative without abandoning the doctrine, or to seek to rationalize such an answer on some other ground, would be a recipe for confusion'.[43]

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[42] *Ibid*., para 10.

[43] Case C-10/89 *CNL-SUCAL/HAG* EU:C:1990:112, Opinion of AG Jacobs, para 67.

Shortly after the overruling in *HAG II,* the Court of Justice was confronted with yet another reconsideration. In the case of *Keck & Mithouard*,[44] the Court was called to deal with the backlash resulting from its case-law on free movement of goods developed during the 1970's and 1980's, which had expanded the definition of 'measures having an equivalent effect ('MEE') to a quantitative restriction'. This evolution led into the development of the *Dassonville* test and mutual recognition, putting the entirety of national regulatory measures under scrutiny in light of free movement provisions. This development created considerable levels of legal uncertainty which were not being remedied at the time by Union legislation. As a result, the Court decided to limit the scope of what constitutes an MEE and excluded from its scope the selling arrangements under national law, in particular when they are of an indistinctly applicable scope. This was not a mere clarification, but a conscious and well reflected decision ensuing from an internal deliberation on the outcome of its case-law. In the Court's own words:

> 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter.
>
> […]
>
> By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment […], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.[45]

[44] Case C-267/91 *Keck & Mithouard* EU:C:1993:905.

[45] *Ibid*., paras 14 and 16.

It is interesting to observe that the Court starts its analysis by pointing at a possible clarification of prior case-law, but what it undertakes is a rather different endeavor. In paragraph 16, it openly admits that the upcoming ruling is no clarification, but a fully-fledged rectification of prior precedent ('by contrast, contrary to what has previously been decided…'). As a result of *Keck & Mithouard*, the scope of *Dassonville* was mutilated and restricted, leaving the task of developing standards for selling arrangements to the Union legislature and not to the courts.

In *Metock*,[46] the Court of Justice rebuked a prior decision taken in the case of *Akrich*,[47] overturning it explicitly. The facts of *Akrich* concerned the situation of third country nationals, holding derivative free movement rights, having entered the territory of the Member States illegally. In such situations, the Court of Justice ruled in *Akrich* that a third country national enjoyed no free movement rights under the Treaties. Five years after the judgment in *Akrich*, the Court of Justice reversed course and overturned its prior decision:

> 'It is true that the Court held in paragraphs 50 and 51 of Akrich that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State'.[48]

The most recent example of a reconsideration took place in 2022 in the case of *NE*,[49] a case in which the Court overturned its prior ruling in Link

[46] Case C-127/08 *Metock and others* EU:C:2008:449.

[47] Case C-109/01 *Akrich* EU:C:2003:491.

[48] *Metock* (n 41) para 58.

[49] Case C-205/20 *NE and Bezirkshauptmannschaft Hartberg-Fürstenfeld* EU:C:2022:168.

Logistic,[50] on the question of whether the principle of proportionality, as enshrined in the text of a directive, has direct effect in national courts.[51] In *Link Logistic*, ignoring the powerful Opinion of Advocate General Bobek in the case, the Court of Justice provided a negative reply:

> 'It follows that, in circumstances such as those of the main proceedings, the requirement of proportionality of penalties in Article 9a of Directive 1999/62 cannot be interpreted as requiring the national court to take the place of the national legislature.
>
> Consequently, Article 9a of Directive 1999/62 does not have direct effect and does not give individuals the right to rely on it before the national authorities in a situation such as that at issue in the main proceedings'.[52]

However, this approach proved to be wrong in the eyes of the Court itself, sitting in Grand Chamber this time around, and it explicitly quashed its prior decision pointing in exactly the opposite direction:

> 'It is apparent from those considerations that, contrary to what was held in paragraph 56 of the judgment of 4 October 2018, Link Logistik N&N […], the requirement of proportionality of penalties laid down in Article 20 of that same directive is unconditional and sufficiently precise to be capable of being invoked by an individual and applied by the national administrative authorities and courts.
>
> In particular, where a Member State exceeds its discretion by adopting national legislation providing for disproportionate penalties in the event of infringements of the national provisions adopted pursuant to Directive 2014/67, the person concerned must be able to invoke directly the requirement of proportionality of penalties laid down in Article 20 of that directive against such legislation.

[50] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* EU:C:2018:810.

[51] On this matter, see Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 European Law Open 576, 590-593.

[52] *Ibid*., paras 55 and 56.

> […]
>
> In the light of all the foregoing considerations, the answer to the first question is that Article 20 of Directive 2014/67, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may thus be relied on by individuals before national courts against a Member State which has transposed it incorrectly'.[53]

VII. AN 'OVERRULING TOOLBOX' FOR THE COURT OF JUSTICE

Throughout its seventy years of case-law, the Court of Justice has proved to be a jurisdiction well attached to a non-written doctrine of *stare decisis*, limiting the derogation of precedent to very selected cases. The description portrayed above is not inconsistent with the practice of other high courts at state or international level, whereby attachment to precedent is a source of legal certainty and foreseeability, limiting the scenario of derogations to specific instances subject to robust justification. If the question is framed in terms of how consistent is the Court of Justice vis-à-vis its own case-law, the answer should be in the positive, and the rate of consistency can be considered to be high.

A different matter lies when it comes to the transparency and the reasons underlying departures from precedent. The cases described in this paper show a significant degree of pragmatism in the Court's approach when having to deal with an overruling. There is no predetermined framework in the case-law distinguishing between cases of evolution, clarification or reconsideration, nor does the Court have a consistent approach in dealing with the distinguishing of cases as an alternative technique to an overruling. The development of the case-law is a pragmatic succession of decisions whereby the Court of Justice moves its stance forward, backward or it openly derogates prior rulings, with no clarity as to why it decides in one sense or the other. The underlying rationale for one of those options can be

[53] *NE* (n 49) paras 30 and 32.

implicitly deduced by reading between the lines of the judgment, or through the looking glass of the Opinion of the Advocate General, or through the extra-judicial publications of the members or legal secretaries of the Court. Overall, consistency does not appear to be a problem for the EU legal order, but transparency is certainly a matter with room for improvement.

The Court of Justice is not a Common Law jurisdiction, nor a continental court. Its hybrid origin, inspired in the French Conseil d'État but fleshed in the course of time by the contributions of legal traditions from all its Member States, impedes a clear-cut categorization of the Court under traditional parameters. It is precisely because of its *sui generis* status among the different families of European legal traditions that its approach towards certain matters resists to fall under standard categories. This is also the case of precedent, the *stare decisis* doctrine and overrulings.

As it was mentioned in Section II, the Common Law tradition tends to develop frameworks of justification to undertake an overruling. The example of the SCOTUS is very telling, introducing a sophisticated number of steps to undertake what in this contribution has been termed as a *reconsideration*.[54] The need to develop predetermined conditions is closely linked to the US legal tradition's attachment to the doctrine of *stare decisis*. This approach contrasts with continental Europe's approach towards the derogation of precedent, traditionally categorized as the result of judicial discretion, legislative fiat or of an automatic outcome linked to the development in the law, whether through the enactment of new legislation or new constitutional rules. Between the formalization of predetermined standards and an approach based on strict discretion, there is a possible middle ground for the Court of Justice. A tentative proposal is outlined below.

The distinction between evolution, clarification and reconsideration is a useful tool to distinguish between the different justifications that underlie an

[54] See Section II of this contribution and the references in footnote 7.

overruling. In all three cases there is a powerful reason to depart from precedent, but such reasons show significant differences that require different justifications. Cases of *evolution* reflect a development in the law, a natural flow in the advancement of legislation, international law or of an overall policy approach, that eventually require adjustments in the case-law. The price to pay for not evolving the case-law is its petrification, a lack of adjustment to reality and, eventually, potential legislative or constitutional derogations of precedent. In cases of *clarification* the need for an overruling is mostly based on the necessity of stream-lining the case-law, or adjusting it in light of the effects that precedent has caused, which might require further specification by the same court. There is no evolution in the law, but a need to fine-tune the building blocks of a prior line of case-law in order to ensure its proper implementation. When it comes to *reconsideration*, the reasons and approach are widely different, inasmuch the Court is not evolving or clarifying, but directly repealing a prior ruling in order to discard it once and for all from its body of case-law. There is a willing intention to *purify* the legal order and put an end to a decision that does not belong any longer to the legal order.

From a practical perspective, it is important for the legal community to understand clearly whether an overruling is delivered based on any of the three grounds mentioned above. In the case of evolution, the legal community can understand that the overruling is a way to ensure consistency of the case-law with the broader evolution of the law. The overruling in such a context also sends a message as the willingness of the Court of Justice to adapt or not to the general developments taking place in the legal system. The fact that in judgments like *Martinez Sala* or *Bidar* the Court explicitly referred to the Maastricht Treaty and to the overall change that this legal text introduced in the broader understanding of the role of the individual in the EU legal order, helped to anticipate the following decisions in the field of Union citizenship. By correcting a prior mistake in *De Diego Porras*, the Court signaled its willingness to rectify case-law, pointing at the circumstances in which such a change can come about. In sum, there is a

high value in having transparency in the circumstances that surround situations of evolution, clarification and reconsideration, providing legal certainty and a better understanding of the case-law to the legal community. In sum, transparency at the time of undertaking an overruling is an asset in terms of *consistency* for the EU legal order. In a system closely attached to the doctrine of *stare decisis*, to introduce change in the case-law while simultaneously guaranteeing robust levels of consistency, is an important asset that should deserve careful attention.

The proposal of this contribution invites the Court of Justice to introduce specific language when dealing with cases of evolution, clarification and reconsideration. It will also be submitted that certain procedural guarantees should be introduced when derogating derogate precedent, particularly when it comes to the role of the Advocate General and the attribution of cases to the Grand Chamber. Also, it is argued that implicit overrulings should be avoided for the sake of clarity. The very notion of an overruling sits uncomfortably with implicit decisions which deprive the auditorium from properly understanding the state in which prior case-law has been left. To this end, transparency can be provided by employing a consistent approach in terms of terminology, in order to signal and inform the legal community of the steps that the Court is taking at the moment of an overruling. In fact, the case-law already anticipates this proposal: in *HAG II* and *Metock*, the Court was consistent in explicitly referring to the term 'reconsider' in order to undertake an overruling of precedent.

The use of standard formulaic expressions in the case-law is frequent in the practice of the Court of Justice. For example, the limits to the scope of a ruling in a preliminary reference are defined by the reference in the judgment to the powers of the national referring court. By stating, in the standard formulation, that a specific matter is 'for the national court to asses, in the light of all the facts of the dispute in the main proceedings', the Court is defining the perimeter of its jurisdiction in the case at hand. In similar terms, when referring to 'the specific circumstances of the case', the Court is

introducing a distinguishing technique, pointing to the fact that its solution applies to that specific factual situation, but not necessarily to a different arrangement if it was ever to be raised in the future. In sum, the role of standard formulaic expressions in the practice of the Court of Justice is a valuable tool that provides transparency and helps in better understanding the true meaning of a judgment. When the ruling is undertaking a derogation of precedent, a highly relevant development for the overall body of case-law, such transparency should be demanded from the Court.

It is submitted that the use of standard formulaic expressions to reflecting an *evolution*, a *clarification* or a *reconsideration* of precedent, should be expressed in the following terms, using the same variables already introduced in Section III:

Evolution

	Explicit
Revocatory	'In view of the developments since the judgment/s in [*x*], it must be considered that the said judgment/s does no longer reflect the case-law of the Court, and [*new precedent*].'
Explanatory	'In view of the developments since the judgment/s in [*x*], the said judgment/s must be interpreted in the sense that [*new precedent*]'

Clarification

	Explicit
Revocatory	'In view of the arguments put forward before the Court, the judgment/s in [*x*] must be clarified in the sense that [*new precedent*]'
Explanatory	'In view of the arguments put forward before the Court, the judgment/s in [*x*] must be interpreted in the sense that [*new precedent*]'

Reconsideration

	Explicit
Revocatory	'In view of the arguments put forward before the Court concerning the relevance of the judgment/s in [*x*], the Court considers that the said judgment/s must be reconsidered. In light of [*reasons justifying the reconsideration*], it follows that [*new precedent*].'
Explanatory	'In view of the arguments put forward before the Court concerning the relevance of the judgment/s in [*x*], the Court considers that the said judgment/s must be reconsidered. In light of [*the reasons justifying the reconsideration*], it follows that judgment [*x*] must be interpreted in the sense that...'

A final remark should be made to the procedural guarantees that reinforce transparency while undertaking an overruling of precedent. A specific attention will be addressed to the role played by the Advocate General and the formations in the Court of Justice.

Considering the importance that derogations from precedent have for any legal order, it should be assumed that, in proceedings in the Court of Justice, such a development should demand the participation of the Advocate General hearing the case. To enrich the decision-making process and provide full legitimacy to the Court's decision, it will be argued that all overrulings, in any of their manifestations referred above, should count with the participation of the Advocate General, as a means of introducing an additional guarantee of stability to the legal order. However, this proposal should not be taken too far to the point of requiring a positive stance of the Advocate General in support of an overruling. Granting a veto power to the Advocate General would undermine the very nature of his/her role, whose function is to support the task of the Court, but not to condition it. In fact, the experience of past overrulings in the Court of Justice show that in most cases the Advocate General has supported a departure or a readjustment of the case-law, in line with the Court's final decision in the case. On some occasions the Advocate General has been the main and active promoter of such a turn in the case-law. It is unquestionable that an overruling will have a reinforced legitimacy if it has been decided upon a proposal of the Advocate General, but nothing should preclude the Court from departing from precedent even if the Advocate General is opposed to such a move. However, the Advocate General should be heard at all times, so it is imperative that any overruling takes place with an Opinion of an Advocate General, something that has always happened to date and should continue to be the standard trend.

In addition, another procedural guarantee should be provided by the role of the Grand Chamber, the Court's leading formation on matters of principle. Unless the overruling is departing from a precedent delivered by the plenary of the Court, all derogations must be undertaken by the Grand Chamber, a fifteen-judge formation that includes the participation of the President, Vice-President and the five Presidents of chambers of five judges. It should be said that, as in the case of the Advocate General's participation, all the overrulings delivered thus far by the Court of Justice have been issued from

the Grand Chamber or an equivalent formation prior to the introduction of the Grand Chamber. This practice should continue and at no point should the Court be tempted to overrule a three-judge chamber judgment in a chamber of five-judges, for the sake of ensuring the legitimacy and consistency in the case-law, as well as to restrict the practice of overrulings to the minimum.

VIII. CONCLUSION

Standard formulaic expressions provide consistency and legal certainty, particularly in a jurisdiction operating with twenty-four official languages. The use of such an approach to derogations of precedent will be an important asset, allowing the legal community to better discern the development of the case-law and the intentions of the Court. Half a decade later, legal scholars are still discussing whether the judgment in *M.A.S.* overruled the decision in *Taricco*. From the perspective of the requisite standards of consistency in any legal order, such outcome is not optimal and it should be avoided.[55]

[55] Transparency in the reasoning, consistency in the language used by the CJEU and legal certainly are also important for allowing the preliminary reference procedure to work efficiently and smoothly. This seems to be particularly important at a time in which one of the most important reforms of the preliminary reference procedure is under discussion. See the Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the TFEU, with a view to amending Protocol No. 3 on the Statute of the Court of Justice of the European Union. On this request, see Sara Iglesias Sánchez, 'Preliminary rulings before the General Court: Crossing the last frontier of the reform of the EU judicial system? (2022) EU Law Live, Weekend Edition No. 125, available online (15 June 2023); Antonio Tizzano, 'Il trasferimento di alcune questioni pregiudiziali al Tribunale UE' (2023) BlogDUE, available online (15 June 2023); Chiara Amalfitano, 'The future of the preliminary rulings in the EU Judicial System' (2023) EU Law Live, Weekend Edition No. 133, available onlin (15 June 2023).

In this contribution it has been argued that the *intention* and the *effects* of a judgment overruling previous precedent are useful variables to create a functional typology that describes the overruling technique of the Court of Justice. These variables can be employed to develop a typology of the *trends* in the case-law: *evolution*, *clarification* and *reconsideration*. The typology, together with the variables, provide a complete portrayal of the diverse configurations of the overruling technique in the Court of Justice. Precisely because the variety of configurations is broad, it is crucial that the Court introduces clarity in the way it proceeds when it decides to depart from precedent. The use of standard formulaic expressions is a modest but effective tool to ensure consistency, clarity and legal certainty at the solemn time of derogating a precedent, an event that should be reserved to very limited occasions.

This analysis should not be taken as a critique to the fact that the Court of Justice has made use of the overruling technique in the past. In fact, it has been argued that the derogation of precedent is a healthy and necessary feature of any legal system that all high courts must have at their disposal. It is the complex balance between consistency and change that must be kept with care, for which some tools are also available. This contribution intends to provide some of those tools, as a means of facilitating the task of making the case-law move forward, while simultaneously providing clarity, legal certainty and trust in the EU legal order.

COMPARING THE PROCEDURES AND PRACTICE OF JUDICIAL DIALOGUE IN THE US AND THE EU: EFFECTS OF US UNCONSTITUTIONALITY AND EU'S PRELIMINARY INTERPRETATIVE RULINGS μ

Fernanda G. Nicola*, Cristina Fasone† and Daniele Gallo•

The article investigates the role and powers of the Supreme Court of the United States (SCOTUS) and the European Court of Justice (ECJ) when a conflict between 'federal'/EU and State law arises. It focuses on how it is solved and the procedure followed to assess, in particular, what is the added value of the European preliminary ruling procedure (PRP), and what the composite European Union (EU) judicial system can learn from the United States (US) experience and the other way around. While in the EU the PRP is the main test bench for the relationship between ECJ and State courts, such a structured mechanism is lacking in the US, though other avenues of cooperation have been established over the last two centuries. Against this background, the contribution first reviews and compares the effects of a declaration of unconstitutionality in the US with the interpretative preliminary rulings rendered by the ECJ in which incompatibility between EU and national norms is de facto *asserted and the duty to disapply arises. Second, it considers, respectively, the power of SCOTUS to remand a case to the State courts, once the State law has been judged unconstitutional, and how disapplication of the national law in contrast with EU law works as a result of an ECJ's ruling. Third, in both systems, it reviews the strategies and the arguments for judicial dialogue used by State courts to react and resist the higher court's assessment. Fourth, it*

μ Although the article was a product of common efforts of the authors, Fernanda Nicola focused on sections III, IV and VII, Cristina Fasone focused on sections V and VI, while Daniele Gallo focused on sections I and II.

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examines proposals to better integrate the views and determination of the State courts into the activity of the 'federal'/EU court and vice versa. In summary, the comparative analysis suggests that SCOTUS tends to prefer a more decentralized approach in enforcing its rulings, largely influenced by its distinct models of judicial review. In contrast, the ECJ appears more inclined to assert substantial control, reserving considerable discretion to dictate the specifics of if, when and how the duty to disapply should come into play.

Keywords: Supreme Court of the United States, European Court of Justice, Article 267 TFEU, Certification procedure, Review of State Courts' judgments, Binding Effects of the rulings, Cooperative Federalism

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I. INTRODUCTION

The comparison between the US and the EU has triggered a significant level of scholarly attention considering both 'compound democracies' and

federalizing processes.[1] While their respective institutional set up and articulation of competences between the central and the State governments have been frequently compared,[2] this is much less the case for the structure and powers of the two highest courts, the Supreme Court of the United States (SCOTUS) and the European Court of Justice (ECJ), with respect to the judicial dialogues between them and State courts.[3] While in the EU the preliminary reference procedure is the main test bench for this relationship, such a structured mechanism is lacking in the US, though other avenues of cooperation have been established over the last two centuries but not widely used in practice.

The article investigates the role and powers of SCOTUS and the ECJ, as well as their judicial dialogue and engagement with State courts when a conflict between 'federal'/EU and State law arises, looking at how it is solved due to the different types of judicial review in place for its evaluation. In particular, the article analyses the added value of the European preliminary reference procedure, and what the composite EU judicial system can learn from the US diffused system of judicial review and the other way around. Against this background, the contribution first reviews and compares the effects of the different disapplications of State law through declaration of unconstitutionality in the US and the interpretative preliminary rulings rendered by the ECJ. Second, it considers the power of SCOTUS to remand

[1] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) and Sergio Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press 2010).

[2] See: Michel Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' (2006) 4(4) International Journal of Constitutional Law, 618–651; Fernanda G. Nicola, 'Legal Diplomacy in an Age of Authoritarianism' (2021) 27 Columbia Journal of European Law 152.

[3] For an exception, see: Jeffrey C. Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 American Journal of Comparative Law 421.

a case to the State courts, once the State law has been judged unconstitutional, and how disapplication of the national law in contrast with EU law works as a result of an ECJ's ruling. Third, it reviews the strategies and arguments used by State courts in both systems to react and resist the higher court's assessment. Fourth, it assesses the practice of EU preliminary references and of US certification. Some concluding remarks will be made on the present design of the relationship between federal/EU and State courts, keeping the remedy of disapplication and the functioning of the preliminary reference proceeding at the hearth of the analysis.

II. The Meta-Comparison in Context

EU scholarship has primarily examined the ECJ as a *sui generis* constitutional court, drawing parallels with SCOTUS and highlighting the ECJ's pivotal role in maintaining the equilibrium of powers between the central governing body and the peripheral entities within the EU.[4] Others have shown how its role of guardian of fundamental rights, along with constitutional/supreme courts of Member States, on one hand, empowered the ECJ to expand its judicial review in the field and, on the other, triggered a judicial dialogue with domestic judiciaries so that the "Court had to develop an incomplete constitutional bargain and it used the language of rights to do so."[5]

Limited scholarly attention has been devoted to comparing the EU preliminary reference mechanism with appellate procedures in which a State court submits a case to SCOTUS. This process involves testing the legal framework and obtaining either a rejection or certification of the State law's

[4] See: Martin Shapiro, 'The US Supreme Court and the European Court of Justice Compared' in A Menon and M. Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford University Press 2006).

[5] See: Alicia Hinarejos, *Judicial Control in the European Union: reforming Jurisdiction in the Intergovernamental Pillars* (Oxford University Press 2009) 9.

validity.[6] In conducting a meta-comparison across different times and institutions[7] between SCOTUS and the ECJ, we examine the judicial dialogue they undertake with State courts to assess the scope of certification procedures employed in the US compared with the preliminary reference mechanism utilized by the ECJ.[8]

1. SCOTUS' Highest Authority in Diffuse Judicial Review

The SCOTUS, established in 1789, has the highest authority to settle all constitutional law issues in the nation, as stated in *Marbury v. Madison* as the first case establishing the notion of judicial review.[9] The US Constitution, in the Supremacy Clause, established federal law power over conflicting State laws, and this power translates judicially to the diffuse ability of federal courts to invalidate State laws that are deemed in conflict with the Constitution, international treaties and federal laws.[10] This provision was promoted by

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[6] Michael L. Wells, 'European Union Law In The Member State Courts: A Comparative View' (2021) University of Georgia School of Law Research Paper Series, Paper No. 2021-11, 11, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911155>, last accessed November 5 2023.

[7] On meta-comparisons see: Stéphanie Hennette Vauchez, 'Religious Neutrality, Laïcité And Colorblindness: A Comparative Analysis' (2021) 42 Cardozo Law Review 539, 549-550. On the ECJ and its constitutional jurisdiction, see: Bo Vesterdorf, 'A constitutional court for the EU?' (2006) 4 International Journal of Constitutional Law, 607 and Pierre-Emmanuel Pignarre, *La Cour de justice de l'Union européenne, jurisdiction constitutionnelle* (Bruylant 2021).

[8] Cohen (n 3) 450. Here Cohen discusses how the US could benefit from operating like the ECJ, particularly in allowing certification and minimizing backlog in the lower federal courts. Cohen suggests creating a certification system for SCOTUS.

[9] *Marbury* v. *Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803).

[10] *Id.*, 177; United States Constitution 1787, Article VI, clause 2: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

James Madison, who understood the need to institute a mechanism that would prevent interstate disputes leading to armed conflict.[11] The intent was made even more explicit when the first session of the newly established congress passed the Judiciary Act of 1789. The act granted appellate jurisdiction for all cases 'arising under' federal law and the Supremacy Clause's mandate that 'judges in every State' be bound by federal law against contrary State law.[12]

Generally speaking, SCOTUS rules on the constitutionality of the provision in question as a matter of law and then remands the law back to a State court to determine the correct rewrite or excision of unconstitutional sections. The so called "diffuse model" of judicial review allows all courts to trump a statute of executive act contrary to the Constitution that ultimately espresses the "supreme will of the people."[13] This explains the distinctive feature of the US diffuse system of judicial review by which an appellant makes the choice as a party to petition federal courts or SCOTUS only when *certiorari* is granted.[14] As demonstrated by the case law below, SCOTUS is the highest authority exercising diffuse judicial review and in doing so it employs strong and authoritative language, explicitly declaring a law as struck down or invalidated when it conflicts with constitutional principles.

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thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'.

[11] Leslie F. Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (The Johns Hopkins University Press 2001), 16.

[12] *Id*., 23, referring to Section 13 of the Judiciary Act of 1789.

[13] See: Steven Gow Calabresi, , 'The Diffuse and Second Look Models of Judicial Review', *The History and Growth of Judicial Review, Volume 1: The G-20 Common Law Countries and Israel* (New York, 2021; online edn, Oxford Academic, 20 May 2021), https://doi.org/10.1093/oso/9780190075774.003.0003, accessed 10 Nov. 2023, at 25.

[14] Wells (n 6) 11.

For what concerns the SCOTUS jurisdiction, the seminal case for judicial review of State laws is *Fletcher v. Peck* (1810),[15] in which for the first time SCOTUS held that a State law was unconstitutional.[16] The defendant, Peck, had bought a parcel of land from local indigenous peoples and later resold that parcel to Fletcher, who sued Peck, arguing that Peck did not have clear title to the land. The State courts of Georgia had originally allowed the sale, but later invalidated it because the original title of the land was procured through bribery. However, Chief Justice John Marshall found in his opinion that the contract of sale was binding, irrelevant to the way the parcel was acquired by the seller and invalidated the Georgia State law that had cancelled the contract. Chief Justice Marshall affirmed that "[T]he State of Georgia was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.'[17]

In deciding this way, SCOTUS affirmed its highest judicial power of constitutional review and Marshall defined the States not as an unconnected sovereign power, but as part of a 'large empire' a member of the American Union that has constitutional supremacy and can impose limits to the legislatures of the several States.[18] After this decision, the law was struck down in the State of Georgia. However, there was significant pushback on how to settle the land claims in Georgia once this law was struck down.[19] Even so, the indigenous tribe continued to ask for payment and the dispute was eventually pacified by a Congressional Act (31 March 1814) that paid

[15] *Fletcher v. Peck*, 10 U.S. 87, 3 L. Ed. 162 (1810).

[16] See: Robert McCloskey, *The American Supreme Court* (Sanford Levinson eds, 6th edn 2016) 33.

[17] Fletcher (n 15) Page 10 U. S. 139

[18] *Id.*, 136

[19] Jane Elsmere, 'The Notorious Yazoo Land Fraud Case' (1967) 51 The Georgia Historical Quarterly 425, 432.

out $4.2 million to the Yazoo people. The remaining claims were settled by an international Treaty.[20]

Finally, in respect to SCOTUS' enforcing power, it can remand, instruct, and even impose sanctions if a decision is not abided by in the lower courts.[21] For SCOTUS, the federal government can punish a State for failing to implement a binding precedent in this case and similar ones. An example of this process is *Brown v. Board of Education*,[22] as many southern States refused to implement integration plans and were forced to do so with federal power.

2. *The ECJ Evolving and Sui Generis Diffuse Judicial Review*

Turning now to the ECJ, the language is different from the very direct approach taken by SCOTUS in the adjudication of cases and controversies. Moreover, its model of judicial review has been defined diffuse "in flux",[23] meaning that it needs to co-exist with the centralization of judicial review in constitutional/supreme courts of Member States when at stake is the protection of fundamental rights.[24] It is also a *sui generis* and hybrid type of diffuse review since the ECJ, on one hand, performs abstract reviews and, on the other, is *de facto* called to systematically scrutinize national laws in the light of EU law. A symptom of this peculiar diffuse review is that the ECJ

[20] See: J. Michael Martinez, *Scoundrels, Political Scandals in American History* (2023) 25.

[21] Wells (n 6) 15.

[22] *Brown* v. *Board of Education*., 347 U.S. 483 (1954).

[23] Markus Vašek, Constitutional Jurisdiction and Protection of Fundamental Rights in Europe in *The Max Planck Handbooks in European Public Law*, Vol. IV Constitutional Adjudication: Common Themes and Challenges (A. von Bogdandy, P. M. Huber and C. Grabenwater eds., Oxford University Press 2023) 376.

[24] See: Mauro Cappelletti, 'Jusidical Review in Comparative Perspective' (1970) 50(5) California Law Rev. 1017-1053. See: also John H. Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985) 89.

uses terms like 'inconsistent', 'setting aside' and 'disapplication'[25] of national laws in conflict with EU law. Indeed, the ECJ does not explicitly and formally impose upon the referring court a duty to disapply the domestic provisions whose possible incompatibility with EU law had induced the referring judge to rely on Article 267 TFEU. The ECJ has no formal power to invalidate national legislation, which is a task of domestic courts only.[26] Typically, preliminary rulings neither address the merit of the national case nor they set the application of EU law to specific facts. In principle, this is the task of the referring court at domestic level which shall apply EU norms to the case at hand according to the interpretation provided by the ECJ. Unlike the supremacy principle in the US, primacy in the EU does not go as far as to turn the incompatibility between supranational and domestic norms into 'unconstitutionality'. From the *Cilfit* decision onwards, it has been written that the preliminary ruling procedure 'does not constitute a means of redress available to the parties to a case pending before a national court'.[27] This implies that the primacy of EU law cannot lead the ECJ, in principle, by virtue of the national court's initiative and thus Article 267 TFEU, to interpret the legal order of a Member State, verify its lawfulness under EU law and decide whether the EU provision 'is applicable in the case brought before it'.[28]

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[25] See: recently, amongst others, respectively, Case C-107/23 PPU *Criminal proceedings against C.I. and Others* EU:C:2023:606, para 28; Case C-113/22 *DX v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social* EU:C:2023:665, para 41; Joined Cases C-615/20 and C-671/20 *Criminal proceedings against YP and Others* EU:C:2023:562, para 65.

[26] But see: *infra*, in this Section, for specific and isolated cases.

[27] Case 283/81 *Srl CILFIT* and *Lanificio di Gavardo SpA* v *Ministry of Health* EU:C:1982:335, para 9; see: also Case C-344/04 *The Queen, ex parte International Air Transport Association and European Low Fares Airline Association v Department for Transport* EU:C:2006:10, para 28.

[28] Case 35/85 *Procureur de la République v Gérard Tissier* EU:C:1986:143, para 9; Case C-428/16 *CHEZ Elektro Bulgaria AD v Yordan Kotsev and FrontEx International EAD v Emil Yanakiev* EU:C:2017:890, para 30.

However, the ECJ can interpret EU law in such a way as to require (from national authorities) the disapplication of all domestic norms – not only the one at hand in the context of the proceeding before the referring judge – in contrast with European norms. As has been very clearly argued, 'Although the ECJ does not have the power to rule on the validity of national measures or apply the law on particular facts, preliminary references serve in fact as the principal way of constitutional review of State action […] ECJ rulings on interpretation thus become a proxy for constitutional review.'[29] *In concreto*, what the ECJ does is assessing the compatibility of national laws with EU primary and secondary law. In this sense, the divergences between SCOTUS' and the ECJ's judicial review, when at stake is a conflict between federal/EU law and State laws, are less remarkable than they seem at first glance.

Having said this, a striking difference can be drawn between the supremacy principle in the US and primacy of EU law inasmuch as primacy alone in the EU cannot justify disapplication, notwithstanding the opposite stance taken by several Advocates general[30], by some authors,[31] and even by the ECJ

[29] Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law 737, 738.

[30] See: Case C-287/98 *Linster* EU:C:2000:3, Opinion of AG Léger, para 73; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* EU:C:1999:620, Opinion of AG Saggio, paras 37-39; Case C-555/07 *Kücükdeveci* EU:C:2009:429, Opinion of AG Bot, para 63; Case C-573/17 *Popławski* II EU:C:2018:957, Opinion of AG Sánchez-Bordona, para 117; Case C-384/17 *Link Logistic* EU:C:2018:494, Opinion of AG Bobek, para 93.

[31] See, amongst others: Denys Simon, *La directive européenne* (Dalloz 1997) 95-96; Melchior Wathelet, 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de justice', in Mark Hoskins and William Robinson (eds.), *A True European – Essays for Judge David Edward* (Hart 2003) 367, 372; Julie Dickson, 'Directives in EU Legal Systems: Whose Norms are They Anyway?' (2011) 17 European Law Journal 190, 201; Marc Blanquet and Guy Isaac, *Droit général de l'Union européenne* (10th edn, Dalloz 2012), 375.

in the *Link Logistic* ruling.[32] As a matter of fact, as had already been suggested by Bleckmann, only directly effective European provisions can produce the disapplication of contrary national laws and replace them.[33] Direct effect is a doctrine unknown to the US legal system and has no role in the judicial review performed by SCOTUS. On the contrary, such EU doctrine is the only means for the principle of primacy to fully take predecence, in practice, over national laws thanks to the remedy of disapplication. However, the extent of the nexus between direct effect, primacy and disapplication has not been precisely unveiled in most of the ECJ's case law its rulings. In spite of such uncertainties, two landmark judgments explain once for all that direct effect is always the precondition for triggering the duty to disapply:[34] *Popławski II*[35] and *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld II*.[36] In particular, in *Popławski II* it was stated that the principle of primacy cannot 'have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all the provisions of EU law by the national courts'.[37] Moreover, the ECJ affirmed

[32] Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya* EU:C:2018:810.

[33] Albert Bleckmann, 'L'applicabilité directe du droit communautaire', in Michel Waelbroeck and Jacques Velu (eds.), *Les recours des individus devant les instances nationales en cas de violation du droit européen* (Larcier 1978) 85, 124: '*d'après la Cour de justice, seul le droit européen directement applicable a la force de repousser une loi nationale contraire*'.

[34] See: also Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* EU:C:1978:49 ('*Simmenthal*').

[35] Case C-573/17 *Criminal proceedings against Popławski* EU:C:2019:530 ('*Popławski II*').

[36] Case C-205/20 *NE* v *Bezirkshauptmannschaft Hartberg-Fürstenfeld II* EU:C:2022:168 ('*NE II*'). For a detailed analysis of the relationship between primacy, direct effect and disapplication in the light of the ECJ's case law see: Daniele Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) 1 European Law Open 576, 590-593.

[37] *Popławski II* (n 35), para 60.

that 'a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it'.[38]

Finally, EU judges observed that 'a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect'.[39] Consequently, the *Popławski II* ruling aims at interpreting the 'famous' *Simmenthal* judgment in the sense that, just as domestic authorities have a *duty* of disapplication only when the EU provision is directly effective and can for this reason replace the conflicting national law, in the same way, a domestic judge has the *discretion* to disapply when direct effect is lacking. In this latter case, however, the legal subjective positions of those affected by disapplication shall be sufficiently safeguarded through the internal legal order, although EU law alone, lacking direct effect, cannot govern the case. The judgment delivered by the ECJ in the *Thelen Technopark* case[40] confirms this reasoning, clarifying that national authorities can (not must) 'disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect'.[41] An approach followed by the ECJ in the recent *Commission v. Spain* ruling:[42] while affirming that national courts were *not required*, solely on the basis of *EU* law, to disapply a provision of national law contrary to a non-directly effective provision of EU law, the Court admitted such possibility and connected this to the discretionary power of domestic judges, to be exercised on the basis of national, rather than EU, law. In this regard, it is not fully clear when and how, in practice, a national authority could disapply an

[38] *Ibid*., para 62.

[39] *Ibid*., para 68. In the same vein, see: Case C-122/17 *Smith* EU:C:2018:631, para 49.

[40] Case C-261/20 *Thelen Technopark* EU:C:2022:33.

[41] *Thelen Technopark* (n 40), para 33. The provision at stake was Article 15 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. See: also Gallo (n 36) 593.

[42] Case C-278/20 *Commission* v *Spain* EU:C:2022:503, para 141.

internal provision, on the basis only of national law, when such provision conflicts against non-directly effective EU provisions. For sure, such situations can occur if there is an antinomy within the domestic legal order and either the judge, or the administration, confronted with conflicting national provisions, decides to set aside a national law not in compliance with EU law and consequently applies another domestic rule which is compatible with EU norms. This might be the case if there are different types of legal sources essentially regulating the same issue.

If the antinomy arises between an EU-friendly superior domestic norm, such as a statute passed by national parliaments, and an inferior norm, like a national regulation passed by the executive, which stands in contrast to EU law, the problem is easily solved in terms of hierarchy of norms. This is even more clear when a declaration of unconstitutionality is made, in respect to those legal orders which foresee such remedy. If such declaration ensures, ultimately, a compliance with EU law, it is irrelevant that this occurred on the basis of national law rather than EU law. Effectiveness of EU law is at the core of the ECJ's role, regardless of the legal source generating the removal of inconsistent domestic law. Additionally, the *Popławski II-Thelen Technopark* formula could apply also in situations where the antinomy arises between sources of equal standing. In this case, every Member State's legal order would provide judges with the adequate substantive and procedural mechanisms to recompose the conflict. A harmony that would be achieved, through the recognition of the precedence of one law over another, by ensuring a fair enforcement of (non-directly effective) EU norms.

Furthermore, in *NE II* the ECJ, openly overruling the *Link Logistic* case,[43] confirmed once for all what was already incidentally observed in *Asociaţia*

[43] See on this issue Daniel Sarmiento, 'The 'Overruling Technique' at the Court of Justice of the European Union', in this special issue.

'Forumul Judecătorilor din România' and Others,[44] *IS*[45] and *Euro Box Promotion*:[46] the national court shall 'give full effect to the requirements of that law in the dispute before it, if necessary disapplying of its own motion any national legislation or practice, even if adopted subsequently, which is contrary to a provision of EU law with direct effect'.[47]

The choice by the ECJ to deem direct effect as the *condicio sine qua non* of the most complete manifestation of the primacy principle, i.e., the disappliction of inconsistent national law, is perfectly understandable.[48] Indeed, direct effect ensures that the EU principle of conferral and the principle of subsidiarity are not overturned by a unrestrained application of the principle of primacy. Asserting disapplication on the basis of primacy would entail a 'blank proxy capable of undermining the fertile relationship between EU law and domestic legal systems for good, as well as the mutual cooperation between EU institutions and Member States' authorities'.[49] As a matter of fact, direct effect still nowadays is an essential doctrine capable of shaping, in proto-federalist terms, a legal order that, albeit having generated a unique advanced system of integration, is not a federal union, as known. Should the EU ever become a federal union, direct effect will no longer be necessary in its current form.[50] Only then national courts will cope with EU

[44] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others* v *Inspecţia Judiciară and Others* EU:C:2021:393, para 247 For a detailed analysis of the relationship between primacy, direct effect and disapplication in the light of the ECJ's case law see Gallo (n 36), 590-593.

[45] Case C-564/19 *IS (Illegality of the order for reference)* EU:C:2021:949, para 80.

[46] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* EU:C:2021:1034, para 252.

[47] *NE II*, para 37.

[48] See the observations in Gallo (n 36), 593.

[49] *Id*., 603-604.

[50] Michael Dougan, 'The primacy of Union law over incompatible national measures: Beyond disapplication and towards a remedy of nullity?' (2022) 59 Common Market Law Review 1301, 1323, refers to direct effect as an 'essential passerelle'.

law like they handle domestic law and, therefore, enforce EU provisions regardless of their direct effect, or lackthereof.[51] As a matter of fact, the EU and domestic legal systems, although closely interconnected, are separate.[52] This is also the reason why disapplication, rather than the remedy of annulment, is the most complete form of effective judicial protection and a distinctive nature of EU law:[53] direct effect enables EU provisions to apply in domestic legal systems and serve as cognizable norms to be enforced by national authorities, including judges.[54]

Now, we have already recalled that at the core of the preliminary reference proceeding lies the interpretation (and validity) of EU law, not the incompatibility of domestic provisions with the latter. However, in practice, we have witnessed, although in very exceptional cases, both the express review and annulment of domestic measures by the ECJ and, conversely, the express review of EU norms and decisions by domestic courts. As for the latter case, over the years, certain Member States' jurisdictions have issued explicit and confrontational judgments that, in practice, resulted in the disapplication of EU law provisions conflicting with domestic legal orders. This will be demonstrated in section V.

As to the former case, special attention shall be devoted to the ECJ judgment in *Rimsevics and ECB v. Latvia*,[55] whereby the ECJ annulled the decision of

[51] See Gallo (n 36) 603-604.

[52] See Dougan (n 50) 1323-1324.

[53] See Case C-314/08 *Krzysztof Filipiak* EU:C:2009:719, para 82.

[54] Amongst the first scholars to reflect upon the potential, future, limits and *effet utile* of direct effect see Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 40 European Law Review 155 and Sacha Prechal, 'Does Direct Effect Still Matter?' (2000) 37 Common Market Law Review 1047.

[55] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:C:2019:139. See also Case C-487/19 *W.Ż* EU:C:2021:798. For a critical account see Michael Dougan, 'The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?' (2022) 59 Common Market Law Review 1301.

the Central Bank of Latvia to temporarily suspend his Governor, Mr. Rimsevics, who was subject to criminal investigations. Most notably, the actions brought by Mr Rimšēvičs and the European Central Bank against that decision represent the first and only case which the ECJ heard on the basis of the jurisdiction conferred on it by the second subparagraph of Article 14(2) of the Statute of the European System of Central Banks (ESCB) and of the European Central Bank to review decisions relieving the governors of the national central banks from office. Now, it is precisely due to the special character of such ruling that its findings cannot be generalized. In fact, in Rimšēvičs the domestic measure is annulled by the ECJ pursuant to a Treaty provision that explicitly confers upon it the power to review its lawfulness. This is a derogation rooted not in a judicial decision taken by the ECJ, yet in primary law, also outside the realm and logics of direct effect. As clarified by the Court, Article 14(2) 'derogates from the general distribution of powers between the national courts and the courts of the European Union as provided for by the Treaties and in particular by Article 263 TFEU'. However, that derogation 'can be explained by the particular institutional context of the ESCB within which it operates', being the ESCB 'a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB'.[56] Anything extraordinary, then, occurs in *Rimšēvičs*, from the standpoint of the role and competences of the ECJ; what occurs is the application of a *sui generis* EU law provision.

As to the EU preliminary reference mechanism, the practice tends to make it close to the US inasmuch as in referring the case to the ECJ, the national court, while lacking the power of *certiorari*, is often induced by private parties to issue a preliminary reference to the Court of Luxembourg. Although this procedure is a remedy only available to domestic judges, 'is of utmost

[56] *Rimšēvičs* (n 55) para 69.

importance to the ability of EU citizens to defend their rights under EU law effectively'.[57]

In theory, one could argue that due to the mediated nature of the preliminary reference, originating from court and not from appellants, the quasi-hierarchical structure of the EU judiciary is weakened by the optional character of this mechanism.[58] However, on the one hand, courts of last resort are obliged to use the preliminary reference procedure if a doubt of interpretation or validity of EU law arises (Article 267(3) TFEU), save for the exceptions established by the ECJ case law, like for the fulfillment of the *acte clair* and of the *acte éclairé* criteria.[59] By the same token, courts other than those of last instance are compelled to make a preliminary reference when there is a question of validity of EU law, according to the *Foto-Frost* ruling,[60] or when they wish to deviate from the ECJ interpretation of an EU legal act.[61] On the other hand, the ECJ, like SCOTUS, presents its judgments as binding precedents for all Member States with an *erga omnes* value, beyond the proceeding of the referring court.[62] *Erga omnes* means that the ruling

[57] Morten P. Broberg, 'Preliminary References as a Means for Enforcing EU Law', in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* 103, 109 (Oxford University Press 2017).

[58] *Id.*, 19.

[59] See the doctrine set in *Cilfit*, and its evolution, on which see François-Xavier Millet, 'Cilfit Still Fits' (2022) 18 European Constitutional Law Review 533; Lorenzo Cecchetti and Daniele Gallo, 'The Unwritten Exceptions to the Duty to Refer After Consorzio Italian Management II: 'CILFIT Strategy' 2.0 and its Loopholes' (2022) 15 Review of European Administrative Law 29; and François-Xavier Millet, 'From the Duty to Refer to the Duty to State Reasons: The Past, Present and Future of the Preliminary Reference Procedure', in this special issue.

[60] Case C-314/85 *Foto-Frost* EU:C:1987:452.

[61] Morten P. Broberg and Niels Fenger, *Preliminary references to the European Court of Justice* (3rd edn, Oxford University Press 2021) 201-234.

[62] Although EU law lacks a stare decisis doctrine similar to that of common law countries: Rafał Mańko, 'Preliminary reference procedure, Briefing of the European

binds not only the referring court[63] but all the authorities of all the Member States, including domestic judges.

Lastly, as to enforcement mechanisms, for what concerns the ECJ preliminary rulings, the Court has no such a mechanism to address State resistances and defiant courts as it depends on the Member States' courts to implement its rulings.[64] Though much weaker than in the US, however, also the EU can deploy some tools in such circumstances, as will be illustrated in section V.

As a last remark, it is beyond doubt that the meta-comparison centers on distinct historical contexts and institutional challenges faced by SCOTUS and the ECJ, stemming from their different common law and civil law foundations and therefore approaches to judicial review. In the early nineteenth century, SCOTUS confronted the task of solidifying its judicial sovereignty and authority in relation to State courts, an accomplishment effectively realized under the leadership of Chief Justice Marshall and under the guise of Hamilton's Federalist Paper no 78. SCOTUS's authority to have the final say with *erga omnes* effect in a diffuse judicial review originated

Parliamentary Research Service, PE 608.628, July 2017. See Giuseppe Martinico, 'Retracing Old (Scholarly) Path. The Erga Omnes Effects of the Interpretative Preliminary Rulings' and Sarmiento (n 43). On this point see, amongst early commentators, Andreas Matthias Donner, 'National Law and the Case Law of the Court of Justice of the European Communities' (1963) 1 Common Market Law Review 8, 15. For a detailed account showing the ECJ's tendency to explicitly grant erga omnes binding legal effects to the ECJ's preliminary rulings see David Anderson, *References to the European Court* (Sweet & Maxwell 1995) 310; David Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002) 331-332.

[63] See, ex multis, Case 52/76 *Luigi Benedetti* v. *Munari F.lli s.a.s.* EU:C:1977:16, para 26; Case C-446/98 *Fazenda Pública* v. *Câmara Municipal do Porto* EU:C:2000:691; Case C-173/09 *Georgi Ivanov Elchinov* v. *Natsionalna zdravnoosiguritelna kasa* EU:C:2010:581.

[64] Wells (n 6) 19-20.

from a protracted struggle among US courts, wherein judicial review is a routine function within their purview for examining the constitutionality of a statute. In contrast, the ECJ was established in 1952, embodying a system of centralized abstract judicial review administered, along with the Court of Luxembourg, by decentralized domestic courts. Its formidable challenge was to evolve in a system of *sui generis* diffuse judicial review, which presents several similarities with the US judicial review model, as shown in this section.

III. Remand to State Courts and The Remedy of Disapplication

Generally, when SCOTUS decides that a law is unconstitutional, the case is remanded to the lower court to decide how this applies to the specific facts but absent the now-invalidated law. The power to remand is granted by statute,[65] and the principle of remand was established in *Fletcher*.[66] Here SCOTUS established that State courts were subordinate to its jurisdiction as SCOTUS had the ultimate power to decide over a conflict between US constitutional law and State law. Therefore, the remand process of introducing new theories and evidence that were not previously considered or were overlooked is a staple of the US Supreme Court jurisprudence.

In the EU the power to disapply national norms in contrast with EU primary or secodary law directly effective provisions lies in the hands of domestic courts. According to Broberg and Fenger, 'the preliminary ruling constitutes merely an interim stage in the national proceedings which continue after the [ECJ]'s ruling having regard to the clarification of EU law that has now been established.'[67] However, often time the boundaries between interpretation and application of EU law by the ECJ become difficult to draw in practice. The remand of the case by the ECJ to the national court is mandatory in the

[65] 28 U.S.C.A § 2106.

[66] *Fletcher* (n 15).

[67] Broberg and Fenger (n 61) 399.

preliminary ruling mechanism.[68] Yet, the reality reveals that sometimes the ECJ ruling leaves no margin of manoeuvre to the domestic court and, *de facto*, 'settles the dispute'.[69] Hence, a European centralized review of national law and, in this vein, a detour of the role conferred by the European treaties to the ECJ.[70] This is further demonstrated by Advocate General Warner's affirmation in his opinion in the *Foglia I* case that the Court can be entrusted with

> the question of the compatibility with Community law' of a rule or administrative practice prevailing in a Member State by means of two types of proceedings: those set forth in then-Article 169 TEEC, currently Article 258 TFEU, to be initiated by the Commission, and those brought 'by a reference under Article 177 made by a court or tribunal of that State in proceedings in which the appropriate authority of that State is a party.[71]

As to SCOTUS, there are three forms of disapplication of State law by the Supreme Court in practice. With a series of caveats, such a categorization can be extended to the ECJ preliminary ruling jurisprudence as well, showing that the rationale and the dynamic of the ECJ case law with regard to State law is not *a priori* different from that of SCOTUS.

We call the first form of disapplication by SCOTUS 'immediate disapplication by national courts' referring to the logic of the *Brandenburg* decision, creating a free speech test that could not be altered in a remand situation. In *Brandenburg v. Ohio* (1969)[72] the plaintiff was prosecuted under an Ohio law that limited speech that was deemed to encourage crime, terrorism, or other violence. The plaintiff, a member of the Ku Klux Klan, was found guilty under the Ohio law, but successfully appealed to SCOTUS,

[68] Broberg and Fenger (n 61) 371 ff. on the margin of manouevre of the Court and the 'duty' to remand the case to the national court.

[69] Tridimas (n 29) 737 ff.

[70] Léontin-Jean Constantinesco, *L'applicabilité directe dans le droit de la CEE* (new edition of the 1970 volume, Bruylant 2006) 41, speaks of 'déviation fonctionnelle'.

[71] Case 104/79 *Pasquale Foglia* v. *Mariella Novello* EU:C:1980:22, 766.

[72] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

who created the famous Brandenburg test, requiring a two-part test to prosecute someone for inflammatory language, and striking down the overly broad State law. After the SCOTUS decision, which reversed the Ohio court's condemnation of Brandenburg's words, SCOTUS did not remand but rather decided directly on the facts.[73] The lack of remand is notable here because SCOTUS seemed to decide that the discussion was over, breaking from usual remand proceedings and demonstrating a lack of trust in the State to act accordingly.[74]

In the framework of the EU preliminary reference mechanism, especially in the area of free movement law, there are very few judgments in which the court not only predefines the outcome of the case, but it sets how the provided interpretation of EU law mandates a certain solution of the dispute in the specific circumstances at stake. In *Grundig Italiana SpA v Ministero delle Finanze* the ECJ dealt with the shortening, by Italian legislation, of the time-limit for claiming reimbursement of consumption taxes imposed in violation of EU law.[75] In this decision the ECJ suggested the establishment of a transitional period of ninety days for claims advanced before the new legislation came into force in breach of EU rules, and also extended the transitional period to be guaranteed by domestic law to six months to protect the principle of effectiveness.[76] Of course, once the preliminary ruling was delivered, the case was resumed in front of the national court, but the ECJ had gone as far as to 'rewrite' domestic legislation forcing its application to the case.[77]

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[73] *Ibid*., 449.

[74] Michael S. Rosenwald, 'The landmark Klan free-speech case behind Trump's impeachment defense' The Washington Post (Washington D.C 12 February 2021), <https://www.washingtonpost.com/history/2021/02/10/brandenburg-trump-supreme-court-klan-free-speech/>, first accessed on 27 November 27 2022.

[75] Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* EU:C:2002:525.

[76] *Ibid*., para 42.

[77] Tridimas (n 29) 741.

We call the second form of disapplication 'disapplication with flexibility in outcomes'. This happens in most of circumstances, when a case is decided by SCOTUS and remanded to the State court. The State court must take into account the decision and logic of the opinion but its result can be the same ultimate decision as it had before. For example, in *Sochor v. Florida*, a capital punishment case, the Florida Supreme Court had given what SCOTUS decided was an unnecessarily vague jury instruction, leading to the death sentence for the defendant. SCOTUS remanded, barring the 8th Amendment violation in the jury instruction, but the Florida Supreme Court found that the error was negligible and upheld the conviction on the other factors associated with weighing the defendant's culpability.[78] This shows that the end result can still be the same, so the remand is not an automatic reversal. Also in the EU, most preliminary rulings provide guidance to the referring court, but leave flexibility in the final outcome. The discretion guaranteed to the national judge depends on the levels of detail offered in the ECJ's instructions and on whether the ECJ allows exceptions. In *Gourmet*, for example, the Court considered that Swedish legislation forbidding the advertising of alcohol amounted to a limitation of the free movement of goods.[79] The ECJ was quite deferential toward the national court, considering the prohibition justified, unless the factual and legal features characterizing trade in the country could lead the domestic judge to detect that less restrictive means could have been used.[80] On other occasions, for instance in *Watts*, on the eligibility for reimbursements of medical expenses incurred in another Member State and the conditions set by UK law, the ECJ was much stricter and provided for specific requirements not to proceed with disapplication.[81] It set a series of conditions under which the

[78] *Sochor* v. *Florida*, 504 U.S. 527 (1992).

[79] Case C-405/98 *Gourmet* EU:C:2001:135.

[80] *Ibid*., para 34.

[81] Case C-372/04 *Watts* EU:C:2006:325.

prior authorization of the expenditures was to be considered in breach of EU law and conditions to be ascertained by the national court.

Finally in the US, in exceptional circumstances we can find a third form of disapplication of State law by the Supreme Court that we call 'disapplication without margin of interpretation'. In practice this type of disapplication is the most extreme when compared to the other two because it gives no margin of interpretation to State courts. In fact through this exceptional form of disapplication the US Supreme Court can avoid the remand to a State court. *NYT v. Sullivan* (1964) is a good example of such third form, as SCOTUS, and in particular the majority opinion authored by Justice William Brennan, struck down the Alabama libel statute in question.[82] What makes *NYT* unique is that Justice Brennan made a point to say that he did not believe the Alabama court would accurately decide the situation without the criminal libel law. Justice Brennan wrote for the majority: 'this Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make sure that those principles have been constitutionally applied'.[83] Normally, SCOTUS decides on a legal issue only, but here the Court applied the new legal standard of 'actual malice' to the facts, essentially directing the lower courts on how they were going to rule on remand. *NYT v. Sullivan* is traditionally seen as an outlier for the result of SCOTUS applying the test on behalf of the State court showing that it did not trust the local court to correctly implement the new decision.

As for the ECJ, in an increasing number of preliminary interpretative rulings, in particular dealing with discrimination, it has left no discretion to the domestic courts or authorities. In *Mangold*, the ECJ clearly asserted that the German legislation on fixed-term employment contracts was incompatible with EU law, following a strict proportionality test, and had

[82] *NYT* v. *Sullivan*, 376 U.S. 254.

[83] *Ibid*., 285.

to be set aside.[84] More recently, in *Coman*, in the sensitive field of the recognition of same-sex marriages and on the ground of free movement of persons, the ECJ has come to set a positive obligation for Member States: to acknowledge the effect of any marriage validly celebrated in another EU country under the condition that the couple has resided for at least three months on that country, thereby setting aside national law that prevents such an outcome.[85] Finally, there is still no evidence, instead, of ECJ's arguments similar to those used by Justice Brennan in *NYT v. Sullivan*: for the ECJ to replace the domestic court would amount to a patent *ultra vires* activity with doubtful consequences.

IV. States' Resistance to SCOTUS Rulings

The Supreme Court faced frequent open resistance from State officials, especially in the antebellum south.[86] The conflict between States and SCOTUS started early when SCOTUS ruled on one of its first cases, *Chisholm v. Georgia* (1793).[87] Georgia refused to carry out the ruling that allowed a citizen of South Carolina to bring a case against Georgia, in violation of what Georgia viewed as its sovereign immunity.[88] State opposition to the case would continue until it was overturned by the enactment of the Eleventh Amendment five years later.[89] So common were such cases prior to the Civil War that the only years (1841-49) that didn't see mass resistance from States coincided with the court's justices holding a pro-states' rights majority.[90]

[84] Case C-144/04 *Mangold* v *Helm* EU:C:2005:709.
[85] Case C-673/16 *Coman* EU:C:2018:385.
[86] Goldstein (n 11), 14.
[87] *Id.*, 16.
[88] *Id.*
[89] *Id.*
[90] *Id.*, 23.

A relatively high level of resistance to SCOTUS decisions would continue until the end of the Civil War in which State courts were defiant of specific federal court interpretation of State or federal laws. The US' relatively high level of cultural homogeneity, shorter-term of independence, and recent experience of confederation make this opposition surprising when compared to the case of the EC.[91]

In one such case, *McCulloch v. Maryland* (1819), SCOTUS found that no State could impose a tax that only targeted the national bank.[92] In defiance of the ruling, the Ohio state auditor enforced the tax with the support of the governor and the state legislature.[93] In doing so, the state of Ohio argued that only states had ultimate authority to decide the constitutionality of federal law.[94] Similarly, in *Worcester v. Georgia* (1832), Georgia ignored SCOTUS's determination that it did not have the authority to regulate trade with the Cherokee Nation. Georgia ignored SCOTUS and issued arrests for a number of Cherokee Nation members.[95] In an attempt to stop the violence against the Cherokee in neighboring Alabama, Andrew Jackson sent federal troops to prevent further violent attacks by Alabamians.[96] The federal force would prove too small for the Alabama perpetrators, and they were forced to retreat.[97]

Opposition was not limited to the antebellum South. After the Civil War, state courts resistance to federal court's judicial authority did not occur again

[91] *Id.*, 18-20 Leslie Goldstein has found that resistance to federal authority was highest with particular States on particular issues, ranging from issues tax laws, land ownership, banking, laws regulating speech and press, and fugitive slave laws.

[92] *Id.*, 21.

[93] *Id.*

[94] *Id.*, 21.

[95] *Id.*, 31.

[96] *Id.*, 49-50.

[97] *Id.*

until the civil rights movements in the '50s and '60s.[98]The Civil War marked a turning point in which despite the Supreme Court was tainted with the infamous decision of *Dred Scott*[99] upholding slavery its 'decline without fall'[100] nevertheless diluted the state courts resistance towards the federal judiciary. In fact the docket of the federal judiciary kept growing steadily due to its relatively easy access compared to the state one and with more than eight hundred judges in the politically appointed federal judiciary .[101]

The constitutional validity of the Court's jurisdiction has been on fairly solid ground since, and even very controversial decisions like *Bush v. Gore* do not give rise to attacks on the Court's jurisdiction.[102] Yet the Supreme Court has an arsenal of political and judicial tools to ensure state courts compliance that it uses according to the different types of resistances and historical circumstances.

First, as mentioned above, the Supreme Court in special dire circumstances has been able to mobilize the Federal government and the National Guard. In fact, after *Brown v. Board of Education*, in the case of recalcitrant Southern governors that still refused to enforce the Court's mandate SCOTUS took extreme measures. In *Cooper v. Aaron*, the Court took the unusual step of issuing an opinion signed by all nine Justices denouncing this, and the Southern states backed down.[103] Normally, SCOTUS lays down an opinion and remands for proceedings 'not inconsistent' with it. If a lower court

[98] See Michael J. Klarman, From Jim Crow to Civil Rights. The Supreme cOurt and the Struggle for Racial Equality (Oxford University Press 2006).

[99] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[100] See McCloskey (n 18) 64.

[101] A politically appointed judiciary has inevitably raised questions of lack of diversity, see Jennifer L. Peresie, 'Female Judges Matter: Gender and Collegial Decision-making in the Federal Appellate Courts' (2005) 114 Yale Law Journal 1759 and Harry T. Edwards 'Race and the Judiciary' (2002) 20 Yale Law & Policy Review 325.

[102] *Bush v. Gore*, 531 U.S. 98 (2000).

[103] See *Aaron v. Cooper*, 358 U.S. 28 (1958); Wells (n 41) 39.

deviates from the Court's mandate, litigants can seek additional review as in *Martin*[104] and, if that isn't possible, a writ of mandamus.[105] Generally, the Court has used the threat of such a writ of mandamus in lieu of the writ itself to exact compliance.[106] Another third tool, already discussed in section III, in the Supreme Court implementation arsenal is to enter judgment itself,[107] or 'remand with directions' to enter a specific judgment.

Finally, the US Supreme Court also has the power under 18 USC 401, a federal statute establishing the power of federal courts to punish for contempt or disobedience of a lawful order or command, though here, too, the power is almost never exercised.[108] However, in one tragic case dating back to 1909, state officials lynched a prisoner despite SCOTUS issuing a

[104] See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) [In *Martin*, the United States Supreme Court held that it possesses the authority to review decisions made by state courts interpreting federal law or the Constitution to ensure a consistent application of the law across all states.]

[105] A Mandamus is a judicial order by an appellate court commanding a lower court or public officer to comply with a prior ruling. Such an order may require the recipient to act or withhold action. *See generally* U.S. Department of Justice, *Justice Manual: Civil Resource Manual Sec. 215. Mandamus* <https://www.justice.gov/jm/civil-resource-manual-215-mandamus> first accessed on November 27, 2022.

[106] See, *e.g.*, *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).

[107] See discussion on *NYT* v. *Sullivan* as an example of this feature, *supra* Section II, para 3.

[108] 18 U.S.C.A. § 401, A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

stay of execution, and the US AG charged state officials with contempt and sentenced them to prison.[109]

V. States' Resistance to ECJ Rulings

Also thanks to the preliminary reference procedure, the ECJ has been able to credit itself as a strong and authoritative Court and as an engine of integration. The paradigm of 'integration through law' was mainly built around the growing body of ECJ case law.[110] The judicial 'creation' of general principles of EU law such as direct effect and primacy, combined together, however, caused some backslash by Member States' courts. The threat of lowering the level of fundamental rights' protection across the then Community, lacking EU human rights provisions and standards, beyond market freedoms, prompted national courts to devise interpretative tools such as the *Solange* and the counter-limit doctrines.[111] The response of the ECJ was to develop a fundamental rights' jurisprudence drawing on the constitutional traditions common to the Member States that could appease the vindications by the domestic judges.[112] The strategy was to a large extent effective, but the unclear contours of the remedy of disapplication, on the one hand, and the broadening of the scope of integration through subsequent Treaty revisions since 1986, on the other, let new signs of domestic resistance by state courts to emerge.

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[109] See *United States* v. *Shipp*, 589 F.3d 1084 (10th Cir. 2009).

[110] Mauro Cappelletti, Monica Saccombe, and Joseph H.H. Weiler (eds), *Integration Through Law. Europe and the American Federal Experience* (vol. I, De Gruyter 1986).

[111] See, respectively, German Constitutional Tribunal, BVerfGE 37, 271 - Solange I, and BVerfGE 73, 339 - Solange II, and Italian Constitutional Court, Judgment No. 183/1973. As well-known, the expression 'controlimiti' was not invented by the Court, but is rather a scholarly elaboration by Paolo Barile, 'Il cammino comunitario della Corte' (1973) 18 Giurisprudenza costituzionale 2406, 2406-2419.

[112] See, e.g. Case 29/69 *Stauder* EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; and Case 4/73 *Nold* EU:C:1974:51 (though the latter refers to an action for annulment).

Unlike SCOTUS, over its (only) 70 years of activity, the ECJ had to balance between heterogeneity of legal cultures and constitutional traditions among the Member States and the need to move the process of integration forward. In this context, the ECJ has explicitly affirmed that in some situations the duty to disapply, in spite of direct effect and the emergence of a clash between EU law and national law, should be subject to derogation.

One of these legitimate exceptions arises when the ECJ approves[113] the invocation of the national identity clause foreseen in Article 4(2) TEU[114] by the referring court in its reference pursuant to Article 267 TFEU and/or by the State involved in the proceeding before the EU judges, which normally takes place in the context of Article 267 TFEU.

The EU post-Lisbon landscape has witnessed interesting, though sometimes alarming developments in this respect. While highest courts had been traditionally reluctant to issue preliminary references before, since 2009 most Constitutional Courts have started making referrals though not on a regular basis.[115] Still, such a partial change in attitude does not necessarily entail the adoption of a more collaborative disposition of the highest judicial authorities toward the ECJ. The national constitutional identity has been

[113] See, for instance, Causa C-438/14 *Bogendorff von Wolffersdorff* EU:C:2016:401.

[114] On the identity clause, looking just at monographs and edited volumes, see François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des Etas members* (LGDJ 2013); Giacomo Di Federico, *L'identità nazionale degli Stati membri nel diritto dell'Unione europea-Natura e portata dell'art. 4, par. 2, TUE* (Editoriale Scientifica 2017); Christian Calliess and Gerhard van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023).

[115] Maria Dicosola, Cristina Fasone, Irene Spigno, 'Foreword: Constitutional Courts in the European Legal System after the Treaty of Lisbon and the Euro-crisis' (2015) 16 German Law Journal 1317, 1318. Of the 18 Constitutional Courts in the EU those who have not made referrals yet are the Constitutional Courts of Bulgaria, Croatia, of the Czech Republic, Hungary, Latvia, Luxembourg, Romania and Slovakia.

routinely invoked by these Courts to waive the obligation to disapply state law, but the ECJ has made clear that it is the only authority to authorize such a derogation.[116]

The preliminary reference procedure has been the main scene within which this confrontation has taken place. As Broberg and Fenger have pointed out, the cases of evident non-compliance with a preliminary reference ruling have been rare.[117] Perhaps the most well known examples involving national Constitutional and Supreme Courts are those of the Czechoslovak pension saga,[118] of the Danish saga on age discrimination in employment relationships,[119] and of the German PSPP saga, dealing with the European Central Bank's mandate.[120] On several occasions, the French *Conseil d'État* has tried to shy away from the obligation to implement preliminary rulings. For example, in one case it contested that the ECJ judgment[121] went beyond the preliminary question asked or accusing the ECJ of having exceeded its competence under Article 267 TFEU after it allegedly grounded the preliminary ruling on an understanding of the facts in the main proceedings

[116] Gallo (n 36) 595.

[117] Broberg and Fenger (n 61) 400. See: also Cohen (n 3) 434.

[118] Czech Constitutional Court, Judgment of 31 January 2012, Pl ÚS 5/12 on which see: Robert Zbíral, 'Annotation on Czech Constitutional Court, Judgment of 31 January 2012, Pl US 5/12' (2012) 49 Common Market Law Review 1475.

[119] See: Danish Supreme Court, Judgment No. 15/2014, 6 December 2016, as a response to Case 441/14 Dansk Industri v Rasmussen EU:C:2016:278, on which see: Sabine Mair and Urška Šadl, 'Mutual Disempowerment: Case C-441/14 Dansk Industri (on behalf of AJOS A/S) v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A' (2017) 13 European Constitutional Law Review 347.

[120] German Federal Constitutional Tribunal, Case No. 2 BvR 859/15, 5 May 2020, on which see: the Special Section: 'The German Federal Constitutional Court's PSPP Judgment' (2020) 21(5) German Law Journal 1090.

[121] Joined Cases C-511, 512 & 520/18 *La Quadrature du Net and others* EU:C:2020:791.

not shared by the referring court.[122] Possibly, even more alarming has been the position taken by the Constitutional Court of Romania in its indirect 'dialogue' with the ECJ, through the preliminary references issued by other Romanian courts. In *Asociatia Forumul Judecătorilor din România*, the ECJ had considered in contrast with the principle of primacy the national constitutional case law preventing lower courts from disapplying national provisions in contrast with EU law whenever those provisions were expressly judged in compliance with the Constitution.[123] The Constitutional Court of Romania 'responded' that the ECJ had acted *ultra vires* when imposing the disapplication of the domestic judicial reforms on the ground of EU norms lacking direct effects.[124] In a follow-up preliminary ruling, the ECJ clarified once again that domestic judges have the power not to apply a judgment of the Constitutional Court contrary to EU law,[125] to which the Constitutional Court of Romania reacted on 23 December 2021 with a (harsh) press release claiming that national judges had to abide by the domestic constitutional jurisprudence rather than by the EU case law and that they could be subject disciplinary proceedings in case of deviation from this rule. In dealing with a further preliminary reference issued by the Court of Appeal of Craiova, Romania, the ECJ rejected the constitutional identity argument and objection in the landmark decision of *RS*.[126] The ECJ also clarified that imposing disciplinary proceedings and penalties against ordinary judges examining the compatibility with EU norms of national provisions already adjudicated in line with the Constitution amounts to

[122] See: Conseil d'État, Assemblée, 21/04/2021, no 393099 and the case note by Araceli Turmo, 'National security as an exception to EU data protection standards: The judgment of the Conseil d'État in French Data Network and others' (2022) 59 Common Market Law Review 1.

[123] *Asociaţia "Forumul Judecătorilor Din România"* (n 44).

[124] Constitutional Court of Romania, Judgment No 390/2021 of 8 June 2021.

[125] *Euro Box Promotion* (n 46).

[126] Case C-430/21 *RS* EU:C:2022:99, para 65. See: also *IS (Illegality of the order for reference)* (n 45).

undermine 'the effectiveness of the cooperation between the Court of Justice and the national courts established by the preliminary-ruling mechanism'.[127]

Which tools, then, can the ECJ and the EU use in the event a state resists implementing preliminary rulings? Unlike SCOTUS, EU institutions cannot deploy military forces against a Member State who fails to implement a preliminary ruling. However, there are other instruments at the EU's disposal which compel Member States to adopt preliminary rulings. First, infringement actions under Article 258 TFEU can start should a court either refuse to issue a preliminary reference to the ECJ, when it is mandatory to do so, or if it fails to comply with a preliminary ruling (especially if it triggered it).[128] Of course, the infringement procedure goes through many steps, but if the State court does not abide by the prescription or the preliminary judgment by the end of the pre-judicial stage, the country could be eventually condemned. To date, the only case where the ECJ ruled that a Member State had been in breach of the duties under Article 267 TFEU following an infringement proceeding has been in *Commission v France (Advance Payments)* due to the persistent hostility of the French *Conseil d'État* to issue a preliminary reference and to conform its case law to the ECJ consolidated jurisprudence.[129]

The second instrument that can be used by the EU against state courts' resistance to comply with a preliminary ruling and to issue a preliminary reference is State liability. Since the '*Francovich* rule'[130] was set Member States can be liable to pay compensation to individuals who suffered loss due to the domestic violation of EU law. With this regard, the comparison with the US has revealed that, contrary to the expectations, the enforcement of state liability is stronger and broader in its scope in the EU than in the old, long-

[127] *Ibid*.

[128] Broberg and Fenger (n 61) 240-242.

[129] Case C-416/17 *Commission* v. *France* EU:C:2018:811.

[130] Case C-6/90 *Francovich* v. *Italy* EU:C:1991:428.

standing, US federation.[131] In *Köbler* the ECJ extended state liability for violation of EU law and to the activity of national courts, including to the lack of use or misuse of the preliminary reference mechanism.[132] However, it set a very high bar with regard to when the state liability can be triggered in such a case, thus confining it to exceptional circumstances.[133] According to Clelia Lacchi, a promising way to enhance the monitoring over the implementation of Article 267 (3) TFEU would be to frame the preliminary reference mechanism as a tool instrumental to guarantee effective judicial protection to individuals.[134] This would mean that the lack of a referral, when in fact it was mandatory, or the lack of implementation of a preliminary ruling, under specific circumstances, could trigger a violation of Article 47 of the Charter.[135] After all, this argument already resonates within the ECJ case law meant to ensure the independence and impartiality of domestic courts, as devised in *Associação Sindical dos Juízes Portugueses*,[136] subsequently applied in the rich case law on controversial national judicial reforms in Eastern Europe.[137]

Finally, the potential of other two tools can be further explored in tandem. Firstly, pending the accession of the EU to the European Convention on Human Rights (ECHR), the avenue of the 'external' supervision by the

[131] Daniel J. Meltzer, 'Member State Liability in Europe and the United States' (2006) 127 Harvard Law School Public Law Research Paper 3.

[132] Case C-224/01 *Köbler* v *Austria* EU:C:2003:513.

[133] Tridimas (n 29) 752-753.

[134] Clelia Lacchi, 'Multilevel judicial protection in the EU and preliminary references' (2016) 53 Common Market Law Review 679, 703-708.

[135] Ibid.

[136] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117 on which see: Laurent Pech and Sébastien Platon, 'Judicial independence under threat:The Court of Justice to the rescue in the ASJP case' (2018) 56 Common Market Law Review 1827.

[137] Laurent Pech, 'The European Court of Justice's jurisdiction over national judiciary related measures', in *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies,* PE 747.368 - April 2023.

European Court of Human Rights (ECtHR) could be used. Indeed, the lack of referral to the ECJ by national courts on the ground of Article 267 TFEU can be challenged by individuals in front of the ECtHR for violation of Article 6(1) ECHR, as the right to a fair trial includes access to courts. The ECtHR acknowledged such a violation for the first time in 2014.[138] It ascertains whether there is an obligation by the Court to issue a preliminary reference and, consequently, whether the domestic judge refused to do so without providing reasons for the denial in light of the *CILFIT* criteria.[139] However, this move by the ECtHR could also trigger some problems in terms of autonomy of the EU legal order and of legal certainty. Although the ECtHR has made clear that it does not review the way EU law has been interpreted by the domestic court and it sticks to *CILFIT*, the ECJ uses different standards to assess the respect of Article 267(3) TFEU.[140]

Secondly, the declining rate of the compliance with the ECJ rulings[141] could be tackled at least in part through spending conditionality, particularly in EU countries whose courts have been the objects of political capture. Country specific recommendations (CSRs) in the framework of the European Semester and annual rule of law reports are not only now more frequently targeting both effective judicial protection and access to justice standards to assess national performance, but they have also become inextricably linked to the implementation of several milestones and targets of the national recovery and resilience plans in this Member States.[142] The

[138] *Dhahbi* v. *Italy* App No. 17120/09 (ECtHR 8 April 2014).

[139] Lacchi (n 134) 699-700.

[140] Niels Fenger and Morten P. Broberg, 'Finding light in the darkness: On the actual application of the acte clair doctrine' (2011) 30 Yearbook of European Law 180, 203-204.

[141] Pech (n 137) 83-85.

[142] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17. More complex, instead, seems to be the activation of the rule of law conditionality

lack of compliance with Article 267 TFEU and with ECJ preliminary ruling could also endanger the payment of the installments foreseen under the Recovery and Resilience Facility.

VI. The Practice of EU Preliminary References and of US Certification

In the United States there is a clear separation between state and federal law so that the States Supreme court has the last word on state law and the Supreme Court is the highest appellant court on federal law. Although the Supremacy Clause in the US constitution (Article VI, clause 2) makes it clear that state judges are bound by Constitution and federal law, litigants who rely on federal law will make sure to access a federal court as state courts are not always the most reliable enforcers of federal law.[143] This lack of comity by state courts in respecting the rulings of federal courts is considered in common law as a matter of mere obligation and of deference and mutual respect towards other courts that could be state, federal or international ones.[144]

Like in the US, EU supranational law and domestic law in theory have their own fields of competence to regulate. However, the design of the EU judicial system, the practice of the preliminary reference procedure and the case law of the ECJ make it difficult to disentangle the two bodies of law. It

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under Regulation 2092/2020 for the denial to use the preliminary reference mechanism or for lack of implementation of the ECJ rulings, although Article 4 refers to 'the effective judicial review by independent courts of actions or omissions' by the national authorities implementing the EU budget or monitoring the implementation.

[143] See: Cohen (n 3) 448. See: also *NYT* (n 82), 285.

[144] See: '"A decent Respect to the Opinions of [Human] Kind": The Value of a Comparative Perspective in Constitutional Adjudication', International Academy of Comparative Law (quoting Ruth Bader Ginsburg) <https://aidc-iacl.org/ruth-bader-ginsburg-a-decent-respect-to-the-opinions-of-humankind-the-value-of-a-comparative-perspective-in-constitutional-adjudication/>.

is clear that national courts are crucial components of the EU judicial system, ensuring that sufficient legal remedies are offered to guarantee effective legal protection in the EU law remit (Article 19(1) TEU).[145] At the same time, as observed in section V, especially since the entry into force of the Charter of fundamental rights, the ECJ has intervened on crucial constitutional matters for the Member States and the management of national law is somewhat in its mandate insofar as the constitutional traditions common to the Member States are part of the standards of review for the Court (Articles 6(3) TEU and 52(4) Charter) and the national constitutional identity is foreseen as a limit to the EU action (Article 4(2) TEU). There have been some conflicts between domestic courts and the ECJ, as reported, but overall the preliminary reference procedure has managed to channel dissensus between courts and has enabled the ECJ to find a compromise and balanced solution, sometimes more deferential toward the referring judge, some others more intrusive. References for a preliminary ruling are by far the most common type of proceeding in front of the ECJ. In the period 2018-2022 preliminary reference proceedings amounted to 67.74% of the total number of new cases introduced in front of the Court.[146] In 2022 only, 546 new preliminary references were issued with variations across the Member States.[147] Germany, Italy, Bulgaria, Spain, Poland, and Austria, in this order, are the countries whose courts made most referrals in 2022 (the figures are similar for the previous years), whereas Sweden, Denmark, Slovenia, Malta and Cyprus are those with the fewest referrals.[148] Of course, it is not just a matter of numbers, but also of contents of the orders of referral. With the increase in the number of preliminary reference proceedings, the clarity and the

[145] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006).

[146] Here and below the data reported can be found in the Detailed statistics of the Court of Justice, Court of Justice of the European Union, *Curia*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/stats_cour_2022_en.pdf> accessed on March 31, 2023.

[147] Ibid.

[148] Ibid.

quality of national courts' referrals become very important to support the job of the ECJ and its growing workload. Since 2005 the ECJ has provided domestic judges with a series of guidelines and recommendations.[149] Amongst other things, the Court also invites the referring court 'to briefly state its view on the answer to be given to the questions referred for a preliminary ruling' in the order issued.[150] Scholars and judges have described the situation where the domestic court also provide a possible answer to the question(s) posed as the 'green light procedure', which simplifies the task of the ECJ: if the ECJ agrees with the referring court, it could immediately accept the solution proposed without entering the ordinary preliminary ruling procedure.[151] The 'green light path' is not used routinely, but as the knowledge and practice of EU law advance among national courts the quality of the order of referrals also improves.[152]

By contrast, the practice of certification in the US remains rare and controversial because it is often seen with 'hostility or ambivalence' by courts

[149] For the latest version, see: ECJ, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, OJ C380/1.

[150] Id., para 18.

[151] 'Report by the Working Party on the Future of the European Communities' Court System from 18–19 January 2000', in Alan Dashwood and Angus C. Johnston (eds), *The Future of the Judicial System of the European Union* (Bloomsbury 2001) 168; Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and Network of the Presidents of the Supreme Judicial Courts of the EU, *Report of the Working Group on the Preliminary Rulings Procedure* (2007) 8–9; Maria Dicosola, Cristina Fasone, and Irene Spigno, Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis (2015) 16(6) German Law Journal 1327; Broberg and Fenger (n 61) 24, highlighting also the drawbacks of such a procedure, Davor Petrić, The Preliminary Ruling Procedure 2.0 (2023) 8(1) European Papers, 40-41.

[152] See, e.g., the orders of referral of the Spanish Constitutional Tribunal in Case C-399/11 *Melloni* EU:C:2013:107, for its clarity and for the proposals advanced as well as the order of referral in Taricco by the Italian Constitutional Court (order No. 24/2017).

from different jurisdictions.[153] One of the reasons is that as Cohen puts it 'judicial federalism is unsparingly hierarchal and confrontational' leading to the broader encroachment and expansion of federal constitutional and statutory law into state laws.[154]

The scope of the certification procedure was initially to prevent jurisdictional conflicts and the Judiciary Act of 1802 allowed the request for questions of law by federal Circuit courts that had to certify their questions to the Supreme Court.[155] While this practice of certification was abandoned by the Supreme Court and is now 'dormant' when it comes from a federal court of appeals to SCOTUS,[156] the practice of certification from federal courts to State Supreme Courts is enjoying some success as an 'intra-systemic vertical certification' of questions of law from lower to higher courts.[157] Often federal courts have to certify a question to State supreme courts in cases of diversity jurisdiction or when State action is challenged based on constitutional or federal statutory law.[158] The New York Court of Appeals (the highest court in the State) has been one of the exemplary courts in this respect that since the mid-1990s has answered several certified questions every year to the United States Court of Appeals for the federal Second Circuit.[159] Another possibility for state courts would be to answer questions

[153] Cohen (n 3) 455.

[154] *Id*., 455.

[155] *Ibid*.

[156] *Id*., 457.

[157] *Id*., 456.

[158] *Ibid*.

[159] *Id*., 456. See: Rob Rosborough, *How te Court of Appeals takes Certifies Questions from the federal Courts and Other States' Supreme Courts: The 202 Certifies Questions* in New York City Court of Appeal website says there are 3-4 certification questions per year, see: <https://nysappeals.com/2020/10/14/court-of-appeals-certified-questions/> accessed on November 27, 2022.

certified to them by other State court as contemplated by federal law and advocated by scholars but never used in practice.[160]

Overall, the certification mechanism could provide a powerful tool to enhance comity between state and federal courts despite additional delays and costs that litigants have to bear.[161] However, certification has been seen with skepticism by judges who need to give an answer to the certifying court that has no obligation to respect and therefore follows its legal interpretation that is often dealing with abstract issues and different factual setting.[162] Nevertheless, scholars have pointed out that certification remains most effective when openly showing conflict, cooperation and dialogue between federal and state courts that could potentially enhance comity and therefore greater uniformity in the interpretation of state and federal laws.[163] This is in line with the logic behind the EU preliminary reference procedure and ensures the uniform enforcement of EU law while relying on judges and domestic authorities as the first enforcers of supranational norms.

In conclusion, the certification in the US is not used on a regular basis nor is able to produce binding effects.[164] By contrast, in a relatively new 'federalizing process' the ECJ and national courts share a structural and daily channel of coordination described as 'the central pillar of the Union's cooperative federalism'.[165] With this regard, in the US Judge Guido Calabresi

[160] See: Bernie Corr and Ira Robbins, 'Inter jurisdictional Certification and Choice of Law' (1988) 41 Vanderbilt Law Review 411, 412-413. The Honorable Henry DuPont Ridgely, Justice of Supreme Court of Delaware, 'Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law' (2010) 63 Southern Methodist University Law Review 1127, 1139. The authors talk about Delaware accepting a certified question from NY Court of Appeals in the case of 998 A.2d 280 (Del. 2010).

[161] Corr and Robbins (n 160), 427.

[162] Cohen (n 3) 457.

[163] *Id*., 461.

[164] *Id*., 421-422.

[165] Robert Schütze, *European Union Law* (3rd edn., Oxford University Press 2021) 357.

has urged to use certification as a reverse preliminary reference, though in small quantity, to tackle the problem of federal courts interpreting State statutes by requiring a hypothetical determination of their constitutional validity without having a clear clue of the State court's understanding of the 'local' constitution and legislation.[166] This relates more directly to conflict arising in EU constitutional courts in their interactions with the ECJ over domestic constitutional norms and points to a similar need the ECJ has to better integrate the view of those courts in the supranational case law.[167]

VII. Conclusion

This article has offered a meta-comparison across distinct periods and judicial review features between the ECJ's preliminary interpretative rulings and the SCOTUS case law on unconstitutionality of State laws. The aim has been to assess how both courts behave when there is a problem of compatibility of domestic law with EU law and of unconstitutionality of State law vis-à-vis the US Constitution. Interestingly SCOTUS and the ECJ have devised similar forms of disapplication of State law (though with some caveats): immediate disapplication by national courts, disapplication with flexibility of outcomes, and disapplication without margin of interpretation. The two courts have also faced resistance to the implementation of their rulings, especially during the first century of the US constitutional history for SCOTUS and more vehemently since the entry into force of the Lisbon

[166] Guido Calabresi, 'Speech: Federal and State Courts: Resorting a Workable Balance' (2003) 78 New York University Law Review 1293, 1301.

[167] See the proposals put forward in the EU to this end: Joseph H.H. Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) XLIV Political Studies 517, 532-533 and Joseph H.H. Weiler and Daniel Sarmiento, 'The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics' (EU Law Live, 6 July 2020) < https://eulawlive.com/the-eu-judiciary-after-weiss-proposing-a-new-mixed-chamber-of-the-court-of-justice-a-reply-to-our-critics-by-j-h-h-weiler-and-daniel-sarmiento/ > accessed on March 31, 2023.

Treaty for the ECJ. Although the enforcement mechanisms supporting the implementation of SCOTUS and federal courts' judgments are more pervasive and far-reaching than in the EU, the tools at disposal of the EU institutions and the ECJ have grown over the last twenty years. In particular, the preliminary reference procedure in the EU has provided a successful tool to fine-tune the ECJ case law in conjunction with the Member States' courts and to ensure the uniformity of EU law. Due to this mechanism and to the design of the EU judicial system, the relationship between the ECJ and domestic courts shows a more evident centralizing dynamic compared to the US, where instruments of cooperation between federal and State courts, notably certification, are seldom used. This is a further proof showing how deeply integrated the EU system of courts is through the *sui generis* diffuse model of judicial review underpinning the preliminary ruling procedure, in conjunction with the ECJ's constant scrutiny of national laws by virtue of the principles of primacy and direct effect.

HUMAN RIGHTS AS AN EXAMPLE OF COOPERATIVE FEDERALISM? A CHRONOLOGY OF THE USE OF THE PRELIMINARY REFERENCE PROCEDURE IN HUMAN RIGHTS CASES BETWEEN 1957 AND 2023

Eleni Frantziou*

This article analyses the role of human rights in the preliminary reference procedure based on a systematic review of the use of fundamental rights in references for a preliminary ruling between 1957 and 2023. It shows that over 30% of preliminary references in the last five years have contained a human rights dimension, compared to only 17% of preliminary references across the span of the Court's docket. A progressive increase in the use of human rights can be observed across the case law. The CJEU can thus be considered a key regional human rights adjudicator not just normatively, i.e. in terms of the content and implications of its decisions, but also empirically, because of the volume and proportion of its human rights case law within the overall docket. This finding challenges the prevailing narrative that paints EU human rights as a key locus of conflict between courts at the domestic and EU levels. Instead, the case law patterns over time display a more harmonious and gradual approach towards the development of EU human rights, which corresponds to a dialogical and cooperative model of EU federalism, rather than a dualistic or strictly hierarchical one.

Keywords: Charter of Fundamental Rights of the EU; Human Rights; Preliminary Reference Procedure; Article 267 TFEU; CJEU; Cooperative Federalism

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I. INTRODUCTION

Is the Court of Justice of the EU (CJEU) a human rights court? If so, when did it become one? This article aims to address these questions empirically, by investigating the volume of the CJEU's human rights jurisprudence across time. Through a series of term-specific searches, it presents a set of

original data about the use of human rights in the preliminary reference procedure and traces the scale of human rights case law chronologically from the first fully documented case recorded on the Court's database on 20 March 1957[1] until 20 March 2023. At the same time, it makes key 'stops' at the constitutional turning points of EU integration in the field of human rights protection (the Maastricht, Nice, and Lisbon Treaties), thus highlighting the trajectory of human rights references across different eras of EU human rights integration. The data reveals a significant, and remarkably linear, change to the *scale* of the Court's engagement with human rights, from only 17.6% of preliminary references across the span of the Court's docket since 1957 to more than 30% of preliminary references in the last five years. The article contextualises this data by using as comparators the two other main litigation avenues at the EU level: actions for annulment[2] and actions for a declaration of a failure to fulfil obligations.[3]

What can this empirical account add to the long-standing debates about whether the EU is a human rights organisation[4] or, indeed, a federal constitutional polity properly-so-called?[5]

The primarily quantitative approach taken in this article may be perceived as an ill-suited attempt to answer by reference to numbers what are ultimately much deeper normative debates about the federalising character

[1] Case C-2/56 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v High Authority* EU:C:1957:4. NB: while three other cases appear to have been decided before this ruling, it was the first ruling I found on curia.europa.eu that showed full and searchable documentation.

[2] Article 263 TFEU.

[3] Article 260 TFEU.

[4] See Armin von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' (2000) 37:6 CML Rev 1307.

[5] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39:5 CML Rev 945; see also Gráinne de Búrca and Jo Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 CJEL 355.

of human rights in EU integration.[6] But my intention in this article is not to reopen questions about whether the EU should be concerned with matters of human rights protection or how the CJEU ought to approach them, but to document whether and, if so, to what extent it actually does. In turn, obtaining such an overview of the CJEU's case law in this field is useful because it allows us to better understand and potentially challenge existing assumptions that, as Meuwese and Versteeg put it, have 'largely gone untested' in earlier scholarship.[7]

More specifically, important claims about the nature of human rights integration have so far been made based on key cases or constitutional developments, but have not yet systematically been mapped onto a large-scale or chronological account of human rights in EU law.[8] One of the key narratives in EU legal scholarship has been that human rights law is the key site of judicial conflict and contestation between domestic courts and the CJEU.[9] A data-driven account allows us to gain a more holistic picture of what EU human rights litigation has amounted to in terms of figures, and to set out in a more coherent way across time some of the formal, institutional characteristics of EU human rights litigation, such as 'how much of it is

[6] For a thorough analysis of the perceived objections empirical research methods in EU legal scholarship, see: Urška Šadl and Jakob v H Holtermann, 'The Foundations of Legal Empirical Studies of European Union Law: A Starter Kit' in Christoph Bexemek, Michael Potacs and Alexander Somek (eds), *Normativism and Anti-Normativism in Law*, Vienna Lectures on Legal Philosophy (Vol 2) (Hart 2020), 210 and 220-226.

[7] Anne Meuwese and Mila Versteeg, 'Quantitative Methods for Comparative Constitutional Law', in Maurice Adams and Jacco Bomhoff, (eds.), *Practice and Theory in Comparative Law* (Cambridge University Press 2012), 233. See also Šadl and Holtermann, ibid, 209.

[8] Šadl and Holtermann (n 6), 209-210.

[9] For an important recent analysis, see Ana Bobić, *The Jurisprudence of Conflict in the European Union* (Oxford University Press 2022), chapter 7; see also Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009).

there?'; 'how did it change over time?'; and 'which procedures and actors has it involved?'.

In this regard, the findings presented in this article contribute previously under-appreciated dimensions to scholarly debates about EU human rights integration:[10] firstly, the article confirms that human rights are a growing aspect of the CJEU docket, but shows that they nevertheless remain, even fourteen years after the introduction of a binding Charter, a secondary source of EU litigation. Further, the article confirms the overwhelming prominence of the preliminary reference procedure as the principal tool in the adjudication of EU human rights. This highlights the continued significance of private enforcement through legal means as a key driver of the EU human rights regime. Finally, the article shows that the contestation that we have assumed to be a defining characteristic of the interaction between domestic courts and the CJEU in the human rights context is not necessarily supported by the case law patterns of preliminary references overall. While there is undeniable contestation in some of the landmark case law in the field, as discussed in **Section IV**, the overarching patterns of preliminary references paint a different picture: that of a more gradual and cooperative interaction on human rights issues than we might have previously imagined. The present article thus provides evidence of a more dialogical approach to human rights than doctrinal accounts have so far offered and allows us to think in a more structured way about the Court of Justice's qualities as a regional human rights actor.

[10] Other quantitative empirical studies have considered the nature of the preliminary reference procedure, eg Tommaso Pavone and Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' 25 (2019) European Law Journal 352; earlier studies had also. included aspects of EU human rights law, eg, sex discrimination; Alec Stone Sweet, *The Judicial Construction of Europe*, (Oxford University Press 2004), chapter 4. However, no other study traces the breadth of the human rights acquis throughout the docket.

The article is set out as follows: **Section II** details the methodology that I have employed to collect my data. **Section III** sets out my key findings. **Section IV** interprets these findings, highlighting the abovementioned patterns. **Section V** concludes.

II. RESEARCH METHODOLOGY

1. Outline of Methodology

As mentioned at the outset, I approached my hypothesis through the research questions of whether the CJEU is and, if so, since when it has been, a human rights adjudicator. These questions were approached as an investigation into the volume and institutional makeup of the case law, i.e. whether and to what extent the CJEU is a forum for human rights complaints in the EU under the preliminary reference procedure (Article 267 TFEU) or an enforcer of rights through direct actions by individuals (Article 263 TFEU) or actions for a failure to fulfil obligations against Member States (Article 260 TFEU).

To answer these questions, I employed keyword searches on the Court's official case law database (curia.europa.eu). The search terms were '"Charter of Fundamental Rights", "human right*"', where a comma denotes 'or' and an asterisk captures the multiple of the term 'right' =, ie both "human right" and "human rights". My search was conducted by selecting the relevant procedure from the Court's database (references for a preliminary ruling, including the urgent procedure), and I mapped all preliminary references mentioning the search terms on an annual basis from 20 March 1957[11] to 20 March 2023 by running individual searches for each year in this 66-year period. I repeated this search for the two procedures that I used as comparators for preliminary references (actions for annulment and actions for a failure to fulfil obligations). I then added a qualitative element to this approach by mapping my data based on 'constitutional time'. In doing so,

[11] i.e. the date of the first judgment fully recorded on curia.europa.eu.

my aim was to understand how key moments in EU human rights integration were reflected in the overall patterns of the Court's case law. To this end, I ran time-defined searches for four different intervals alongside my search of the full docket. These were:

- Full docket: 20 March 1957 – 20 March 2023
- Pre-Maastricht case law: 20 March 1957 – 31 December 1992
- Post-Maastricht case law: 1 January 1993 – 31 January 2003
- Nice case law (declaratory Charter): 1 February 2003 – 30 November 2009
- Lisbon case law (binding Charter): 1 December 2009 – 20 March 2023

My search was limited to cases before the "Court of Justice", thereby excluding the General Court.[12]

2. Justification of Methodology

Defining case law that bears relevance to human rights was a challenging aspect of my methodology. The keyword-search approach is an imperfect method,[13] but it was essential to use it here due to the high volume of cases in the CJEU's docket. In turn, before the data was collected, it was essential to ensure the accuracy of the contents of the search. To this end, I trialled several ways of searching for the presence of human rights in the Court's docket through pilot searches based on random years. These revealed that

[12] NB: my search includes cases that mentioned the search terms in the Opinion of the Advocate General.

[13] There have been 23,278 cases lodged before the Court of Justice between 20 March 1957 and 20 March 2023, under any procedure, as recorded on the curia.europa.eu case law database on 28 March 2023. For the challenges associated with constitutional design of large-scale studies, see Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies', in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224, 267 ff.

search terms such as 'Charter', 'general principle*', and 'fundamental right*' would not lead to accurate overall results. The two former terms were over-inclusive, as they returned several results referring to the UN Charter and to general principles of EU law other than human rights. The term 'fundamental right*' was also misleading, being in some respects over-inclusive, as it was used to refer to rights-conferring provisions of the Treaties and not only to human rights, understood positively as the rights that were subsequently constitutionalised in the Charter. At the same time, it was under-inclusive with respect to the early case law, excluding cases such as *Stauder* and *Internationale Handelsgesellschaft*, where the terms 'human right' or references to the 'European Convention on Human Rights' were employed, as the term 'fundamental right' only became more consistently used in later judgments.[14] Other trialled terms, such as "fundamental freedom*" also resulted in an over-inclusion of matters covered by the Treaties that were not relevant to human rights and were, therefore, excluded from the final search to avoid the findings capturing irrelevant material. Finally, I considered searching for each of the provisions of the Charter and collating them. However, this method carried too significant a risk of manual error, as well as a substantive risk of under-inclusion for the pre-Charter years, where the terms used to refer to a particular right varied from the terms subsequently used in the Charter's text.

For these reasons, I ultimately chose to represent engagement with human rights in the Court's case law through mentions of the terms "Charter of Fundamental Rights" and "human right*", which cropped up consistently in the pilot results and were not substantively over-inclusive. This approach had the benefit of capturing both early engagement with human rights as general principles of EU law and reliance on fundamental rights subsequently, under the Charter. Still, given that the terms used in the pre-

[14] Case 29/69 *Stauder v Stadt Ulm* EU:C:1969:57, para 7; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.

Charter case law were (unsurprisingly) more fluid and interchangeable than in the post-Charter years, the possibility of under-inclusion needs to be accounted for in my study. Pilot searches showed that the Court relied consistently on the Charter in its later judgments and, therefore, I expect that the post-Charter results paint an accurate picture of the Court's case law. However, my use of the term "human right*" as the relevant term means that the findings presented here are likely to be overly conservative when it comes to the Court's case law before the Charter. Having noted this limitation, a cursory manual review of the results of the pre-Maastricht case law confirmed that the term-based search did return expected results, with key early cases, such as *Stauder*, *Internationale Handelsgesellschaft*, *Defrenne*, *Hauer*, *Wachauf, Dekker*, and *Konstantinidis*[15] being returned in the dataset. Nevertheless, the data should be read with the caveat of potential under-inclusivity in the pre-Charter years in mind. Indeed, the fact that the dataset is more likely to be under-inclusive than over-inclusive is significant because it strengthens the overall conclusion of continuity and gradual build-up, rather than a radical shift, in human rights litigation at different phases of EU integration, as I go on to explain in the next section.

When it comes to the intervals I selected to account for potential turning points in EU human rights integration, my frame of reference (detailed in subsection 1 above) differs slightly from earlier accounts. Following Weiler's analysis in 'The Transformation of Europe', it would be common to break down the pre-Maastricht period into at least two halves.[16] The first half is the 'foundational period' between 1958 and the mid-70s, where the key normative pillars of EU law were laid down. In the second half, there is

[15] *Stauder* (n 14); *IHG* (n 14); Case 43/75 *Defrenne v Sabena (No 2)* EU:C:1976:56; Case 44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290; Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321; Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* EU:C:1990:383; Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* EU:C:1993:115.

[16] Joseph H H Weiler, 'The Transformation of Europe' (1991) 100:8 Yale Law Journal 2403–83, 2413 ff.

period of 'mutation of jurisdiction and competences' between 1973 and the mid-80s, where key judicial principles about EU jurisdiction and the CJEU's approach of incrementalism started to be refined.[17] In my account, I have consciously decided to represent the human rights case law before Maastricht as a unitary entity. Similarly, based on a broader view of EU integration, it might have been considered unjustifiable to include three periods in the post-Maastricht era, as I have done, but to leave other key developments in EU law, such as the Single European Act, Amsterdam Treaty, or failed Constitutional Treaty, seemingly unaccounted for. These departures from the classical account are, however, justified by the specificity of human rights integration to the EU's post-Maastricht framework and the particular significance of the Charter thereto.[18]

Human rights cases only started to appear – with the exception of *Stauder* – in the 1970s and, by their very nature, posed considerable jurisdictional challenges for the CJEU before their first formal inclusion in the Treaties in Article F TEU (Maastricht). I have thus selected to represent in my data periods that correspond to further integration in the field of human rights specifically, rather than in EU law, more generally.

The first period, between the first recorded case in 1957 until just before the entry into force of the Maastricht Treaty on 1 January 1993, represents human rights in their judicial iteration as general principles of EU law at a time when the Treaties still did not explicitly provide for their protection. The post-Maastricht dataset corresponds to the early period of political integration, with the first explicit mention of human rights being made in the Treaty on European Union, thus giving a clearer EU law basis for

[17] Ibid.

[18] See Elizabeth Defeis, 'Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon' (2017) 35:5 Fordham Journal of International Law 1207, although Defeis places a greater emphasis on the Amsterdam Treaty and a lesser one on the proclamation of the Charter through the Nice Treaty: 1207-1210.

ensuring respect for human rights.[19] The next key change was the proclamation of the Charter as a non-binding instrument in the Nice Treaty, which entered into force on 1 February 2003. While the Charter was not at the time binding on the Member States, it was already binding for the EU institutions (including the Court of Justice) and its gathering of EU human rights in a single instrument facilitated a more unified perception of these rights in EU law.[20] The final period I coded for was the attribution of binding effect to the Charter upon the entry into force of the Lisbon Treaty on 1 December 2009, until the end of the coded period (20 March 2023). This is the first period in which human rights have acquired a fully constitutionalised status in EU law, enjoying 'the same legal value as the Treaties' in line with Article 6(1) TEU under the Lisbon amendment. Given that these periods and, particularly, the Charter's entry into binding force represented key constitutional changes to the status of human rights in EU law, I expected that they would result in a discernible jump in the volume of human rights cases reaching the Court.

Of course, it must be noted that since each of these intervals contains a different number of years, the absolute figures are not comparable. It would be impossible to compare the 35-year period pre-Charter with the much smaller intervals covered in more recent years. To avoid confusion in this regard, I have chosen to represent the figures through statistical (percentile) models in my graphs. I have also provided the full annual breakdown of preliminary references as returned in my dataset (Figure 2b below), for reference.

[19] At the preamble and Article F TEU (Maastricht). This period also includes the change from Article F Maastricht to Article 6 TEU in the Amsterdam amendment, which did not otherwise alter human rights competence, despite arguably creating the impetus for the creation of the Charter: see further on this, Eleni Frantziou, 'The EU Charter of Fundamental Rights in EU Integration' in Laurence Gormley, Sacha Garben and Kai Purnhagen (eds), *Oxford Encyclopedia of EU Law* (Oxford University Press 2023).

[20] Eeckhout (n 5) 990; de Búrca (n 5) 372.

3. Margin of Error and other Limitations

Beyond the limitations inherent in the specific methodology that I employed, as detailed above, some further clarifications and qualifications need to be made about the scope of my findings.

First, it must be noted that there is a margin of error of between 0.01 and 0.04% in my data: this was discovered through reverse-sum testing of the findings of cumulative years and intervals, which resulted in slightly more results than my search of the full docket. This inconsistency stems from the fact that certain cases appeared more than once in the systematic and interval-based searches, when the search terms were used in case documents spanning more than one search period. As such, there are a few repetitions in the systematic chronology and interval-based findings, which explains why case results are slightly more numerous there. In order to ensure that my findings remain transparent to the reader, I have included the full docket figures as a self-standing search and have used those more accurate figures when referring to the full docket. However, it is essential for completeness to acknowledge this internal inconsistency in the data, which is most significant in the systematic (year-on-year) mapping of preliminary references (showing a 0.04% variation from the full docket search).

Second, it is essential to note that my data was verified as accurate to 20 March 2023 (the limit of my review period) based on the information available on the curia.europa.eu database upon my last visit to the site on 28 March 2023. Nevertheless, a margin of error is present in the case law database itself. For example, when conducting the exact same full docket search of all references on 30 October 2023 for the coded period (20 March 2057 – 20 March 2023), the search produced 23,540 case results, as opposed to the 23,278 total number of cases recorded on 28 March. This is likely to be due to the fact that the Curia database is constantly updated by the Court's research and documentation department, which means that the absolute numbers presented here are subject to a further margin of error of more than 1% overall (and likely higher for the final coded year). Still, there is no

reason to imagine that such updates would influence one procedure more than the others or that they significantly affect the overall conclusions about the makeup of the docket.

Third, an important limitation in my method, which I did not anticipate at the outset, was that it was not possible to filter mentions of human rights in Opinions of Advocates General. While I had initially hoped to provide different accounts for mentions in the preliminary reference request itself, mentions in the judgment, and mentions in the Opinion, the database consistently returned results that mentioned the terms in any of the case documents despite the specific exclusions being selected (these exclusions currently only work for legislation official document searches, and not for other text-based search terms). The results should thus be viewed as a holistic chronology of human rights mentions at any stage of the preliminary reference procedure (as well as, where relevant, the other two coded procedures). My plan in this article was to map engagement with human rights, but further study of the use of human rights in binding judgments could strengthen or refine some of the conclusions presented here.

Last, but not least, some broader qualifications should be made about the scope of the arguments that the data can support. It must be reiterated that the findings are not necessarily representative of the number of cases with a human rights *focus*: rather, both the findings and the conclusions subsequently drawn from them refer to cases with a human rights *dimension* (i.e., including cases of potentially minor relevance to human rights, despite employing relevant terms). Finally, insofar as the findings presented in Section III are quantitative, they can be separated from my own interpretation of their meaning (section IV) and can stand alone as an overarching guide for subsequent research into the nature and effects of the human rights case law.[21]

[21] The author is happy to provide copies of the original databank to facilitate further research.

III. FINDINGS

1. *Human Rights in the CJEU's full docket (20 March 1957-20 March 2023)*

The results relating to the full docket show the volume of the Court's case law that concerns human rights lodged in the coded period. The findings show that, of the 23,278 cases that have come before the Court of Justice under any procedure between 20 March 1957 and 20 March 2023, 2,932 cases related to human rights, based on the search terms (12.60%). This is a small, albeit not insignificant percentage of the EU case law. However, the figures are greater when looking at the three biggest procedures, which are in turn coded in greater detail in this research. For example, 17.60% of the cases coming before the Court through the preliminary reference procedure under Article 267 TFEU procedure (including the urgent procedure) had a human rights dimension. In total, this amounted to 1,886 cases out of 10,718 requests for a preliminary ruling in the Court's docket. Actions for annulment (Article 263 TFEU) displayed a slightly higher percentage of human rights litigation at 18.00% of cases under this procedure but were much fewer in absolute terms (687 cases out of a total of 3,817 in the docket).

By contrast, the cases coming before the Court under the Article 260 process (i.e. actions against Member States for failure to fulfil EU obligations) involved human rights to a considerably smaller extent (82 cases out of 3,974 in total), amounting to only 2.06% of the cases under this procedure.

Figures 1a and 1b visually represent the full docket findings. Figure 1a shows the prominence of the Art 267 process before the Court altogether. Figure 1b shows that the significance of preliminary references is overwhelming within the human rights cases identified in the docket. Together, preliminary references and actions for annulment accounted for 87% of all the human rights case law coming before the Court in the last sixty-six years.

Figure 1a: Proportion of cases per procedure overall:

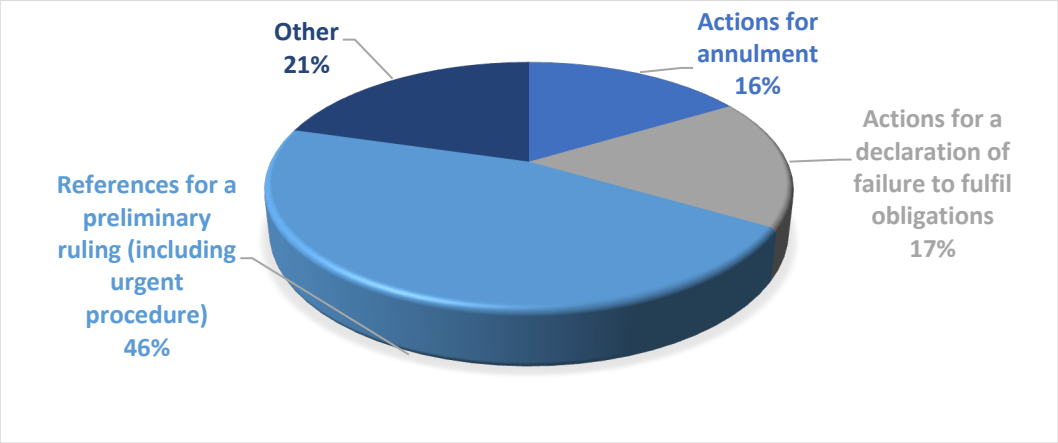
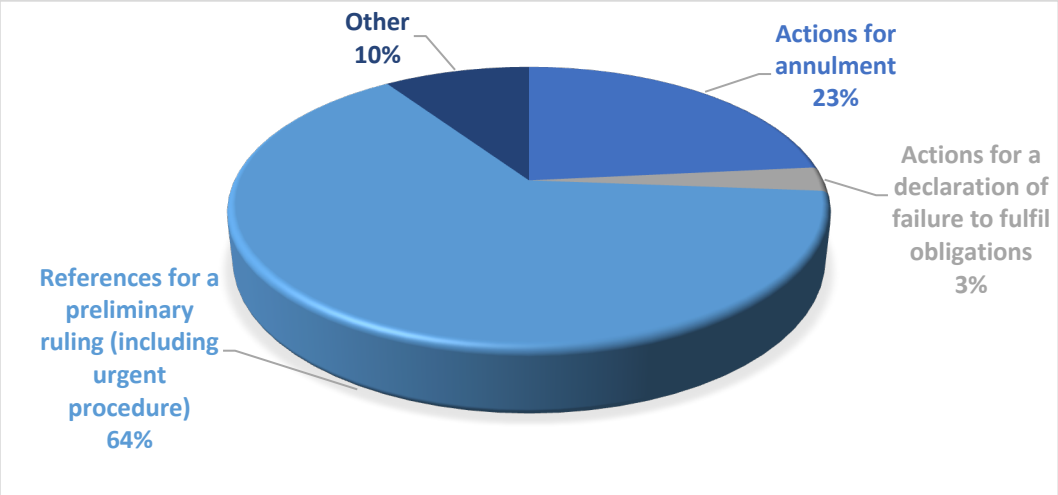


Figure 1b: Proportion of human rights cases per procedure:



While these figures are not contradictory, in the sense that the prominence of Article 267 in human rights cases is consonant with the overall prominence of Article 267 cases across the docket as well, they are remarkable in two ways. Firstly, they show that there is a much greater engagement with human rights through private or hybrid enforcement, via domestic litigation querying aspects of EU law or via direct challenges to EU measures. By contrast, there is a relative lack of public enforcement of EU human rights against Member States. In particular, and without taking into account other actions, the CJEU's human rights case law has clearly emerged predominantly through *bottom-up* litigation, through Article 267 and, to a lesser extent, Article 263, rather than *top-down* litigation, through the Article 260 procedure against Member States. This is an interesting feature of the docket, considering that human rights, albeit not in themselves a legislative competence, feed into several of the Union's key competences, such as external action, environmental protection, and employment regulation.

Secondly, the overwhelming significance of the preliminary reference procedure within the human rights case law is likely to have influenced the nature of the CJEU's engagement with human rights, potentially distinguishing it in some respects from that of other courts with a human rights competence. Since Article 267 is not in itself an adversarial process, human rights case law at the EU level has the opportunity to develop in a less hierarchical and more dialogical manner than in other regional contexts, such as under the Council of Europe system, where reparation for the victim(s) is a central feature of every application. This is compounded by the lack of public enforcement against Member States and by the fact that direct actions challenging EU measures are far fewer than preliminary rulings in absolute terms (despite having a similar percentage of human rights relevance), rendering EU human rights litigation highly reminiscent in practice of the docket of federal judiciaries.

Because of these features of the preliminary reference procedure and its prominence within the docket, it is useful to briefly look at the full chronology of human rights references under Article 267 in sub-section 2 below, before going on to contextualise them alongside the other two coded procedures by reference to key moments in EU integration in subsection 3.

2. The Chronology of Human Rights in the Preliminary Reference Procedure

As noted earlier, when looking chronologically at the evolution of the preliminary reference procedure since 20 March 1957, I had expected to find significant differences between different years. More precisely, I had expected to see a very stark increase in or shortly after years when an important constitutional change to the status of EU human rights had occurred, and especially since the Charter of Fundamental Rights entered into binding force under the Lisbon Treaty. However, the results of my research were more nuanced. The entry into binding force of the Charter undeniably did result in a greater number of mentions of human rights in EU litigation. But it did not necessarily have as significant an impact upon it as I had hypothesised. Figure 2a visually represents this pattern. Figure 2b lists the chronological data as a table, for ease of reference.

Figure 2a: Chronology of the use of human rights in the preliminary references (chart)

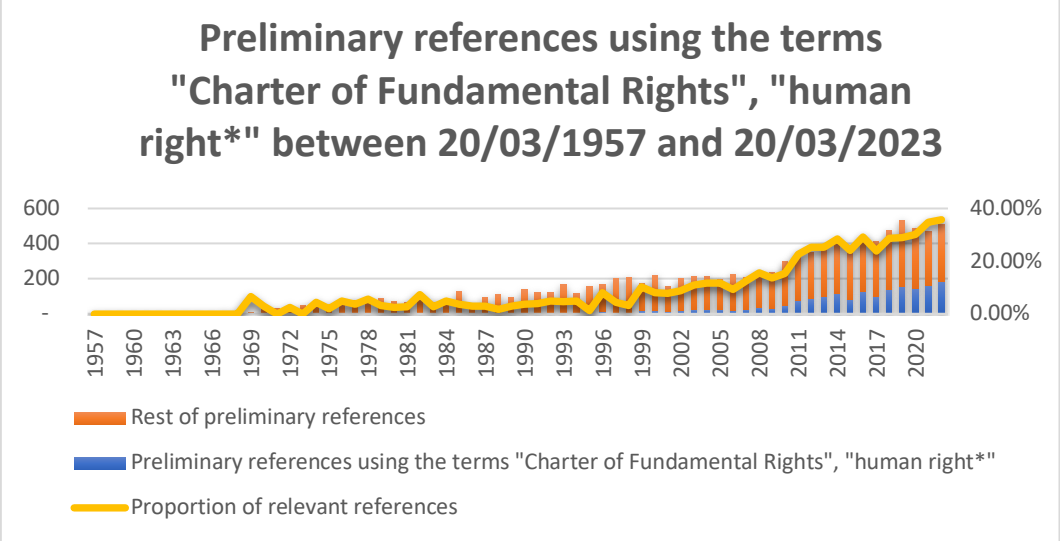


Figure 2b: Chronology of the use of human rights in the preliminary references (table)

Start	End	Human Rights References	Total References	Percentage of Human Rights References
20/03/1957	19/03/1958	0	0	0.00%
20/03/1958	19/03/1959	0	0	0.00%
20/03/1959	19/03/1960	0	0	0.00%
20/03/1960	19/03/1961	0	0	0.00%
20/03/1961	19/03/1962	0	1	0.00%
20/03/1962	19/03/1963	0	2	0.00%
20/03/1963	19/03/1964	0	3	0.00%
20/03/1964	19/03/1965	0	8	0.00%
20/03/1965	19/03/1966	0	5	0.00%
20/03/1966	19/03/1967	0	4	0.00%
20/03/1967	19/03/1968	0	15	0.00%
20/03/1968	19/03/1969	0	14	0.00%
20/03/1969	19/03/1970	1	15	6.67%
20/03/1970	19/03/1971	1	34	2.94%
20/03/1971	19/03/1972	0	29	0.00%
20/03/1972	19/03/1973	1	38	2.63%
20/03/1973	19/03/1974	0	53	0.00%
20/03/1974	19/03/1975	2	46	4.35%
20/03/1975	19/03/1976	1	48	2.08%
20/03/1976	19/03/1977	3	61	4.92%
20/03/1977	19/03/1978	3	81	3.70%
20/03/1978	19/03/1979	4	72	5.56%
20/03/1979	19/03/1980	3	92	3.26%
20/03/1980	19/03/1981	2	77	2.60%
20/03/1981	19/03/1982	2	71	2.82%
20/03/1982	19/03/1983	7	96	7.29%
20/03/1983	19/03/1984	2	74	2.70%
20/03/1984	19/03/1985	4	79	5.06%
20/03/1985	19/03/1986	5	131	3.82%
20/03/1986	19/03/1987	2	64	3.13%
20/03/1987	19/03/1988	3	100	3.00%
20/03/1988	19/03/1989	2	114	1.75%
20/03/1989	19/03/1990	3	102	2.94%
20/03/1990	19/03/1991	5	138	3.62%
20/03/1991	19/03/1992	5	128	3.91%
20/03/1992	19/03/1993	6	123	4.88%
20/03/1993	19/03/1994	8	169	4.73%
20/03/1994	19/03/1995	6	121	4.96%
20/03/1995	19/03/1996	2	160	1.25%
20/03/1996	19/03/1997	14	172	8.14%
20/03/1997	19/03/1998	9	207	4.35%
20/03/1998	19/03/1999	7	212	3.30%
20/03/1999	19/03/2000	18	177	10.17%
20/03/2000	19/03/2001	18	222	8.11%
20/03/2001	19/03/2002	12	154	7.79%
20/03/2002	19/03/2003	18	203	8.87%
20/03/2003	19/03/2004	24	216	11.11%
20/03/2004	19/03/2005	26	220	11.82%
20/03/2005	19/03/2006	24	204	11.76%
20/03/2006	19/03/2007	21	227	9.25%
20/03/2007	19/03/2008	27	215	12.56%
20/03/2008	19/03/2009	37	238	15.55%
20/03/2009	19/03/2010	33	241	13.69%
20/03/2010	19/03/2011	46	301	15.28%
20/03/2011	19/03/2012	78	343	22.74%
20/03/2012	19/03/2013	88	348	25.29%
20/03/2013	19/03/2014	100	394	25.38%
20/03/2014	19/03/2015	116	406	28.57%
20/03/2015	19/03/2016	84	347	24.21%
20/03/2016	19/03/2017	129	443	29.12%
20/03/2017	19/03/2018	99	415	23.86%
20/03/2018	19/03/2019	137	478	28.66%
20/03/2019	19/03/2020	155	536	28.92%
20/03/2020	19/03/2021	148	489	30.27%
20/03/2021	19/03/2022	164	473	34.67%
20/03/2022	20/03/2023	183	512	35.74%

As these figures highlight, a somewhat sharp change of approximately +7% is noticeable between 2010-2012, i.e. shortly after the binding Charter was introduced, but a more gradual, steady impact continues thereafter. A similar jump can be observed before the proclamation of the Charter in its non-binding dimension. Nevertheless, when viewed as part of a chronology spanning sixty-six years, these changes iron out relatively quickly, and do not lead to a drastic alteration of the wider trend followed by preliminary references, as shown by the line in Figure 2a. There is a mainly linear tendency in this figure, which can be contrasted with the findings in respect of other procedures, and most notably with actions for a failure to fulfil obligations. As discussed in greater depth in subsection 3 below, the latter procedure shows a very pronounced, exponential increase in litigation following the entry into force of the Charter. While it is clear that the Charter has had an impact on preliminary references, too, it is noteworthy that the picture here is not one of step-changes, but of a gradual growth of human rights mentions over time. This conclusion is strengthened when considering that my data is likely to be under-inclusive for the pre-Charter years, where the absence of a common EU-wide terminology for human rights means that the search terms may have excluded at least some relevant early case law (which could, in turn, have further strengthened the predominantly linear character of the progression identified above).

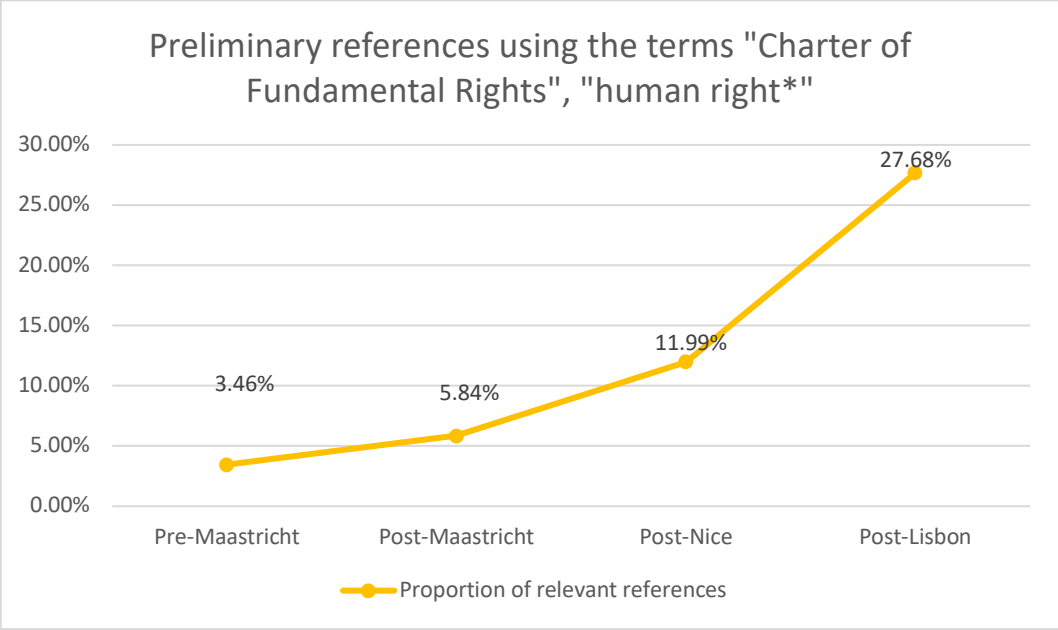
3. The Court's human rights case law at key intervals in EU integration

The patterns identified above are further nuanced by a more specific analysis of the case law before and after the key turning points in EU human rights integration. The interval changes for preliminary references are as follows: 3.46% of the pre-Maastricht case law contained a human rights dimension, rising to 5.84% between Maastricht and Nice, to 11.99% after Nice, and finally to 27.67% on average after Lisbon.

These results, visually represented in Figure 3.1, do somewhat sharpen the chronological analysis presented above, and result in a more pronounced

exponential curve. For example, when looking at this graph, it becomes more obvious that the Charter in its binding dimension had a discernible impact on human rights actions compared to other amendments. However, the graph also allows us to see that all relevant Treaty amendments made a difference to the volume of EU human rights litigation. In turn, if we consider the breadth of the change effectuated to EU law by the binding Charter, which added 54 human rights provisions having the status of Treaty law, the impact that the Charter had may be viewed as less explosive than expected.

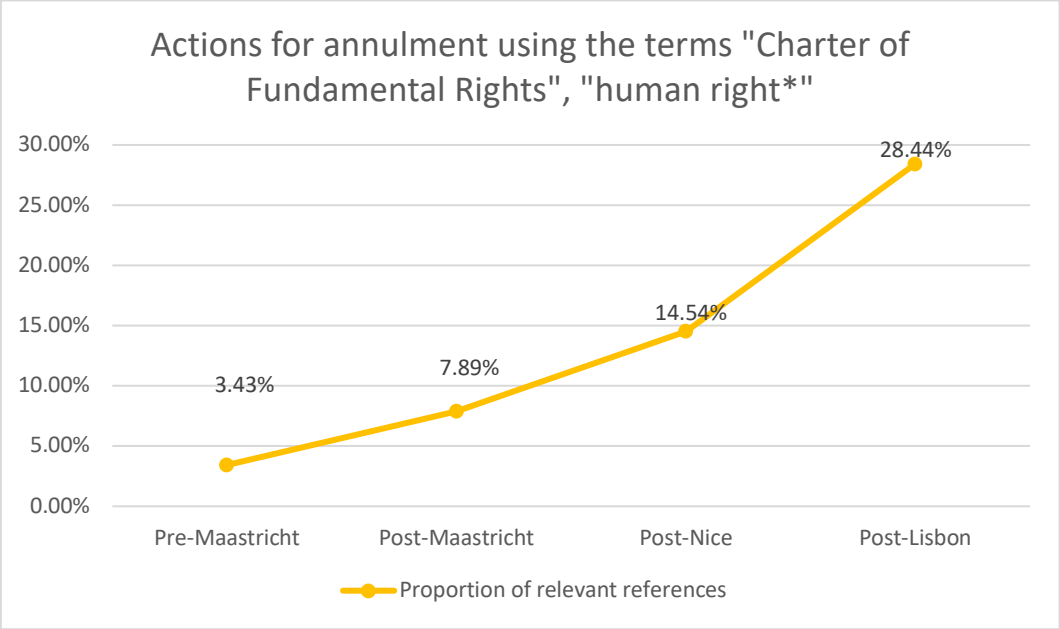
Figure 3.1: Changes to the use of human rights in preliminary references, defined by key eras in EU human rights integration



A similar pattern is present in respect of actions for annulment. These actions also increased significantly since the entry into force of the Charter, from 149 out of 1,9238 before 1 December 2009 (7.69%) to 540 out of 1,899 in the post-Charter docket (28.43%). However, the changes were less sharp

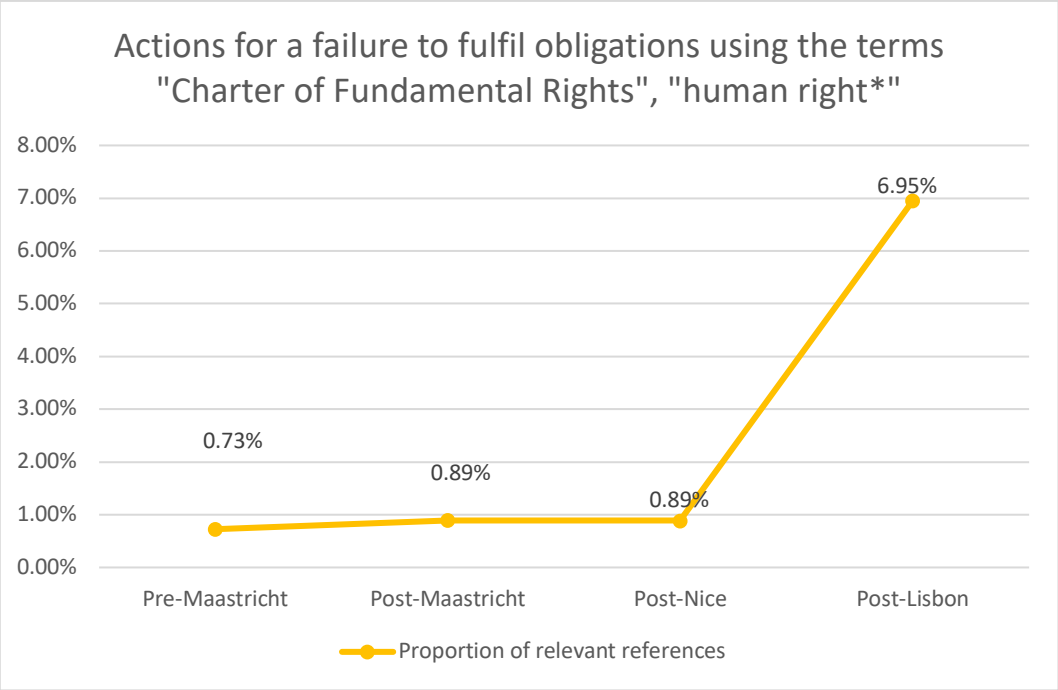
than for preliminary references and had an almost perfect pattern of doubling with each relevant amendment. Making up only 3.43% of the pre-Maastricht case law, human rights relevant actions for annulment grew to 7.89% between Maastricht and Nice, to 14.54% after Nice, and to 28.44% after Lisbon. Figure 3.2 represents these findings.

Figure 3.2: Changes to the use of human rights in actions for annulment, defined by key eras in EU human rights integration



A very sharp contrast to this picture is presented by actions for a failure to fulfil obligations, from almost nil references in the pre-Charter years, to a more significant – albeit still small – proportion of 6.95% of all actions for annulment following the post-Lisbon Charter. Crucially, there were no significant changes to the use of human rights in these actions at all prior to the Charter's entry into binding force, as further shown in Figure 3.3.

Figure 3.3: Changes to the use of human rights in actions for a failure to fulfil obligations, defined by key eras in EU human rights integration



The stark contrast presented by Figure 3.3 as the figure representing public (Commission-driven) enforcement of EU law, compared to both of the private enforcement procedures (Figures 3.1 and 3.2), is remarkable. On the one hand, it is of course true that the Lisbon Treaty was the first to render the Charter binding upon Member States. This might be viewed as in itself a sufficient reason for the marked increase in mentions of human rights in litigation against Member States. On the other hand, it was clear since the early 1990s that commitment to human rights was embedded in Member State action implementing (or derogating from) EU law.[22] Similarly, it was made plain during the Charter's drafting process that its codification of fundamental rights was intended neither to create new rights nor to expand

[22] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* EU:C:1991:254.

the Union's competence to police human rights in the Member States. Indeed, Article 51 of the Charter concerning the Charter's scope had been specifically redrafted ahead of the attribution of binding effect to the Charter to ensure that it was not interpreted as a new legal basis for EU action.[23] Thus, while the increase in mentions represented in figure 3.3 does not tell us whether reliance on the Charter has been successful, it does suggest an important *change* in the self-perception of the EU as an organisation with human rights competences. Crucially, considering that this pattern is less clear in both preliminary references and actions for annulment, it is suggestive of a greater impact of the Charter on non-judicial EU institutions than on courts.

IV. INTERPRETING THE FINDINGS: HUMAN RIGHTS AS AN EXAMPLE OF COOPERATIVE FEDERALISM

Having documented the presence of human rights in the language of the CJEU's jurisprudence over the years, in this section I aim to contextualise my findings by reference to existing literature and case law and invite further reflection about their meaning.

1. Is the CJEU is a human rights court? Since when?

First, it is necessary to answer the questions with which I set out: is the Court a human rights organisation and, if so, when did it become one? The CJEU clearly is, in one sense, a human rights court: the findings show that thousands of cases with a human rights relevance have been decided by the Court over the years, thus making clear its role as a significant actor in human rights litigation in Europe.

At the same time, my analysis has shown that CJEU case law remains quantitatively limited overall when viewed in the context of the Court's full docket. My search returned only 12.60% of human rights judgments in the

[23] Frantziou (n 199), para 6.

CJEU docket across different procedures over time. However, this figure does rise to 25.87% when looking at the case law after the entry into force of the Charter and, as noted in the earlier sections, it reaches well above 30% in more recent years within the preliminary reference procedure (the procedure that, in turn, occupies the vast majority of human rights references in absolute terms). This confirms that human rights are becoming an increasingly significant element of CJEU case law. But trying to pinpoint when that shift occurred – eg, by positing the Charter as its clear starting point – is not a simple task. Instead of radical changes, both the full chronology of preliminary rulings and the more focused analysis of 'constitutional turning points' showed consistent growth over the years. Despite being heavily supported by the binding Charter, this growth cannot – contrary to my own initial assumptions – unequivocally be considered the starting point of a more hands-on engagement with human rights in EU litigation.

Furthermore, the steady increase in human rights references is clear in both of the privately originating actions I researched: actions for annulment and the preliminary reference procedure. This suggests that, aside from the CJEU, a language of human rights has increasingly been used by and vis-à-vis individuals and national courts. The only area where the binding Charter made a stark difference was in actions for a failure to fulfil obligations. The almost exclusively Charter-generated jurisprudence against EU Member States raises an important question about how we can understand the different trajectory of human rights litigation within the EU legal order, and about what *kind* of human rights court the CJEU has been and might become in the future. The increase in mentions of human rights in actions for a failure to fulfil obligations suggests that there is a difference between procedures involving *interpretation* and procedures involving the *pronouncement of a violation* of EU obligations. The pronouncement of a violation may be seen as a characteristic of a dual or competitive federal model, where supranational institutions start to usurp traditionally local competences. However, the small scale of this pattern (under 7% of the

current case law) is not necessarily – or not yet – robust enough to be viewed as indicative of such a tendency. At the same time, the steady increase in actions seeking the interpretation of EU law through Article 263 and, particularly, the much more frequently litigated Article 267 TFEU, shows that there is a rising awareness of human rights within different facets of EU law and a concomitant expectation of respect and protection of these rights in its development. The preliminary reference procedure is an especially noteworthy aspect of these findings, as its inherently relational character (always involving domestic courts as well as the CJEU) invites a series of more specific conclusions about the relationship between judicial actors in the EU.

2. *Preliminary references and human rights: an unexpected example of cooperative federalism?*

While key cases in the context of actions for annulment, both before and after the Charter, have been viewed as landmarks of EU human rights law for improving accountability and more fully integrating human rights protection within EU legislation,[24] the established EU constitutional law narrative concerning preliminary references has been different. Under this procedure, human rights have tended to be seen, both in academic and in judicial accounts, as an area of irreconcilable conflict between domestic ccourts and the CJEU.[25]

[24] See, for a typical example of this, the *Kadi* litigation: Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities* EU:C:2008:461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Kadi* EU:C:2013:518. For a critical analysis and assessment of the scope of the Court's engagement with human rights in this line of case law, see Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105:4 AJIL 649.

[25] For an in-depth overall analysis of these conflicts see Torres Pérez (n 9). More recently, Bobić (n 9); Dana Burchardt, 'Backlash against the Court of Justice of the

The findings from the above research invite a re-examination of this narrative.

On the one hand, when viewed through the lens of important cases at the EU level, both before and after the entry into force of the Charter, such as *Mangold*,[26] *Melloni*,[27] and *Dansk Industri*,[28] an understanding of human rights as a cause of deep disagreements and antagonism between the national and the EU level would appear to have strong support. In each of these cases, the Court of Justice developed, and imposed through the principle of primacy, a version of human rights that was different from that of its national constitutional counterparts and, as such, difficult for them to absorb in their own reasoning. In *Mangold*, the CJEU found that non-discrimination on grounds of age – a right only recognised in the Portuguese constitution at the time of its proclamation by the Court – enjoyed full protection in the EU legal order, giving it direct effect against states as well as private parties.[29] In *Melloni,* it restricted the concept of a fair trial under the Spanish constitution to a lower uniform standard, thereby limiting the protection against *in absentia* trials within the scope of EU law.[30] In *Dansk Industri*, it

EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21:S1 German Law Journal 1. On the cases detailed in my analysis, more specifically: Leonard Besselink, 'The Parameters of Constitutional Conflict after *Melloni*' (2014) 39:4 EL Rev 531, 545; Elena Gualco, '"Clash of Titans" 2.0. From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case' (2017) 2:1 European Papers 223; Editorial comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43:1 CML Rev 1; Editorial Comments, 'The scope of application of the general principles of Union Law: An ever expanding Union?' (2010) 47:6 CML Rev 1589.

[26] Case C-144/04 *Mangold v Helm* EU:C:2005:709.

[27] Case C-399/11 *Melloni v Ministerio Fiscal* EU:C:2013:107.

[28] Case C-441/14 *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* EU:C:2016:278.

[29] *Mangold* (n 26) para 74.

[30] *Melloni* (n 27) para 60.

held that the principle of non-discrimination applied in spite of concerns over legal certainty and legitimate expectations, which also had a constitutional status.[31] In turn, these – and similar – decisions, attracted (in)famous responses at the domestic level, with extra-judicial calls to 'stop the European Court of Justice',[32] as well as highly confrontational rulings when the aforementioned CJEU decisions returned to the national level, in cases like *Honeywell*[33] and *Ajos*.[34] These clashes have been relatively widespread, as Martinico has highlighted, with more recent examples in Austria, France, and Italy.[35]

In light of this experience, it is clear that constitutional conflicts in the EU have remained rife in the field of human rights, leading logically to an understanding of this field as a lingering example of a competitive, early

[31] *Dansk Industri* (n 28) paras 33-35.

[32] Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice,' EU Observer, 10 September 2008, <https://euobserver.com/opinion/26714> accessed 14 March 2023.

[33] *Honeywell* – BVerfGE 126, 286 (Az: 2 BvR 2661/06); analysed in Christoph Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7:1 EuConst 161; and Mehrdad Payandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualising the Relationship between the German Constitutional Court and the European Court of Justice' (2011) 48:1 CML Rev 9.

[34] Danish Supreme Court, judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A*; analysed in Rask Madsen, Mikael Olsen, Henrik Palmer, and Urška Šadl, 'Competing supremacies and clashing institutional rationalities: the Danish supreme court's decision in the Ajos case and the national limits of judicial cooperation' (2017) 23 European Law Journal 140.

[35] Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath (2019) 15 EuConst 731; see also Daniele Gallo, 'Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure' (2019) 25 European Law Journal 434.

federal model to be distinguished from a broader tendency towards a cooperative federal constitutionalism between the Union and the Member States.[36]

On the other hand, while a numerical study such as the present one cannot serve fully to *explain* these conflicts (nor does it suggest that they are unimportant), it allows us to question their generalisability. The unknown, hidden, and perhaps not-very-interesting cases, which make up the bulk of any court's docket, become the central feature of a possible counter-claim: the idea of deep or irreconcilable conflict is incompatible with the overall patterns of the case law presented in the data concerning Article 267. Whereas constitutional conflicts may remain present in EU human rights law, the gradual increase in human rights mentions in preliminary references suggests a more complicated position of contestation, but not of outright defiance. This position could be viewed as much more akin to Schütze's analysis of the gradual emergence of a cooperative federal relationship between domestic and EU authorities (in this case, national and EU courts).[37]

Two reasons based on the data on the preliminary reference procedure that I have presented above suggest that this is the case: first, references have been consistently growing over time, which indicates at least a degree of acceptance between national courts and the CJEU. A narrative of strong antagonism or dualism could be expected to result in a patchier overall pattern of references, including clearer drops in human rights litigation, e.g., following CJEU rulings viewed as problematic. At these times, domestic courts may choose not to refer cases, despite their right and, for higher courts, obligation to do so under EU law.[38] There is no such evidence within the chronology presented above. Second, the fact that there has been a steady, year-on-year increase in human rights litigation, which has become

[36] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

[37] Ibid, 265-284.

[38] Case C-224/01 *Köbler v Republik Österreich* EU:C:2003:513, paras 118 ff.

faster since the entry into binding force of the Charter, suggests that a body of litigants and lawyers are becoming more aware of EU human rights, and actively seek their protection through the preliminary reference procedure. While this is a rather obvious observation when looking at the dataset, it can serve to soften academic critiques of the qualities of EU human rights integration as purely symbolic and lacking in democratic participation.[39] Even acknowledging that the aforementioned patterns only show *expert* awareness of EU human rights law, the consistent increase of human rights mentions in the Article 267 process over time indicates that human rights are becoming a valued element of EU law, despite their parallel, and often clearer, protection at the national level. This supports the perspective of a more diffuse, multi-focal model of human rights integration, rather than a strictly dualistic one.

What does (or might) this challenge to the conflict narrative change in our understanding of human rights in the EU legal order? While one ought to be careful about drawing conclusions from the data without a more in-depth, qualitative case sampling that could build detail into the present dataset, the following suggestions can be made for further reflection and academic investigation. First, the very use of the language of human rights in EU litigation is important. Since the CJEU and national courts are necessary interlocutors within the preliminary reference procedure, the increase in the human rights case law witnessed over time could be associated with greater openness to mutual understanding on human rights issues by judicial actors both at the national and at the EU level. After all, rational actors usually avoid the pointless exercise of addressing themselves to others

[39] E.g., Jo Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9:1 ELJ 45, 58 ff.; Julio Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 Maastricht Journal of European and Comparative Law 65, 74.

in a language that they do not, at least partly, understand.[40] Second, taken a step further, these findings appear to confirm with some evidentiary force a thesis propounded in different iterations by von Bogdandy and Lenaerts, namely that human rights are not necessarily or merely a cause of contestation in EU law, but also an area where basic agreement on minimum guarantees is likely, even in the face of occasional conflict.[41] Indeed, as Ana Bobìc has observed by examining post-Charter case law, there is evidence of domestic courts embracing the Charter as a benchmark for their own human rights review, with the German Constitutional Court in its *Right to Be Forgotten II* ruling being counted as one of several examples of this tendency.[42] Coupled with the existence of a healthy body of preliminary references, this competition for the interpretation of EU human rights need not be viewed as a sign of an impending rights revolution by domestic courts. Rather, it could be understood as an inherent feature of a *de facto* federal judicial architecture.

V. Conclusion

EU human rights law does not (yet?) amount to a quantitatively sufficient part of the CJEU docket to posit human rights as the Court's main function. However, with a steady increase in cases with human rights dimensions, and approximately a third of the cases now coming before the Court using

[40] As famously and succinctly explained by Jacques Derrida in 'Force of Law: The "Mystical Foundation of Authority"' in David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (eds), *Deconstruction and the possibility of justice* (Routledge 1992) 3.

[41] Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49:2 CML Rev 489; Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779.

[42] German Bundesverfassungsgericht, Case 1 BvR 276/17 *Right to Be Forgotten II*, Decision of 6 November 2019; Bobić (n 9), chapter 7, section 4.1.1.2.

human rights language in some form, it is clear that human rights are becoming a prominent feature of EU litigation. This article has been able to evaluate, for the first time through a legal lens, the trajectory of human rights litigation before the Court and, particularly, the trajectory of references for a preliminary ruling with a human rights relevance. Through a full systematic chronology of references for a preliminary ruling mentioning human rights, as well as an analysis of the presence of human rights within all three main EU actions in key eras of EU integration between 1957 and 2023, it demonstrated the spread and progression of human rights in EU case law over the years.

This approach has yielded surprising results. The remarkably steady increase of preliminary references with a human rights relevance over the years challenges the core narrative about the relationship between domestic courts and the CJEU in this field as one of contestation and dualism. It suggests that a more cooperative and gradual model of incorporation of human rights within EU law has been at play instead. While the dataset does not in itself permit an assessment of the Court's engagement with human rights through the ground-breaking rulings that may be handed down from time to time, it allows logical links and comparisons between different eras of EU integration to be drawn, as well as between the different institutions and actors involved in EU human rights protection. In uncovering these links or patterns, the article suggested that EU human rights law already enjoys a considerable degree of acceptance by the principal addressees of the EU human rights system: individuals falling within the scope of EU law and national courts, which remain the principal forum within which human right arguments are deployed. In turn, the scale and key patterns of the CJEU's human rights docket generally align with what might be expected of a process of gradual federalisation of EU human rights law. They can thus be used to question or even displace a view of EU human rights as a site of irreconcilable conflict and exceptionalism and to place human rights more confidently within a narrative of incremental federal integration.

CONCLUSION: ARTICLE 267 TFEU AND EU FEDERALISM

Robert Schütze*

Is the relationship between the EU judiciary and the Member State judiciaries a federal one; and if so, is it 'dual' or 'cooperative'? Federalism generally means *duplex regimen*: within a Union of States, the tasks of government are divided between two levels of government each of which endowed with its own institutions.[1] This institutional duplication will, in its most extensive form, apply to all three branches of government: the legislature, the executive, and the judiciary. With regard to the judicial function, two institutional judiciaries may thus simultaneously coexist. A Union judiciary and a State judiciary each interpreting and applying the law within their respective jurisdiction; and depending on how these jurisdictions are divided, two federal models can be distinguished.

Within a dual federal arrangement, the judicial powers of the Union judiciary and the State judiciary are divided into blocks of exclusive power. The federal judiciary and the State judiciary are co-equals and operate independently in their separate spheres. Union courts interpret (and apply) Union law, whereas State courts interpret (and apply) State law. Such a dual federal system can, with some modifications,[2] be found in the history of the United States. For the latter has established a complete – federal – court system designed for the adjudication of federal law, and which runs, as a

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[1] For a general overview of the idea of federalism, see: Robert Schütze, 'Political Philosophy of Federalism', in Rüdiger Wolfrum, Rainer Grote, & Frauke Lachenmann (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2023).

[2] For a good analysis of US American judicial federalism, see: Thomas Baker, 'A Catalogue of Judicial Federalism in the United States' (1995) 46 South Carolina Law Review 835.

second set of judicial institutions, in parallel to the State court system of each of Member States. The US federal court system is thereby elaborate and extensive: for in addition to the Supreme Court at its apex, there exist 'inferior' federal courts in 94 geographic districts and above them 13 federal appellate courts.[3]

What about Europe's 'judicial federalism'?[4] The EU has traditionally relied on only one single court: the Court of Justice of the European Union (CJEU).[5] What explains this institutional minimalism? When the European Communities were founded, the existence of a single court may have seemed natural in light of their 'international' origins and their limited 'sectorial' scope. In *Humblet*, the Court, in a dualist spirit, thus still insisted that 'the Treaties are based on the principle of the strict separation between the powers of the Court on the one hand and of the national courts on the other' as 'there is no overlapping of the jurisdiction assigned to the different

[3] The US Constitution had granted Congress the express competence to establish these inferior courts in Article III, section 1 (emphasis added): 'The judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*.'

[4] On the idea of judicial federalism in the context of the European Union, see: Jeffrey C Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 American Journal of Comparative Law 421; Jan Komárek, 'Federal Elements in the Community Legal System: Building Coherence in the Community Legal Order' (2005) 42 Common Market Law Review 9; Michael Wells, 'Judicial Federalism in the European Union' (2017) 54 Houston Law Review 697; and most recently: Jan Zglinski, 'The new judicial federalism: the evolving relationship between EU and Member State courts' (2023) 2 European Law Open 345.

[5] The CJEU has, however, since the Single European Act, been internally divided into two separate courts: the Court of Justice and the General Court. Article 19 (1) TEU states today that '[t]he Court of Justice of the European Union shall include the Court of Justice, the general Court and specialised courts.' There currently exist no specialised EU courts.

courts'.[6] Yet with the greater widening and deepening of the EU Treaties, this vision quickly proved untenable; and the Union legal order soon recruited the national courts in the interpretation and application of EU law.

Through the principles of direct effect, indirect effect, and Union primacy, national courts are obliged to be involved in (almost) all 'European' judicial activities – and transformed every single national court into a 'European' court.[7]

This *functional* integration of national courts into the European judiciary has, with the Lisbon Treaty, been textually endorsed in Article 19 TEU.[8] However, the lack of an *institutional* integration has, at the same time, also revealed major weaknesses.[9] For in the absence of Union harmonisation, the Union must essentially 'piggyback' on the national judicial systems.[10] For it must generally 'take' national courts as it 'finds' them. The Union legal order

[6] Case 6/60 *Jean-E Humblet* v *Belgian State* EU:C:1960:48, 572.

[7] But see: Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* EU:C:1987:452, paras 15-17: '[National] courts do not have the power to declare acts of the [Union] institutions invalid. (…) Divergences between courts in the Member States as to the validity of [Union] acts would be liable to place in jeopardy the very unity of the [Union] legal order and detract from the fundamental requirement of legal certainty. (…) Since Article [263] gives the Court exclusive jurisdiction to declare void an act of a [Union] institution, the coherence of the system requires that where the validity of a [Union] act is challenged before a national court the power to declare that act invalid must also be reserved to the Court of Justice.'

[8] Article 19(1) TEU states: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' See also: Case C-619/18 *Commission* v *Poland* EU:C:2019:531, where the Court found that Article 19 TEU 'entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice' (ibid., para 47).

[9] For this point, see especially Wells (n 4), 699: 'The EU's approach to judicial federalism, with its heavy reliance on member state courts, will retard the political integration envisaged by the Treaty.'

[10] Koen Lenaerts *et al*., *EU Procedural Law* (Oxford University Press 2014), 107.

has nonetheless emphasised that although 'the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law';[11] and it has, therefore, specifically insisted on the need to institutionally guarantee national judicial independence.[12] Yet such institutional (or procedural) requirements have remained piecemeal; and the absence of a formal appeal or review procedure connecting the European Court with the national judiciaries has further limited potential judicial control mechanisms exercised by the centre.

The main road to collaboration and control remains today the preliminary reference procedure set out in Article 267 TFEU. This procedure establishes a voluntary and horizontal constitutional nexus between the central and the decentralised adjudication of European law. Where national courts encounter problems relating to the interpretation of Union law, they could ask 'preliminary questions' to the European Court. The interpretative questions are 'preliminary', since they *precede* the final application of European law by the national court. Importantly, then: the European Court will not 'decide' the case. It is only *indirectly* involved in the judgment delivered by a national court. The decision to refer to the European Court of Justice (ECJ) thereby lies entirely with the national court – not the parties

[11] *Commission* v *Poland* (n 8) para 52.

[12] Case C-64/16 *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas* EU:C:2018:117, paras 42-44 (emphasis added): 'The guarantee of independence, which is inherent in the task of adjudication is required *not only at EU level (…) but also at the level of the Member States as regards national courts.* The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU[.]'

to the dispute;[13] and the European Court's rulings are therefore, in turn, formally addressed to the national court requesting the reference: 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.[14] This preliminary reference procedure constitutes today, as in the past, the cornerstone of the Union's judicial federalism. This federalism is decidedly *cooperative* in nature, because the European Court and the referring national court here actively collaborate in the adjudication of a single case.[15]

The various articles in this special issue have dealt with some of the more controversial problems and questions that this procedure has generated over the past decades. For example: should there always be at least one court within each national system to refer to the ECJ, and if not, under what conditions can the obligation in Article 267(3) be suspended (François-Xavier Millet)? What, in fact, are the *de jure* and *de facto* effects of a preliminary ruling beyond the national court that asked the question (Giuseppe Martinico); and will these effects be *ex nunc* or *ex tunc* (Lorenzo Cecchetti)? What happens if the Court subsequently changes its mind on an important point of interpretation (Daniel Sarmiento); and why is it that Article 267(1) has doctrinal troubles with the European Court declaring

[13] Case C-2/06 *Kempter* v *Hauptzollamt Hamburg-Jonas* EU:C:2008:78, para 41: '[T]he system established by Article [267 TFEU] with a view to ensuring that [Union] law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties'.

[14] Case 52/76 *Benedetti* v *Munari* EU:C:1977:16, para 26: 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.

[15] Already in 1965, the ECJ spoke of the 'judicial cooperation under [Article 267] which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision', see: Case 16/65 *Firma G Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1965:117, 886.

national laws incompatible with European Union law (Fernanda G. Nicola, Cristina Fasone and Daniele Gallo)?

The rise of human rights related issues in preliminary references (Eleni Frantziou) here poses a particularly urgent challenge: for once EU fundamental rights become a general standard of review for most national law,[16] the number of preliminary rulings may further, and dramatically, increase and with it the pressure on the ECJ as the sole European Court at the other end.

What can be done here? One solution might modestly point to the General Court.[17] But with the latter having recently broken into the four-digit mark of registered cases,[18] some more radical solution might ultimately have to be found for the future European judicial federalism. One possibility is, of course, to *restrict* the number of preliminary references by transforming the Article 267 procedure into an appeal procedure.[19] Yet if one wanted to keep – if not even increase – the judicial cooperation between the European and the national level, a broader institutional base for the European judiciary may prove unavoidable.

The two oft-discussed options in this context are that of 'regional' European courts and that of 'specialised' European courts. The former solution would, *mutatis mutandis*, import the US American model of 'inferior' federal courts into the EU legal order and has been said to suffer, in the European context,

[16] On the EU doctrine of incorporation, see: Robert Schütze, 'European Fundamental Rights and the Member States: From 'Selective' to 'Total' Incorporation?" (2012) 14 Cambridge Yearbook of European Legal Studies 337.

[17] See: Article 256(3) TFEU. On this prospect, see recently: Davor Petrić, 'The preliminary Ruling procedure 2.0' (2023) 8 European Papers 25.

[18] At the time of writing, the General Court has registered 1100 cases for 2023, see: Case T-1100/23 *IN tIME Express Logistik* v *EUIPO (inTime Agile Logistics)*.

[19] For a discussion of the pros and cons here, see: Kieran Bradley, 'Judicial Reform and the European Court: Not a Numbers Game', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021), 156 at 182-184.

from a number of shortcomings.[20] By contrast, the creation of specialised European courts, when endowed with the power to give preliminary rulings,[21] could here kill two (very) big birds with one stone. For it could not only relieve the ECJ of its quantitative burden (mainly caused by preliminary references!), the creation of specialised jurisdictions may also help improve the argumentative and forward-looking quality of European judgments, especially in such demanding technical areas as intellectual property or corporate taxation. But these are matters that themselves deserve a special conference and a special EJLS issue in the future. They would open a new chapter in the judicial federalism of the EU.

[20] Ibid., 182.

[21] That move would however require an amendment to the EU Treaties. For while Article 257 TFEU allows the Union, under the ordinary legislative procedure, to 'establish specialised courts attached to the General Court to hear and determine at first instance certain classes of actions or proceedings brought in specific areas', a transfer of Article 267-jurisdiction to such specialised courts is unlikely to be covered by the provision.