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

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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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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.