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.

* Professor of EU Law and Jean Monnet Chair at Luiss University, Rome

† Postdoctoral Research Fellow in European Union Law at Luiss University, Rome.

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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.