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

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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.