Articles

The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity

By Sarah Verstraelen[*]

A. Introduction

Although the temporal effects of judicial decisions have not completely escaped the attention of academic reviewers, the research on this topic is far from thorough. Most research focuses on the Court of Justice of the European Union (CJEU),[1] thereby ignoring the temporal effects of judicial decisions of national or constitutional courts. This lack of interest is remarkable given the interaction between the national and European level.

The national courts of the twenty-seven Member States employ a variety of approaches to modulate the temporal effects of their decisions. Generally, the national legislature sets forth the framework on the temporal effect of judicial decisions, thereby opting for either an effect *ex nunc*, *ex tunc*, or *pro futuro.* Each category has its merits and drawbacks; it is up to the legislature to strike the optimal balance.[2]

In some cases, however, the mere application of the legislature's chosen balance will not have the desired effect. Consequently, constitutional courts will often deviate from the legislative framework by altering the temporal effect of their decisions, even if the national legislature does not explicitly grant them the power to do so. An overview of the decisions of different constitutional courts indicates that their case law concerning the temporal

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[1] *See*, *e.g.*, Frank Balmes & Martin Ribbrock, *Die Schlussanträge in der Rechtssache Meilicke—Vorschlag einer zeitlichen Begrenzung der Wirkung des Urteils "auf Zuruf" der Mitlgiedstaaten?!*, 1 BETRIEBS-BERATER 17 (2006); 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*, 48 COMMON MKT. L. REV. 1985 (2011); T. Koopmans, *Retrospectivity Reconsidered*, 39 CAMBRIDGE L.J. 287 (1980); Michael Lang, *Limitation of the Temporal Effects of Judgments of the ECJ*, 35 INTERTAX 230 (2007); Roman Seer, *The Jurisprudence of the European Court of Justice: Limitation of the Legal Consequences?*, 2006 EUR. TAX'N 470; M. Waelbroeck, *May the Court of Justice Limit the Retrospective Operation of its Judgments?*, 1 Y.B. EUR. L. 115 (1981); Ariane Wiedmann, *Non-Retroactive or Prospective Ruling by the Court of Justice of the European Communities in Preliminary Rulings According to Article 234 EC*, 5/6 EUR. L.F. 197 (2006).

[2] *See infra* Part B.

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effects of these decisions share common characteristics. Regardless of the basic temporal rule, every national constitutional court aspires for a certain degree of flexibility.[3]

The tension between the CJEU's case law on the temporal effect of preliminary rulings and the national concern for flexibility merits attention. The CJEU's interpretative judgments have an effect *ex tunc*, which entails that the given interpretation clarifies and defines the meaning and scope of the Union rule as it must be or ought to have been understood and applied from the time of its entry into force.[4] The CJEU laid down strict conditions to limit this retroactive effect. In recent cases, the CJEU made it very clear that only the CJEU may limit the temporal effect of an interpretative judgment. Given the important consequences of preliminary rulings in the national legal order, we must examine the extent to which the more strict case law of the CJEU can be reconciled with the need for flexibility.[5]

B. The Temporal Effect of Judicial Decisions

I. Active Role of a Judge

"*Les juges de la nation ne sont . . . que la bouche qui prononce les paroles de la loi.*"[6] These famous words of Montesquieu have been criticized and debated extensively. It is clear from these discussions that a simple syllogistic argument—the automatic application of a general rule to a specific case—is not feasible. Application entails interpretation, and by interpreting legislation, judges often create law.[7]

The active role of judges in constitutional courts is more outspoken than the active role of ordinary courts. The notion of *législateur négatif* (negative legislator) has become well-known. When constitutional courts annul or void an unconstitutional provision, the court acts as a legislator—it removes a legal provision from the legal order so that its application

[3] *See infra* Part C.

[4] *See*, *e.g.*, Case 24/86, Blaizot v Univ. of Liège, 1988 E.C.R. 379, para. 27; Case C-347/00, Barreira Pérez v. INSS, 2002 E.C.R. I-08191, para. 44; Case C-453/02, Finanzamt Gladbech v. Linneweber, 2005 E.C.R. I-01131, para. 41; Case C-292/04, Meilicke v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835, para. 34.

[5] *See infra* Part D.

[6] CHARLES DE SECONDAT MONTESQUIEU, OEUVRES DE MONSIEUR DE MONTESQUIEU: DE L'ESPRIT DES LOIX 391 (1764) (translation: The national judges are no more than the mouth that pronounces the words of the law.).

[7] *See* WALTER VAN GERVEN, HET BELEID VAN DE RECHTER 72 (1973); *see also* Pascale Deumier, *Création du droit et rédaction des arrêts par la Cour de cassation,* 50 ARCHIVES DE PHILOSOPHIE DU DROIT 49, 53–54 (2007); François Ost, *L'heure du jugement. Sur la rétroactivité des décisions de justice. Vers un droit transitoire de la modification des règles jurisprudentielles, in* TEMPS ET DROIT. LE DROIT A-T-IL POUR VOCATION DE DURER? 91, 94 (François Ost & Mark Van Hoecke eds., 1998).

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is no longer possible. This decision has an *erga omnes* effect, the same general character that the adoption of the provision possessed.[8]

In fact, the case law of constitutional courts even opens the possibility to discern a function of *législateur positif* (positive legislator).[9] Constitutional courts often hand directions and instructions to the legislator,[10] and sometimes even act as an actual legislator. Good examples of this active role are the tools of constitutional interpretation[11] and the courts' precedents regarding legislative omissions.[12]

Therefore, we can conclude that judges are not just "*la bouche de la loi*."[13] They often make drastic changes by creating new rules or by removing them. A retroactive application of such new rules in old cases creates significant uncertainty. This is especially true in cases where the alterations were unforeseeable. This is why the temporal effect of a judicial decision needs to receive due attention.

This article will focus on the decisions of national constitutional courts. This restriction is made because constitutional courts often have the explicit competence to decide upon the

[8] *See* ALLAN R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators in Comparative Law*, *in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY 1, 10 (2011); Hans Kelsen, *La garantie juridictionnelle de la Constitution*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER 197, 224–25 (1928); Koopmans, *supra* note 1, at 296–99; Ost, *supra* note 7, at 96; François Rigaux, *Une machine à remonter le temps: la doctrine du precedent, in* TEMPS ET DROIT. LE DROIT A-T-IL POUR VOCATION DE DURER? 55, 61 (Francis Ost & Mark Van Hoecke eds., 1998).

[9] For a comprehensive analysis see Denys de Béchillon, *Comment encadrer le pouvoir normatif du juge constitutionnel?*, 24 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 78, 78–112 (2008) and ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS (2011).

[10] *See* CHRISTIAN BEHRENDT, LE JUGE CONSTITUTIONNEL, UN LÉGISLATEUR-CADRE POSITIF (2006).

[11] See recently for Belgium: Cour constitutionnelle [CC] [Constitutional Court] decision No. 90/2012, July 12, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Oct. 8, 2012, 46,880; Cour constitutionnelle [CC] [Constitutional Court] decision No. 87/2012, June 28, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 23, 2012, 49,606; Cour constitutionnelle [CC] [Constitutional Court] decision No. 85/2012, June 28, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 23, 2012, 49,600; Cour constitutionnelle [CC] [Constitutional Court] decision No. 80/2012, June 28, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium] Aug. 23, 2012, 49,587; Cour constitutionnelle [CC] [Constitutional Court] decision No. 77/2012, June 14, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 17, 2012, 48,715. For France see: Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-258, June 22, 2012, J.O. 10356; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-257, June 18, 2012, J.O. 10181; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-253, June 8, 2012, J.O. 9796; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-242, May 14, 2012, J.O. 9096; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-236, Apr. 20, 2012, J.O. 7197.

[12] BREWER-CARÍAS, *supra* note 8, at 125–72.

[13] Translation: Mouth of the law.

temporal effect of their decisions. It seems as though legislators clearly understand the possible implications of these decisions and thus grant the constitutional court the possibility to modulate them in time. Therefore, these explicit rules can be compared.

II. A Difficult Assessment

Judges can give decisions three different types of temporal effect: An effect *ex tunc,* an effect *ex nunc*, or an effect *pro futuro*. Within each of these three categories, two important legal principles interact: The principle of legal certainty and the principle of legality.[14] The balance between these two principles shifts depending on the chosen category. It is for the legislature to decide which one of these three temporal effects becomes the general rule.

Establishing a general temporal rule, however, does not imply that every constitutional decision will always follow that rule. In general, the legislator provides for the opportunity to diverge from the general rule when the constitutional court deems it necessary.[15] It will become clear, that to a large extent cross-fertilization between the three categories takes place.

When a decision of a constitutional court has an effect *pro futuro*, the constitutional judge postpones the annulment or rescission until a later date. Courts will continue to apply the contested norm—although it is unconstitutional—to cases and situations that occur between the day of the pronouncement of the judgment and the later date indicated by the court. Despite the judgment, the rule in force is simply further applied and the principle of legal certainty remains untouched. In contrast, it is clear that the principle of legality is heavily infringed.

The temporal effect *pro futuro* has not been identified as the general rule in any legal order. Thus, the effect is not thoroughly reviewed in this article. Nonetheless, the merits of this category should not be underestimated. Constitutional courts that annul or rescind norms often have the competence to postpone their decision or the effects of their decision to a later date. It should be noted that the power of constitutional courts to postpone the effects of an annulment or rescission confirms and enhances the law-making

[14] *See* Ost, *supra* note 7, at 95.

[15] See the comparative study FRIEDHELM HUFEN, *Partie 2: Rapports sur la situation dans les différents pays*, *in* LIMITATION DES EFFETS DE DÉCISIONS JURIDICTIONNELLES EN CAS DE CONSTATATION DE L'INCONSTITUTIONNALITÉ DE NORMES JURIDIQUES (2008), *available at* http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/675967.pdf?__blob=publicationFile&v=3.

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power of these judges. After stating that a provision is unconstitutional, the court imposes, *erga omnes*, a further application.[16]

An *ex tunc* effect removes the unconstitutional norm retroactively from the legal order; it is as if the norm never existed, and consequently never created any legal consequence. The annulment has a retroactive effect up to the date that the norm came into force.[17]

It is obvious that this retroactive disappearance is nothing more than fiction. The norm did exist and it did create consequences. This shows that in this category of temporal effect, the principle of legal certainty is shoved aside to the benefit of formal legality. Sacrifices are made because the principle of legality is so highly valued. An *ex tunc* rule negatively affects the legitimate expectations of individuals, who need to know the law so they can accommodate their behavior accordingly. This temporal effect therefore negates the principle of foreseeability of legislation. A regulatory gap is created. When the annulment takes place many years after the rule's entry into force, it often becomes difficult for the legislature to fill this gap. Finally, from the authorities' perspective, the retroactive effect is often problematic when state finances are involved. For example, imagine the annulment of a tax law resulting in the reimbursement of taxes already paid.[18]

The majority of EU Member States' legislatures opted for a temporal effect *ex nunc*.[19] Here, a fair balance is struck between the principles of legal certainty and legality. When a constitutional judge rescinds a rule, the decision has an immediate effect, beginning the moment of the judgment and continuing onward. The unconstitutional rule will still be applied in all cases and circumstances that occurred prior to the judgment. In contrast, from the judgment onward this unconstitutional rule disappears from the legal order and

[16] *See* BREWER-CARÍAS, *supra* note 8, at 94–102; Sabien Lust & Patricia Popelier, *Rechtshandhaving door het Arbitragehof en de Raad van State door de uitoefening van de vernietigingsbevoegdheid: de positieve en negatieve bijdrage aan de rechtsvorming,* 34 RECHTSKUNDIG WEEKBLAD 1210, 1212–13 (2002); Rigaux, *supra* note 8, at 71–72.

[17] *See* Ost, *supra* note 7, at 96.

[18] See also in this respect Joubert v. France, ECHR App. No. 30345/05 (July 23, 2009), http://hudoc.echr.coe.int; Zielinski v. France, ECHR App. No. 34173/96, 1999-VII EUR. CT. H.R. (Oct. 28, 1999) http://hudoc.echr.coe.int; Pressos Compania Naviera S.A. v. Belgium, ECHR App. No. 17849/91 (July 3, 1997) http://hudoc.echr.coe.int; Ost, *supra* note 7, at 95.

[19] Out of all the Member States that provide for a certain degree of judicial review of statutes, hereby excluding Great Britain and the Netherlands, 64% opted for a general *ex nunc* effect. Only 24% attached to these judicial decisions a retroactive effect. The remaining 12% do not follow one general rule, but impose a temporal limitation on a case by case basis because of the *inter partes*-effect of their decisions. FRIEDHELM HUFEN, THE RESTRICTION OF THE EFFECTS OF JUDGMENTS IN CASES OF ASCERTAINMENT OF THEIR UNCONSTITUTIONALITY 8 (2008), *available at* http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/Summary.pdf?__blob=publicationFile&v=3.

will therefore not be applied to situations and cases which will occur after the judgment. An equilibrium arises between the principle of legal certainty and that of legality; the former dominates the past and the latter decides the future.[20]

To avoid confusion, this article will use a different terminology to designate the decision of the constitutional judge depending on the category of temporal effect. By doing so, the general rule of the temporal effect, as it was laid down by the legislature, remains unequivocal.

If the legislature opts for an effect *ex tunc*, the judge retroactively *annuls* an act. On the other hand, if an effect *ex nunc* is the general rule, the judge will *rescind* the contested act. Reflecting on this distinction, an annulment upon which the judge imposes an *ex nunc* effect (i.e. by maintaining all the effects up until the day of the pronouncement of the judgment) will have the same consequences as a rescission, although the two terms have different origins.

Annulments and rescissions need to be differentiated from a mere declaration of unconstitutionality. In the latter, the unconstitutional rule does not disappear from the legal order. Depending on whether the declaration has an effect *erga omnes* or an effect *inter partes*, the unconstitutional rule shall no longer be applied within the entire legal order or only in that specific case before the court, respectively. No different labels will be assigned to the temporal effect of these declarations. Instead, the article will simply add *ex tunc*, *ex nunc*, or *pro futuro*.

Because Germany was one of the first countries to impose a retroactive effect on the decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court), the effect *ex tunc* is referred to hereinafter as the German model. Regarding the effect *ex nunc*, Austria sets the example inspired by Kelsen, who stated as early as the nineteen twenties that the decision of a constitutional court cannot have a retroactive effect because of the ensuing grave consequences on legal certainty.[21]

In 2008, the German Federal Ministry of Finance carried out a study regarding "the restriction of the effects of judgments in cases of ascertainment of their unconstitutionality."[22] This study shows that only six Member States depart from the German model. Moreover, "new" Member States,[23] except Estonia, opted for the Austrian

[20] *See* Kelsen, *supra* note 8, at 218–19.

[21] *Id.*

[22] HUFEN, *supra* note 15; HUFEN, *supra* note 19.

[23] Bulgaria (2007), Cyprus (2004), Czech Republic (2004), Hungary (2004), Latvia (2004), Lithuania (2004), Malta (2004), Poland (2004), Romania (2007), Slovakia (2004), Slovenia (2004).

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model. The study observes an increasing trend to waive the retroactive effect of judicial decisions. The recent evolution in France, introducing an *a posteriori* review with an effect *ex nunc*, seems to confirm this trend.[24]

Hereinafter the two models will be further analyzed and compared.

C. Comparative Analysis

I. Effect ex tunc

As stated before, six Member States' legislatures envisioned an effect *ex tunc.* Besides Germany, also Belgium, Ireland, Portugal, Spain and Estonia all opted for a retroactive effect. Additionally, the decisions of the CJEU and the rulings of the European Court of Human Rights (ECHR) follow the German model.[25]

If the legislature chooses the effect *ex tunc* as the general temporal rule, it grants priority to the principle of legality. For example, in Belgium, when the Constitutional Court was established in 1983, the choice for an effect *ex tunc* seemed logical, regardless of the grave consequences for legal certainty. Unconstitutionality was seen as a vice that besmirched the norm from its entry into force.[26] Within Belgian legal scholarship, retroactivity was considered self-evident.[27] As a general rule, the temporal effects *ex nunc* and *pro futuro* were hardly considered by the Belgium legislature. Although comparison was made with Austria, the possibility of a general effect *ex nunc* was quickly discarded because this technique too closely resembled an abrogation which was considered an exclusive competence of the legislature.[28]

[24] *See* HUFEN, *supra* note 19, at 7–8.

[25] *See* Marckx v. Belgium, ECHR App. No. 6833/74, para. 58 (June 13, 1979), http://hudoc.echr.coe.int; *see also* HUFEN, *supra* note 19, at 8.

[26] *See* Advisory Opinion, Parl. Doc. Senate 1980-81, No. 704/1, at 40 (Belg.); Parl. Doc. Senate 1981-82, No. 246/2, at 359–60 (Belg.); Parl. Debates Senate 1982-83, 28 April 1983, 1837-1838 (Belg.); Parl. Doc. Senate 1983-84, No. 579/3, at 5 (Belg.); *see also* Roger Moerenhout, *Art. 8 Bijz.W. 6 januari 1989*, *in* PUBLIEK PROCESRECHT 19 (P. Lemmens et al. eds., 1999).

[27] *See* HENRI SIMONART, LA COUR D'ARBITRAGE: UNE ÉTAPE DANS LE CONTRÔLE DE LA CONSTITUTIONNALITÉ DE LA LOI 195–96 (1988); s*ee also* ÉRIC GILLET, RECOURS ET QUESTIONS PRÉJUDICIELLES À LA COUR D'ARBITRAGE 137 (1985); Ernest Krings, *Beschouwingen over de gevolgen van de door het Arbitragehof gewezen arresten*, 8 RECHTSKUNDIG WEEKBLAD 481, 488 (1986); Marie-Françoise Rigaux, *L'effet rétroactif des arrêts d'annulation rendus par la Cour d'arbitrage et les effets de la norme annulé*, 105 JOURNAL DES TRIBUNAUX 589, 589 (1986).

[28] Parl. Doc. Senate 1981-82, No 246/2, at 359–60 (Belg.); Parl. Doc. Senate 1983-84, No 579/3, at 5 (Belg.); *see also* JAN VELAERS, HET ARBITRAGEHOF 102 (1985).

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1. Difficulties

1.1 Consequences of an Annulment

Given the retroactive effect of the annulment, we must examine what effect the annulment will have on decisions based on the annulled act. Do they also automatically disappear from the legal order as if they never existed?

Paragraph 78 of the Federal Constitutional Court Act (FCCA)[29] states that in case of constitutional incompatibility, the German *Bundesverfassungsgericht* shall declare the law to be null and void. Final decisions based on a rule declared null and void remain unaffected. Nevertheless, the execution of such decisions shall no longer be admissible. This general rule can be departed from in one important situation: New proceedings may be instituted against a final criminal conviction based on a rule which has been nullified.[30]

Similar considerations can be found in the legislation on the Spanish and Portuguese Constitutional Courts. An annulment by the Spanish Constitutional Court does not provide a legal basis for the review of closed proceedings—the judgment having force of *res judicata*—except for criminal proceedings or administrative litigation concerning a sanction procedure where the nullity of the rule applied would entail either (a) reduction of the penalty or sanction, or (b) exclusion, exemption, or limitation of liability.[31] A ruling of the Portuguese Constitutional Court does not automatically grant the possibility to review earlier criminal proceedings. Rulings in cases that have been tried shall stand unless the Portuguese Court rules to the contrary. This is limited to rules concerning penal matters, disciplinary matters, and administrative offenses whose contents were less favorable to the defendant.[32] The Court seldom expands the effects of its ruling to this extent.[33]

[29] Bundesverfassungsgerichts-gesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBL. IS. at 243 (Ger.); Russell Miller & Donald P. Kommers, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court,* 3 J. COMP. L. 194, 197 (2009).

[30] Bundesverfassungsgerichts-gesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBL. IS. at 243, § 79 (Ger.).

[31] Organic Law 2/1979 art. 40 (B.O.E. 1979, 23186) (Spain).

[32] Const. of the Port. Rep., art. 282, sec. 3 (Apr. 2, 1976) (Port.).

[33] Portuguese Report for the XIVth Congress of the Conference of European Constitutional Courts, *Problems of Legislative Omission in Constitutional Jurisprudence*, 57 (June 2008), *available at* http://www.confcoconsteu.org/reports/rep-xiv/report_Portuguese%20_en.pdf.

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Belgium seems to be the odd man out. The temporal effect of an annulment by the Belgian Constitutional Court can be characterized as absolute retroactivity.[34] Not only are pending cases decided without taking into account the unconstitutional norm, the Special Act even provides the possibility to revoke final and conclusive judgments of civil, criminal, and administrative courts.[35] Even decisions by the Belgian Supreme Court (Court of Cassation) and by the Belgian Council of State may be revoked if based on the annulled norm.[36] Furthermore, notwithstanding the expiration of the time limits set by the law, administrative and judicial appeals may still be lodged against acts and regulations of the various administrative bodies when these acts were based on the annulled norm.[37]

Because judgments and regulations are not direct consequences of the unconstitutional act—judges or administrative bodies necessarily intervene—they do not automatically disappear from the Belgian legal order. Instead, further actions and new proceedings are needed.[38] Parliamentary proceedings refer to the principle of "general mutability": all judgments and regulations based on the unconstitutional act may disappear from the legal order, but only if additional action is undertaken.[39]

1.2 The Search for a Well-Balanced Temporal Effect

To counteract the grave consequences which the application of the principle of retroactivity entails, arrangements are made in every six of the Member States and the CJEU, to deviate from this effect *ex tunc* when the courts find this necessary.[40] In order to spare the principle of legal certainty, a modulation of the retroactive effect is sometimes needed. This does not detract from the fact that in all these legal orders, the effect *ex tunc* remains the general temporal rule.

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[34] François Ost & Sébastien Van Drooghenbroeck, *Le droit transitoire jurisprudentiel dans la pratique des juridictions Belges*, 26 REVUE DE DROIT DE L'U.L.B. 1, 6 (2002).

[35] Special Act on the Constitutional Court, of Jan. 6, 1989, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 7, 1989, arts. 10–14, 16, 18, *available at* http://www.const-court.be/en/basic_text/basic_text_law_01.html.

[36] *Id.* at arts. 15, 17.

[37] *Id.* at art. 18.

[38] *See* Parl. Doc. Senate 1983-84, No. 579/3, at 18 (Belg.); Moerenhout, *supra* note 26, at 21; VELAERS, *supra* note 28, at 104; JAN VELAERS, VAN ARBITRAGEHOF TOT GRONDWETTELIJK HOF 298 (1990).

[39] Additional report, Parl. Doc. Senate 1983-84, No .579/3, at 7–8 (Belg.).

[40] *See* HUFEN, *supra* note 19, at 9.

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a) Constitutional or Legal Basis?

The German Federal Constitutional Court (FCC) may decide not to annul an unconstitutional act, preferring to declare the act incompatible with the German Basic Law. This practice arose long before the legislative basis to do so was created in 1970.[41] Because of this declaration of incompatibility, the unconstitutional act is, in principle, no longer applicable. This prohibition of enforcement of the unconstitutional act constitutes the so called "*Anwendungssperre*." The legislature must amend the unconstitutional norm and provide for a retroactive redress so that, for example, in pending cases the new rule can be applied.[42] The FCC made it possible to deviate from this "*Anwendungssperre"* by imposing the continued application of a norm that was declared incompatible.[43] Remarkably, neither the Basic Law nor the Law on the FCC specify the legal consequences of such a declaration of incompatibility. Consequently, the FCC assumed a wide margin of appreciation in deciding on the possible consequences of such a declaration.[44] Spain follows the German example. Without any legal basis, the Spanish Constitutional Court distinguishes an annulment from a simple declaration of incompatibility.[45]

The Portuguese Constitution states that the Court may rule that the scope of the effects of the unconstitutionality or illegality shall be more restricted than the general retroactive effect which its decisions normally carry.[46]

The European treaty maker and the Belgian legislature were more explicit when granting their courts the power to modulate the temporal effects of their decisions. Former article 174, second paragraph, of the Treaty establishing the European Economic Community (EEC Treaty)[47] stated that in the case of regulations, the CJEU shall, if it considers it necessary,

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[41] Bundesverfassungsgerichts-gesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBL. IS. at 243, § 79 (Ger.); *see also* WERNER HEUN, THE CONSTITUTION OF GERMANY 177 (2011).

[42] *See* Holger Schmitz & Philipp Stammler, *Mehr Freiheiten für den nationalen Gesetzgeber! Die Rechtsprechung des EuGH und des BVerfG zur zeitlichen Beschränkung von Urteilswirkungen*, 136 ARCHIV DES ÖFFENTLICHEN RECHTS 479, 485 (2011).

[43] *See* HUFEN, *supra* note 15, at 22; Werner Schroeder, *Temporal Effects of Decisions of the German Federal Constitutional Court, in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

[44] *See* KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT 251 (2010); Schroeder, *supra* note 43.

[45] HUFEN, *supra* note 15, at 27–30.

[46] Const. of the Port. Rep., art. 282, sec. 4 (Apr. 2, 1976)(Port.).

[47] Now the second paragraph of Article 264 of the Treaty on the Functioning of the European Union. Treaty on the Functioning of the European Union, art. 264, Mar. 25, 1957, 83 O.J. 47, 163, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF [hereinafter TFEU].

indicate those effects of the annulled regulation which shall remain in force. Article 174 EEC Treaty inspired the second paragraph of article 8 of the Belgian Special Act which states as follows: "Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court." Evidently, the Constitutional Court has the power to mitigate the effect *ex tunc* by giving its decision an effect *ex nunc*, thus maintaining the effects until the date of the publication of the annulment. It may also impose an effect *pro futuro*, thus provisionally maintaining the effects.

It is important to note that neither the CJEU nor the Belgian Constitutional Court can postpone the annulment. When the norm is found unconstitutional or contrary to EU law, they must annul the contested norm.[48] This does not exclude them from maintaining the effects of the rule until either the day of the annulment or a specific date in the future; that way the legal basis of effects which occurred after the judgment is not the act that was annulled, but the judgment itself.[49]

b) Usage

i) Frequency

It is impossible to imagine the case law of the German FCC without the declarations of incompatibility.[50] Although the so called "*Anwendungssperre*" constitutes the general rule, the Court often imposes an effect *pro futuro*, especially in cases regarding tax law.[51] The Spanish Constitutional Court often declares acts simply incompatible.[52] In contrast, imposing an effect *pro futuro* remains exceptional within the case law of the Spanish highest Court.[53] The Portuguese Constitutional Court too, often limits the retroactive effect

[48] Special Act on the Constitutional Court, of Jan. 6, 1989, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 30, 2010, art. 8; *see also* TFEU, *supra* note 47, at para. 1.

[49] *See* Lust & Popelier, *supra* note 16, at 1213; RENÉ BARENTS, PROCEDURES EN PROCESVOERING VOOR HET HOF VAN JUSTITIE EN HET GERECHT VAN EERSTE AANLEG VAN DE EG 143 (2005).

[50] *See* SCHLAICH & KORIOTH, *supra* note 44, at 251.

[51] *See* HUFEN, *supra* note 15, at 22–23; Schroeder, *supra* note 43.

[52] *See, e.g.*, S.T.C., Feb. 20, 1989 (Mar. 2, 1989 BOLETÍN OFICIAL DEL ESTADO [B.O.E.] 52, No. 45/1989) (Spain); S.T.C., Feb. 6, 1992 (Mar. 3, 1992 BOLETÍN OFICIAL DEL ESTADO [B.O.E.] 54, No. 13/1992)(Spain); S.T.C., Nov. 7, 2007 (Dec. 10, 2007 BOLETÍN OFICIAL DEL ESTADO [B.O.E.] 295, No. 236/2007)(Spain); S.T.C., July 5, 2012 (July 30, 2012 BOLETÍN OFICIAL DEL ESTADO [B.O.E.] 181, No. 150/2012)(Spain); *see also* HUFEN, *supra* note 15, at 27–29.

[53] *See* HUFEN, *supra* note 15, at 27, 29.

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of its decisions to an effect *ex nunc.* It has, however, never postponed the effects of an annulment.[54]

The case law of the German FCC inspired the Belgian legislature to grant the Belgian Constitutional Court the competence to maintain the effects of an annulled provision up to a certain future date.[55] Despite the great latitude granted to the Belgian Constitutional Court, a study of its case law demonstrates that it does not use its competence to limit the retroactive effect excessively. Out of the 317 annulments, the Court limited the retroactive effect in seventy-eight cases. Remarkably, in contrast with the Portuguese and Spanish Constitutional Courts, the Belgian Court often maintains the effects of the annulled rule for a certain period into the future. In forty-six of these seventy-eight judgments, the Belgian Court granted the legislature a certain time period to change the unconstitutional rule.[56]

The CJEU has repeatedly exercised its power to limit the retroactive effect of an annulment.[57] Although article 264, second paragraph, of the Treaty on the Functioning of the European Union (TFEU) only allows the CJEU to consider certain effects as definitive, thus giving an effect *ex nunc* to its judgments, the CJEU did not hesitate to extend its competence by granting an effect *pro futuro*. The CJEU did so for the first time in 1973[58] and recently confirmed its case law in the well-known *Kadi and Al Barakaat* case.[59] In addition, the CJEU also stated by analogy that the second paragraph of former article 174 EEC Treaty may be applied to acts other than regulations. When there are important considerations of legal certainty, comparable to those which arise in the case of annulment of certain regulations, these justify an exercise by the Court of the power conferred on it

[54] Joaquim de Sousa Ribero & Esperança Mealha, *Portugal-Constitutional Courts as positive Legislators*, *in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 721, 727 (A.R. Brewer-Carias ed., 2011).

[55] Parl. Doc. Senate 1981-82, No 246/1, at 6 (Belg.)*;* Parl. Doc. Senate 1981-82, No 246/2, at 115 (Belg.); VELAERS, *supra* note 28, at 322.

[56] This count includes 28 years, starting from 1985 up through 2012. *See* Verfassungsgerichtshof [Constitutional Court of Belgium], http://www.const-court.be/ (last visited Aug. 5, 2013).

[57] *See, e.g.*, Case C-51/87, Comm'n v. Council, 1988 E.C.R. 05459; Case 45/86, Comm'n v. Council, 1987 E.C.R. 01493; Case C-22/96, Parliament v. Council, 1998 E.C.R. I-03231; Case C-445/00, Austria v. Council, 2003 E.C.R. I-08549.

[58] Case 81/72, Comm'n v. Council, 1973 E.C.R. 00575.

[59] Case C-402/05, Kadi & Al Barakaat v. Council & Comm'n, 2008 E.C.R. I-06351; *see also* Case C-166/07, Parliament v. Council, 2009 E.C.R. I-07135; Case C-178/03, Comm'n v. Parliament & Council, 2006 E.C.R. I-00107; Case C-310/04, Spain v. Council, 2006 E.C.R. I-07285; Case C-392/95, Parliament v. Council, 1997 E.C.R. I-03213; Case C-271/94, Parliament v. Council, 1996 E.C.R. I-01689; Case C-388/92, Parliament v. Council, 1994 E.C.R. I-02067; Case C-7/87, Comm'n v. Council, 1988 E.C.R. 03401.

by the second paragraph of article 174 EEC Treaty.[60] The TFEU broadened the scope of former article 174 EEC Treaty; the CJEU may since maintain (definitively) the effects of *every act* which it has declared void.[61]

ii) Conditions

There are no explicit conditions which need to be met in order for the (constitutional) courts to limit the temporal effects of their decisions. They hold a discretionary power to decide whether or not it is appropriate to limit the retroactive effect. Given the often inconsistent and diverse case law of the courts, it is hard to predict their decisions with regards to the temporal effect.[62]

Nevertheless, certain reasons for limiting the retroactive effect seem to cut across the case law of the different courts. The protection of legal certainty constitutes the basis of every temporal modulation.[63] Courts often give additional justification for maintaining the effects of the annulled norm either definitely or provisionally. A commonly used argument is the fear that an annulment will cause administrative problems and negatively impact state finances.[64] Sometimes the annulment creates a situation that is even more unconstitutional, necessitating a limitation of the temporal effect.

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[60] *See, e.g.*, Case C-370/07, Comm'n v. Council, 2009 E.C.R. I-08917; Case C-155/07, Parliament v. Council, 2008 E.C.R. I-08103; Case C-106/96, United Kingdom v. Comm'n, 1998 E.C.R. I-02729; Case C-271/94, Parliament v. Council, 1996 E.C.R. I-01689.

[61] *See* TFEU, *supra* note 47, at art. 264, para. 2.

[62] For Belgium, see Ost & Van Drooghenbroeck, *supra* note 34, at 23; VELAERS, *supra* note 28, at 119. For the CJEU, see ALEXANDER TÜRK, JUDICIAL REVIEW IN EU LAW 155 (2009). For Germany, see FRIEDHELM HUFEN, LIMITATION DES EFFETS DE DÉCISIONS JURIDICTIONNELLES EN CAS DE CONSTATATION DE L'INCONSTITUTIONNALITÉ DE NORMES JURIDIQUES, PARTIE 1 EXPERTISE JURIDIQUE 17 (2008), *available at* http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Europa/675843.pdf?__blob=publicationFile&v=3; Schroeder, *supra* note 43.

[63] See, for example, case law of the Belgian Constitutional Court: Cour de Cassation [Cass] [Constitutional Court] decision No. 45/2012, Mar. 15, 2012, *available at* http://www.const-court.be/public/n/2012/2012-045n.pdf; Cour de Cassation [Cass] [Constitutional Court] decision No. 33/2011, Mar. 2, 2011, *available at* http://www.const-court.be/public/d/2011/2011-033d.pdf; Cour de Cassation [Cass] [Constitutional Court] decision No. 49/2007, Mar. 21, 2007, *available at* http://www.const-court.be/public/d/2007/2007-049d.pdf; Cour de Cassation [Cass] [Constitutional Court] decision No. 137/2006, Sept. 14, 2006, *available at* http://www.const-court.be/public/d/2006/2006-137d.pdf; Cour de Cassation [Cass] [Constitutional Court] decision No. 56/92, July 9, 1992, *available at* http://www.const-court.be/public/n/1992/1992-056n.pdf.

[64] *See*, *e.g.*, Cour Constitutionnelle [CC] [Constitutional Court] decision No. 67/2012, May 24, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 17, 2012, 48,437 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 184/2011, Dec. 8, 2011, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 8, 2012, 9934 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 104/2008, July 17, 2008, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 11, 2008, 41,562 (Belg.).

By postponing the effects of the annulment, a (constitutional) court gives the legislature time to amend the unconstitutional act.[65] Another frequently used argument for limiting the retroactive effect is to prevent a regulatory gap from coming into existence.[66] Additionally, it allows certain services to continue and provides the opportunity for measures to be added.[67] Also, in cases were multiple solutions exist to remove the unconstitutionality, constitutional courts tend to postpone the effects of the annulment in order for the legislature to select from among the different measures. When a court annuls a norm because of a regulatory lacuna, the retroactive disappearance of this norm is often undesirable; in contrast, an expansion of the field of application is mostly required.[68]

Portugal draws our attention because the Constitution itself sets forth the reasons for limiting the retroactive effect of its decisions. Article 282, paragraph 4 states: "When required for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest, the grounds for which shall be given, the Constitutional Court may rule that the scope of the effects of unconstitutionality or illegality shall be more restricted . . . ." These explicit wordings do not alter the fact that the case law is hard to predict; legal certainty can always be invoked to justify a temporal limitation because this principle is always affected by the retroactive effect.

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[65] *See e.g.*, Cour Constitutionnelle [CC] [Constitutional Court] decision No. 8/2011, Jan. 27, 2011, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 14, 2011, 16,190 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 49/2008, Mar. 13, 2008, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Apr. 14, 2008, 19,854 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 163/2006, Nov. 8, 2006, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 19, 2007, 14,993 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 131/2005, July 19, 2005, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 8, 2005, 34,459 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 128/2005, July 13, 2005, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 2005, 34,363 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 114/2004, June 30, 2004, *available at* http://www.const-court.be/public/d/2004/2004-114d.pdf (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 66/98, June 10, 1998, *available at* http://www.const-court.be/public/f/1998/1998-066f.pdf (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 43/97, July 14, 1997, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 26, 1997, 19,345 (Belg.).

[66] *See*, *e.g.*, Case C-299/05, Comm'n v. Parliament & Council, 2007 E.C.R. I-08695; Case C-178/03, Comm'n v. Parliament & Council, 2006 E.C.R. I-00107; Cases C-164/97 & C-165/97, Parliament v. Council, 1999 E.C.R. I-01139; Case C-21/94, Parliament v. Council, 1995 E.C.R. I-01827; Case C-295/90, Parliament v. Council, 1992 E.C.R. I-04193.

[67] *See, e.g.*, Case C-284/90, Council v. Parliament, 1992 E.C.R. I-02277; Case C-65/90, Parliament v. Council, 1992 E.C.R. I-04593; Case C-7/87, Comm'n v. Council, 1988 E.C.R. 03401.

[68] BREWER-CARÍAS, *supra* note 8, at 125–172.

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1.3. Position of Applicants and Pending Cases

When an effect *ex nunc* or *pro futuro* is imposed, the position of the applicants in that specific case and those in other pending cases becomes a pressing problem.[69] Parties who started the legal proceedings—putting time, money, and effort into the proceedings—will not be able to benefit from them.[70] A systematic application of the effect *ex nunc* or *pro futuro* will discourage individuals from starting legal proceedings.[71] To make sure that applicants can profit from their own proceedings, a limited retroactive effect of the judgment is needed, i.e. a retroactive effect of the judgment for the applicants' case, and if necessary, for other pending cases.[72]

This argument comes into the ambit of articles 6 and 13 of the European Convention on Human Rights. Article 6 ensures the right to a fair trial in civil and criminal cases. Out of this provision, the right of access to a court was developed, and subsequently, the fundamental aspect that a final court judgment should be effective.[73] Article 13 provides for the right to an effective remedy. It's object, in the words of the Grand Chamber, "is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."[74]

It could be debated whether these rights are adversely affected when a conditional court rescinds a norm. However, the ECHR has stated repeatedly that the principle of legal certainty can dispense the state from re-opening legal acts or situations that antedate the delivery of the judgment of the ECHR, even when no exception was made for the applicants' case. The Court also accepts that a constitutional court sets a time-limit for the

[69] *See* J.H. van Kreveld, *Temporele werking van bestuursrechtspraak*, 7 NEDERLANDS TIJDSCHRIFT VOOR BESTUURSRECHT 203, 212 (2008); Lang, *supra* note 1, at 230–45; Ost & Van Drooghenbroeck, *supra* note 34, at 51–55; Rigaux, *supra* note 8, at 70–71.

[70] Patrick Henry, *La difficile mise en œuvre des zones d'aménagement différé en Région wallonn*, REVUE DE JURISPRUDENCE DE LIÈGE, MONS ET BRUXELLES 1352, 1362 (2000)("*Ils devront se contenter de la satisfaction d'avoir contribué au progrès de la science juridique*," or "They will have to settle for the satisfaction of having contributed to the advancement of legal science.").

[71] *See* Ost & Van Drooghenbroeck, *supra* note 34, at 24, 38.

[72] Gilles Pellissier, *Quatre ans d'application de la jurisprudence Association AC!—Une nouvelle dimension de l'office du juge,* 656 REVUE JURIDIQUE DE L'ÉCONOMIE PUBLIQUE survey 7, para. 3 (2008).

[73] JACOBS ET AL., THE EUROPEAN CONVENTION ON HUMAN RIGHTS 254, 254–60 (Robin C.A. White & Clare Ovey eds., 5th ed. 2010).

[74] *See* Kudla v. Poland, ECHR App. No. 30210/96, § 152 (Oct. 26, 2000), http://hudoc.echr.coe.int.

legislature to enact new legislation, thus maintaining the application of an unconstitutional provision for a transitional period.[75]

The German FCC frequently decides that pending cases need to be suspended until a new act comes into force.[76] The Court, however, does not explicitly exclude the applicant from this temporal limitation. The FCC does sometimes decide, for reasons of equity, that the German state will bear some of the costs incurred by the applicant by initiating proceedings.[77] Throughout the case law of the Belgian Constitutional Court, we find only two occasions on which the Court excluded an individual case from a temporal limitation.[78] The Court seems reluctant to take into account the position of requesting parties. Some authors see the words "by a general ruling" used in paragraph 2 of article 8 of the Special Act on the Belgian Constitutional Court as an obstacle for the Court to make an exception for the applicants and other pending cases.[79] Recently, the Constitutional Court decided that the Council of State can make an exception to the temporal limitation for applicants and pending cases when annulling administrative acts.[80] Remarkably, the rule applicable to the Council of State is an exact copy of this article 8, second paragraph, including the

[75] *See* Marckx v. Belgium, ECHR App. No. 6833/74 (June 13, 1979), http://hudoc.echr.coe.int; J.R. v. Germany, ECHR App. No. 22651/93 (Oct. 18, 1995), http://hudoc.echr.coe.int; Walden v. Liechtenstein, ECHR App. No. 33916/96 (Mar. 16, 2000), http://hudoc.echr.coe.int; P.B. v. Austria, ECHR App. No. 18984/02 (July 22, 2010), http://hudoc.echr.coe.int; Ost & Van Drooghenbroeck, *supra* note 34, at 51–55; Patricia Popelier, *The European Court of Human Rights' Approach to Retrospective Judicial Reversals, in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

[76] *See* HUFEN, *supra* note 62, at 23.

[77] *See*, *e.g.*, Bundesverfassungsgericht [BVerfG—Federal Constitutional Court], Case No. 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91 (Nov. 10, 1998), http://www.bverfg.de/en/decisions/rs19981110_2bvr105791.html; Bundesverfassungsgericht [BVerfG—Federal Constitutional Court], Case No. 2 BvC 1/07, 2 BvC 7/07 (July 3, 2008), http://www.bverfg.de/en/decisions/cs20080703_2bvc000107.html; *see also* HUFEN, *supra* note 15, at 22; Schroeder, *supra* note 43.

[78] These exclusions occurred within the scope of article 4, second paragraph of the Special Act on the Constitutional Court. This article states that after a declaration of unconstitutionality, a new six-month period opens in which an action for annulment of that statute can be brought before the Court. In 1992, the Court excluded from the effect *ex nunc* the specific case which initiated the proceedings that led to the declaration of unconstitutionality a few years earlier. In 2008 the Court maintained the general retroactive effect of its judgment for the party who brought the action for annulment before the Court. *See* Cour Constitutionnelle [CC] [Constitutional Court] decision No. 140/2008, Oct. 30, 2008, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Nov. 13, 2008, 59,258 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 56/92, July 9, 1992, *available at* http://www.const-court.be/public/n/1992/1992-056n.pdf.

[79] *See* Rigaux, *supra* note 27, at 590–91; Ost & Van Drooghenbroeck, *supra* note 34, at 24.

[80] Cour Constitutionnelle [CC] [Constitutional Court] decision No. 18/2012, Feb. 9, 2012, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Apr. 11, 2012, 23,464 (Belg.).

words "by a general ruling."[81] Maybe this judgment will incite the Court to similarly adjust its own case law.

It must be observed that within the framework of article 264 of the TFEU, the CJEU has not yet excluded applicants or pending cases from its temporal limitation. This is contrary to the CJEU's case law within the preliminary reference procedure. When the Court imposes an effect *ex nunc* onto an interpretative judgment, it will often maintain the retroactive effect for the applicants.[82]

2. Preliminary Questions: Temporal Limitation Needed?

Should constitutional courts be able to limit the retroactive effect of preliminary questions? To answer this, we must look at the scope of the effects of these rulings. Do they have an effect *inter partes* or *erga omnes*? In the case of the former, no limitation of the retroactive effect is needed. After all, such a limitation is justified by the protection of the principle of legal certainty. When proceedings have already been initiated, however, uncertainty as to the applicability of the contested rule is necessarily raised. Because the decision does not entail any consequences for other cases, it should not be up to the courts to arbitrarily decide which individual cases need to be excluded from the temporal effect. Such a limitation would not be tolerated by the ECHR in light of articles 6 and 13.

By contrast, when an effect *erga omnes* is given to rulings under preliminary reference procedures, a temporal limitation of the retroactive effect is sometimes needed. The judgments of the German Court have an *erga omnes* effect[83] whether they are given in a procedure of abstract review,[84] concrete review,[85] or in case of a constitutional complaint.[86] In preliminary reference procedures, the German Court often declares legislation incompatible with the Constitution, instead of annulling it.[87]

[81] Organic laws on the Council of State coordinated by the Royal Decree of 12 January 1973, Article 14*ter*; Sarah Verstraelen, *Het eerste gewin is kattengespin. De onzekere toekomst van artikel 14ter RvS-wet,* 6 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT [TBP] 356, 359–60 (2012).

[82] *See infra* Part D(I): Temporal Effect of Preliminary Rulings.

[83] Bundesverfassungsgerichts-gesetz [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBL. IS. at 243, § 31(1) (Ger.).

[84] *Id.* §§ 78, 79.

[85] *Id.* § 82 (stating explicitly that the sections 77 and 78 of the Federal Constitutional Court Act apply *mutatis mutandis*).

[86] *Id.* § 95(3) (stating that when a complaint is upheld, the Court shall declare the law null and void, and reaffirming that § 79 needs to be applied *mutatis mutandis*).

[87] *See* HUFEN, *supra* note 62, at 23–24.

Article 28 of the Special Act on the Belgian Constitutional Court bestows an *inter partes* effect to the decisions under a preliminary reference procedure. The referring court and any other court passing judgment in the same case have to comply with the ruling given by the Constitutional Court.[88] Because of this limited effect of a declaration of unconstitutionality, it was deemed unnecessary to grant the Belgian Court the competence to limit the retroactive effect of its preliminary judgments.[89] This consideration is remarkable for several reasons, the most important of which is that Article 26, § 2, 2° of the Special Act on the Constitutional Court does not oblige courts to make a preliminary ruling when the Constitutional Court has already ruled on an identical subject. Thus, the declaration of unconstitutionality has a greater impact than the effect *inter partes.*[90]

In 2003, the Belgian Special Act was amended. The question was raised whether or not it was desirable to grant the Constitutional Court the competence to limit the retroactive effect of its preliminary judgments.[91] Despite the urgent appeal of two former presidents of the Constitutional Court to answer this question affirmatively, the consideration was rejected.[92] The Constitutional Court used various techniques to bypass its limited competence.[93] In 2011, however, the Court made a U-turn: It explicitly referred to Article

[88] Special Act on the Constitutional Court, of Jan. 6, 1989, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 30, 2010, art. 28.

[89] Opinion of Sir J. Mertens de Wilmars, *Parl.Doc.* Senate 1981-82, No 246/2, at 372.

[90] *See* Cour Constitutionnelle [CC] [Constitutional Court] decision No. 171/2009, Oct. 29, 2009, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Dec. 29, 2009, 82,237 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 117/2008, July 31, 2008, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Sept. 17, 2008, 48,509 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 83/93, Dec. 1, 1993, *available at* http://www.const-court.be/public/f/1993/1993-083f.pdf (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 18/91, July 4, 1991, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 1991, 18,144 (Belg.); FRANCIS DELPÉRÉE and ANNE RASSON-ROLAND, LA COUR D'ARBITRAGE 108 (1996); Michel Mahieu, *noot onder Cass. 19 februari 1997*, JT 293, 294 (1997); Michel Mahieu & Gautier Pijcke, *L'autorité dans le temps des arrêts préjudiciels prononcés par la Cour constitutionnelle, in* LIBER AMICORUM MICHEL MELCHIOR 143, 155 (Paul Martens et al. eds., 2010); PATRICIA POPELIER, PROCEDEREN VOOR HET GRONDWETTELIJK HOF 380 (2008); VELAERS, *supra* note 38, at 405–06;

[91] Amendment 47, Parl. Doc. Senate 2001-02, No. 2-897/4, at 11–12 (Senator Vandenberghe) (Belg.); Report on behalf of the Commission for Institutional Affairs, Parl. Doc. Senate 2002-03, No. 2-897/6, at 22 (Belg.).

[92] Parl. Doc. Senate 2002-03, No. 2-897/6, at 14–15, 22, 36, 64, 76, 118, 138, 159–160, 172, 175–76 (Belg.); Parl. Doc. Senate 2002-03, No. 2-897/6 at 232–33 (Belg.).

[93] For example, the Court declared a certain act unconstitutional, but it emphasized that given the social evolution, this act will become unconstitutional in the future. *See, e.g.*, Cour de Cassation [Cass] [Constitutional Court] decision No. 56/93, July 8, 1993, *available at* http://www.const-court.be/public/f/1993/1993-056f.pdf(Belg.); Cour de Cassation [Cass] [Constitutional Court] decision No. 53/93, July 1, 1993, *available at* http://www.const-court.be/public/f/1993/1993-053f.pdf (Belg.); *see also* POPELIER, *supra* note 90, at 382–84.

8, second paragraph of the Special Act on the Belgian Constitutional Court and applied this provision analogously to limit the temporal effect of a declaration of unconstitutionality.[94] The Court provisionally maintained the effects of the unconstitutional provision to give the legislature time to amend the norm in accordance with the judgment. Since this decision on 7 July 2011, the Court has in subsequent judgments confirmed that it can apply this analogous competence in preliminary reference procedures but only in exceptional circumstances.[95] However, this decision was a clear sign to the legislature that it ought to amend the Special Act so that a temporal limitation is possible when a provision is declared unconstitutional.

Given the multilevel dimension of the preliminary references made by the CJEU, its case law will be treated separately below.

II. Effect ex nunc

The earlier-mentioned German study shows that no less than sixteen Member States opted for a temporal effect *ex nunc.* In addition to Austria, Bulgaria, Cyprus, Czech Republic, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Poland, Romania, Slovakia, and Slovenia are convinced that this temporal effect sets the right balance between the principle of legality and that of legal certainty. It is striking that out of all the "new" Member States, only Estonia opted for a retroactive effect.[96]

1. Difficulties

1.1 The Search for a Well-Based Temporal Effect

The balance struck between the principles of legal certainty and legality is a good starting point, but in certain cases, this balance does not lead to a satisfactory result. For this reason, the constitutional judge must be able to differ from the general *ex nunc* rule.

[94] *See* Cour de Cassation [Cass] [Constitutional Court] decision No. 125/2011, July 7, 2011, *available at* http://www.const-court.be/public/d/2011/2011-125d.pdf (Belg.); Sarah Verstraelen, *Toen barstte de bom: het Grondwettelijk Hof handhaaft in een prejudicieel arrest de gevolgen van een vastgestelde ongrondwettigheid*, 28 RECHTSKUNDIG WEEKBLAD 1230, 1230–41 (2012).

[95] Cour Constitutionnelle [CC] [Constitutional Court] decision No. 48/2013, Mar. 28, 2013, *available at* http://www.const-court.be/public/n/2013/2013-048n.pdf (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 3/2013, Jan. 17, 2013, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 20 2013, 16,809 (Belg.); Cour Constitutionnelle [CC] [Constitutional Court] decision No. 1/2013, Jan. 17, 2013, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 20, 2013 (Belg.).

[96] *See* HUFEN, *supra* note 19, at 7–8.

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a) Constitutional or Legal Basis?

Article 140(5) of the Austrian Constitution states that the rescission enters into force on the day of publication if the Court does not indicate a different deadline. This Court-appointed deadline may not exceed eighteen months. It must be emphasized that such an explicit time limit can limit, to a certain extent, the legislative powers of the Constitutional Court that it exercises when postponing the effects of a rescission. The Polish Constitution imposes a similar time limit: The Constitutional Tribunal may specify another date for the end of the binding force of a normative act, but the time period may not exceed eighteen months for a statute, or twelve months for any other normative act.[97]

The Austrian Court can also impose an effect *ex tunc.* According to Article 140(7) of the Austrian Constitution, the law shall continue to apply to the circumstances effected before the rescission, unless the Court decides otherwise. The Hungarian Constitutional Court has a similar discretionary power.[98] As a general rule, the rescission of the legal regulation does not affect the legal relations originating on that day, or any day before the decision was published and the resulting rights and obligations were imposed.[99] If however, the rescission results in the reduction or waiver of punishment, or limits criminal or contravention liability, the Court shall order the review of the criminal or contravention proceedings concluded with a final decision based on the rescinded regulation.[100] What's more, section 45(4) of the Hungarian Act CLI of 2011 on the Constitutional Court provides in very broad terms the possibility that the Court may deviate from the general rule, either *ex tunc* or *pro futuro*, if justified by the protection of the Fundamental Law, the interest of legal certainty, or a particularly important interest of the entity initiating the proceedings.

The Czech Constitutional Court Act and the Slovakian Act of the National Council provide for similar exceptions to the *ex nunc* effect when criminal proceedings are involved.[101] These provisions are comparable to the German, Spanish, and Portuguese legislation. The Polish Constitution even ascribes an effect *ex tunc* to decisions of its Constitutional Court.[102] Legal proceedings can be re-opened when judgments or final administrative

[97] CONST., art. 190, para. 3 (Pol.).

[98] 2011. évi CLI. tövény a Alkotmánybíróság (Act CLI of 2011 on the Constitutional Court) at § 45(Hung.).

[99] *Id.* § 45(3).

[100] *Id.* § 45(6).

[101] Czech Constitutional Court Act of 16 June 1993, § 71; Act of 20 January 1993 of the National Council of the Slovak Republic, § 41(b); Ján Svák and Lucia Berdisová, *Constitutional Court of the Slovak Republic as Positive Legislator via Application and Interpretation of the Constitution, in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 767, 775 (Allan R. Brewer-Carias ed., 2011).

[102] CONST., art. 190, para. 4 (Pol.).

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decisions are based on the rescinded norm. As a result, the cross-fertilization between the two main categories of temporal effects becomes apparent.

The Constitutional Court Law of the Republic of Latvia requires the judgment of the Constitutional Court to indicate the moment when the unconstitutional legal norm shall cease to be in force.[103] Consequently, this Constitutional Court can decide at its own discretion to impose an effect *ex tunc* or *pro futuro*.

By contrast, not all constitutional courts have the explicit power to modulate the *ex nunc* effect of their decisions. For instance, the constitutional courts of Malta, Romania, and Italy do not.[104] As stated before, the possibility to mitigate the consequences of a decision is sometimes indispensable. Consequently, some constitutional courts take matters into their own hands and modulate the temporal effect of their decisions without any legal or constitutional basis. Italy serves as a good example. The Italian Constitution merely states that when the Constitutional Court declares the constitutional illegitimacy of a law, the law ceases to have effect the day following the publication of the decision.[105] Nevertheless, the Italian Constitutional Court has on more than one occasion imposed an effect *pro futuro* or an effect *ex tunc* onto its judgments.[106] It is established case law of the Court that its judgment will benefit cases still pending.[107] Furthermore, a commonly used instrument by the Italian Court is the so called "warning decision" by which the Court sends a message to the legislature that he ought to amend a certain regulation to avoid rescission and its negative consequences.[108] This clearly illustrates the need for some flexibility as to the temporal effect of judicial decisions.

b) Usage

According to the Austrian Constitution, the rescission becomes effective with its publication.[109] Although this seems to be the general rule, research shows that the

[103] Latvian Constitutional Court Law, July 25, 1996 Ziņotājs 14, § 31, para. 11, §32, para. 3 (June 5, 1996).

[104] *See* HUFEN, *supra* note 15, at 56, 69–70, 83–84.

[105] Art. 136 Consituzione [Cost.] (It.).

[106] Gianpaolo Parodi, *The Italian Constitutional Court as Positive Legislator, in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 603, 618–20 (Allan R. Brewer-Carias ed., 2011).

[107] *See* HUFEN, *supra* note 15, at 56; Giuseppe Martinico, *Report on Italy, in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

[108] Martinico, *supra* note 107.

[109] BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] BGBL No. 1/1930, art. 140, para. 5 (Austria).

Austrian Constitutional Court often departs from it. Out of the 213 rescissory judgments the Court has made, it set a deadline in 103 cases and it imposed a retroactive effect in 36 cases.[110] Unfortunately, it is common for the Austrian Court not to state reasons for a deviation from the general rule.[111] The Polish Constitutional Tribunal and the Hungarian Constitutional Court also often postpone the effect of their judgment to a later date.[112]

Dealing with *ex nunc* decisions causes the same arguments that relate to *ex tunc* decisions to resurface when limiting this temporal effect. Time is given to the legislature to amend the rule in order to avoid regulatory gaps.[113] Remarkably, in decision 37/1992, the Hungarian Constitutional Court imposed a *pro futuro* effect, giving the legislature until 30 November 1992 to amend the unconstitutional legislation. The legislature however, failed to meet this deadline. The Court, in its decision 17/1993, decided to prolong the deadline until 31 December 1995. The Court stressed that only Parliament may end the unconstitutionality by the adoption of new rules.[114]

Also, the fear of administrative problems and consequences of the annulment for state finances seems to be a common denominator.[115] The Polish Constitution states that when a judgment has financial consequences not provided for in the budget, the Constitutional Tribunal shall specify the date of the postponement after seeking the opinion of the Council of Ministers.[116] The postponement of the rescission also prevents a greater nonconformity with the Constitution from arising.[117]

The Hungarian Act on the Constitutional Court even enumerates three justifications to depart from the effect *ex nunc* in a concrete case or in general: The protection of the

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[110] Manfred Stelzer, *'Pro-futuro' and Retroactive Effects of Rescissory Judgments in Austria*, *in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

[111] *See* HUFEN, *supra* note 15, at 10 & 46-48; *see also* Konrad Lachmayer, *Austrian-Constitutional Courts as Positive Legislators,* in CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 251, 258 (Allan R. Brewer-Carias ed., 2011).

[112] HUFEN, *supra* note 15, at 75.

[113] *See* HUFEN, *supra* note 15, at 64; *see also* Zdenek Kühn, *Czech Constitutional Court as Positive Legislators, in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 445, 465 (Allan R. Brewer-Carias ed., 2011).

[114] Tímea Drinóczi, *Temporal Effects of Decisions of the Hungarian Constitutional Court, in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

[115] *See* HUFEN, *supra* note 15, at 49.

[116] *See* Art. 190, para. 3, Rozdzial III, Konstytucja Rzeczpospolitej Polskiej (Pol.).

[117] *See* Marek Safjan, *Poland—The Constitutional Court as Positive Legislator*, *in* CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 701, 707 (Allan R. Brewer-Carias ed., 2011).

Fundamental Law, the interest of legal certainty, and a particularly important interest of the entity initiating the proceedings.[118] Unfortunately, the Hungarian Constitutional Court hardly justifies why it deviates from the general *ex nunc* effect. Instead, it simply quotes Section 45(4) of the Hungarian Act CLI of 2011 on the Constitutional Court.[119]

1.2 Position of Applicants and Pending Cases

Austria sets a good example because it provides a constitutional protection of the applicants. Article 140 (7) of the Austrian constitution describes that, given the effect *ex nunc,* the law shall continue to apply to circumstances effected before the rescission, the case in point (*Anlassfall)* excepted. When the Court sets a deadline for the rescission, the law shall apply to all the circumstances affected until the deadline, with the exception of the *Anlassfall, i.e.* the case in point. This way, the individual who filed the complaint may benefit from the judgment. Remarkably, the Constitutional Court extended the "case in point effect" so that not only the case in which proceedings have been formally adjourned, but all cases which were pending before the Court when the public hearing to review the law was announced are considered as cases in point. This led to so called "mass complaints", which are especially common in tax law matters. Hundreds of complaints were lodged with the Constitutional Court so they could possibly benefit from the decision when the Court rescinds the law. The Austrian administration produced various techniques in order to avoid this extension of the case in point effect.[120]

The Hungarian Act on the Constitutional Court also pays due attention to the position of applicants by confirming that the rescinded norm will not be applied in the case that led to the proceedings before the Court.[121] The particular importance of the interest of the entity initiating the proceedings is listed as a legitimate reason to depart from the effect *ex nunc* in a concrete case.[122]

The possibility of the imposition of an effect *ex tunc* definitely benefits pending cases. As stated before, not all constitutional courts have the power to impose this temporal effect. Even if they do, this power is sometimes restricted to criminal matters.

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[118] 2011. évi CLI. tövény a Alkotmánybíróság (Act CLI of 2011 on the Constitutional Court) at § 45(4)(Hung.).

[119] *See* Drinóczi, *supra* note 114.

[120] *See* Lachmayer, *supra* note 111, at 257–58; *see also* Stelzer, *supra* note 110.

[121] 2011. évi CLI. tövény a Alkotmánybíróság (Act CLI of 2011 on the Constitutional Court) at § 45(2)(Hung.).

[122] *Id.* § 45(4).

2. Preliminary Questions: Temporal Limitation Needed?

Preliminary rulings with an effect *erga omnes* may need a temporal limitation. The judgments of the Austrian Constitutional Court are binding for all courts and administrative authorities.[123] In cases of preliminary reference procedures, the Court has the power to limit the temporal effect.[124] Similarly, all decisions of the Hungarian Constitutional Court have a binding effect *erga omnes.* The Hungarian Court can modulate the effects of its preliminary ruling.[125] The same goes for the equivalent Polish Court.[126] It is important to emphasize that the Austrian Constitution and the Hungarian Act on the Constitutional Court exclude the application of rescinded legislation to the case that led to the proceedings.[127]

Interestingly, in 2008 Article 61-1, which made an *a posteriori* review possible, was adopted into the French Constitution.[128] Under this review procedure, judgments of the French Constitutional Council have an effect *ex nunc* and *erga omnes.* Despite the fact that annulments of administrative regulations by the French Council of State have a retroactive effect, the choice of an effect *ex nunc* has never been disputed.[129]

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[123] *See* BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBI No. 1/1930, art. 140, para. 7 (Austria).

[124] *Id.*

[125] *See* 2011. évi CLI. tövény a Alkotmánybíróság (Act CLI of 2011 on the Constitutional Court) at §§ 39, 45 (Hung.).

[126] *See* Art. 190, Rozdzial III, Konstytucja Rzeczpospolitej Polskiej (Pol.); *see also* Safjan, *supra* note 117, at 704.

[127] *See* BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBI No. 1/1930, art. 14, para. 7 (Austria); *see also* 2011. évi CLI. tövény a Alkotmánybíróság (Act CLI of 2011 on the Constitutional Court) at §45, para. 2 (Hung.).

[128] *See* Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 24, 2008.

[129] *See* Julie Benneti, *La genèse de la réforme* [*The Genesis of Reform*], 2 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF [LEGAL ADMIN. NEWS] 74, 75–77 (2010) (Fr.); Didier Blanc, *Les changements de l'état de droit : illustration française des quatre saisons du contrôle de constitutionnalité des lois* [*Changes in the Rule of Law: French Illustration of the Four Seasons of the Constitutionality of Laws*], 2 LE COURANT JURIDIQUE [THE LEGAL CURRENT] 13, 22 (2010) (Fr.); François Dieu, *La modulation des effets des annulations contentieuses ou comment concilier principe de légalité et principe de sécurité juridique* [*Modulating the Effects of Cancellations or How to Reconcile the Principle of Legal Certainty*], 44 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF [LEGAL ADMIN. NEWS] 2428, 2428–36 (2006) (Fr.); Olivier Dubos & Fabrice Melleray, *La modulation dans le temps des effets de l'annulation d'un acte administrative* [*Modulation in Time of the Effects of the Cancellation of Administrative Acts*], 8 DROIT ADMINISTRATIF [ADMIN. ACTS] para. 1, 42–55 (2004) (Fr.); François-Xavier Millet, *Temporal Effects of Judicial Decision–French Report*, *in* TEMPORAL EFFECTS OF JUDICIAL DECISIONS (Patricia Popelier et al. eds., forthcoming 2013).

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Article 62, second paragraph, enables the Council to postpone the effect of its judgment to a later date, and even to impose an effect *ex tunc*, by determining under which conditions the effects produced by the provision can be challenged.

Although the Constitutional Council seems to manage its power to limit the effects in time quite well, three remarks need to be made on this subject. First, the Constitutional Council often decides that a decision of unconstitutionality can be invoked in pending cases where the outcome of the case depends on the application of the contested legislation.[130] In contrast, the Council exercises restraint regarding situations that were finalized before the decision of the Council.[131] Consequently, a limited retroactive effect is frequently imposed.[132]

Second, the Constitutional Council acknowledges that the applicant who raised the question needs to be able to benefit from the rescission. This, however, does not mean that the Council always excludes applicants from the *ex nunc* or *pro futuro* temporal effect. The Council gives an explicit reasoning why such exclusion is not possible or desirable, often claiming to safeguard the public interest and legal principles of constitutional value. Examples of these legal principles are the criminal justice of minors and environmental protection.[133]

Finally, the French Constitutional Council seems to perceive itself as an actual positive legislator. Given the fact that the case law of the Council is barely three years old, we should not jump to conclusions. Nevertheless, some decisions of the Constitutional Council make us wonder how far the power of this Council reaches, especially when the Council

[130] See *e.g.* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-10, Jul. 2, 2010, J.O. 12120 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-15/23, Jul. 23, 2010, J.O. 13727 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-33, Sept. 22, 2010, J.O. 17292 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-93, Feb. 4, 2011, J.O. 2351 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-110, Mar. 25, 2011, J.O. 5406 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-146, Jul. 8, 2011, J.O. 11978 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-202, Dec. 2, 2011, J.O. 20015 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-212, Jan. 20, 2012, J.O. 1214 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-213, Jan. 27, 2012, J.O. 1675 (Fr.).

[131] Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-163, Sept. 16, 2011, J.O. 15600; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-222, Feb. 17, 2012, J.O. 2846 (Fr.).

[132] *See* Millet, *supra* note 129.

[133] *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-32, Sept. 22, 2010, J.O. 17291 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-71, Nov. 26, 2010, J.O. 21119 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-147, July 8, 2011, J.O. 11979 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-183/84, Oct. 14, 2011, J.O. 17466 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-235, Apr. 20, 2012, J.O. 7194 (Fr.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-262, Jul. 13, 2012, J.O. 11635 (Fr.).

attaches transitory measures to its judgments.[134] In one of its first decisions on 28 May 2010, the Council ordered that all pending cases in which the unconstitutional act was applicable needed to be deferred to 1 January 2011.[135] Eight months later, the Council ruled in a similar fashion.[136] In its decision No. 2010-10, the Council found the composition of the Maritime Commercial Courts unconstitutional because they did not meet the requirements of independence. The Council added that from the date of the publication of the judgment that "Maritime Commercial Courts shall sit with a Bench composed in similar fashion to that of ordinary courts of criminal jurisdiction."[137] In November of 2011 the Council even postponed the effect of its ruling so the administrative authorities could learn from the declaration of unconstitutionality and adapt their behavior accordingly.[138]

III. Preliminary Conclusion

Despite their differences, one common denominator returns in every specific legal order: The need for flexibility. The choice for an effect *ex nunc* or *ex tunc* as a general rule is not vitally important. By contrast, the ability of the constitutional court to deviate from this general rule is crucial.

It is remarkable that in different and sometimes very diverse legal orders, the same reasons for limiting the temporal effect are invoked. A commonly used argument to postpone the effect of the judgment is, for example, the consideration that the legislature needs to have time to amend the unconstitutional legislation. Also, many Member States consider the position of the applicants and other pending cases.

Hereinafter we will examine whether the CJEU pays due attention to this need for flexibility.

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[134] Pascal Puig, *Le Conseil constitutionnel et la modulations dans le temps des decisions QPC* [*The Constitutional Council and the Modulations in the Time of QPC Decisions*], 3 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 517, 517–20 (2010); *see also* Millet, *supra* note 129.

[135] *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-1, May 28, 2010, J.O. 9728 (Fr.).

[136] *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-83, Jan. 13, 2011, J.O. 881 (Fr.).

[137] *Id.*

[138] *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-192, Nov. 10, 2011, J.O. 19005 (Fr.).

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D. Multilevel Dimension: Impact of the CJEU's Case Law

I. Temporal Effect of Preliminary Rulings

Article 267 TFEU provides for judicial review through a preliminary reference procedure. The CJEU has jurisdiction to give preliminary rulings concerning the interpretation of treaties and validity and interpretation of the acts of the institutions, bodies, offices, or agencies of the European Union.[139] Consequently, the CJEU does not have the power to rule on provisions of national law. It may only review EU legislation. The main purpose of this preliminary reference procedure is to secure uniform interpretation and application of EU law within the twenty-seven Member States.[140]

It is settled case law that a preliminary judgment is binding on a national court for the purposes of the decision to be given in the main proceedings.[141] When the CJEU declares an act to be void it is sufficient reason for any other national court to regard that act as void.[142] Even the interpretations given by the CJEU bind all national authorities, including national judges.[143]

Rulings under the preliminary reference procedure have an effect *ex tunc.* The interpretation which the Court gives to a rule of Union law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and

[139] TFEU, *supra* note 47, at art. 267.

[140] *See* Robert Lecourt, *Le role unificateur du juge dans la communauté* [*The Unifying Role of the Judge in the Community*], *in* ÉTUDES DE DROIT DES COMMUNAUTÉES EUROPÉENNES: MÉLANGES OFFERTS À PIERRE-HENRI TEITGEN 223, 233 (1984); DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 171 (2010).

[141] *See* Case C-52/76, Benedetti v. Munari, 1977 E.C.R. 00163, para. 26; Case 69/85, Wünsche Handelsgesellschaft v. Germany, 1986 E.C.R. 00947, para. 13; Case C-446/98, Fazenda Publica v. Câmara Municipal do Porto, 2000 E.C.R. I-11435, para. 49.

[142] *See* Case 66/80, Int'l Chemical Corp. v. Amminstrazione delle Finanze dello Stato, 1981 E.C.R 01191, paras. 13–14.

[143] This, however, does not exclude national judges to refer questions of interpretation to the CJEU, even if they already were the subject of a preliminary ruling in a similar case. *See* Case C-30/62, Da Costa & Schaake v. Netherlands Inland Revenue Admin., 1963 E.C.R *special edition* 00031; Cases C-332/92, C-333/92 and C-335/92, Eurico Italia v. Ente Nazionale Risi, 1994 E.C.R. I-00711, para. 15; Case C-453/00, *Kühne & Heitz v. Productschap voor Pluimvee en Eieren*, 2004 E.C.R. I-00837; BARENTS, *supra* note 49, at 338-39; RENÉ BARENTS, DIRECTORY OF EU CASE LAW ON THE PRELIMINARY RULING PROCEDURE 262 (2009); CHALMERS ET AL., *supra* note 140, at 171.

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applied from the time of its entry into force.[144] Likewise, a judgment of the Court in proceedings for a preliminary ruling declaring a Union act invalid has retroactive effect.[145]

Although none of the treaties grants the CJEU the power to limit the retroactive effect of its preliminary judgments, the Court has been doing so since the 1976 *Defrenne* case. Important considerations of legal certainty affecting all the interests involved made it impossible to reopen the question. The interpretation was, therefore, given an *ex nunc* effect. The CJEU excluded from this temporal limitation workers who had already brought legal proceedings or made an equivalent claim.[146] The case law of the CJEU demonstrates that a distinction between its judgments on validity and its interpretative judgments needs to be made.

1. Judgment on Validity

The CJEU applied by analogy Article 174 EEC Treaty, now Article 264, second paragraph, TFEU, for the first time in 1980 to a judgment of invalidity for legal certainty reasons; after all, these legal certainty concerns also formed the basis of Article 174 EEC Treaty.[147] The CJEU later emphasized the necessary consistency between the preliminary ruling procedure and the action for annulment, which are two mechanisms provided by the Treaty for reviewing the legality of acts of the Union institutions. The possibility of imposing temporal limits on the effects of the invalidity of a Union legislative act, whether under Article 263 or Article 267 TFEU, is a power conferred on the Court in the interest of a uniform application of Union law.[148]

The CJEU does not only maintain effects of the legislative acts occurring prior to the judgment. Recent case law shows that the CJEU also provisionally maintains the effects of the contested legislative act. That way a further application is possible until a specific date in the future.[149] We must bear in mind that the CJEU does not even have the explicit power to give *pro futuro* effect to its rulings on actions for annulment.

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[144] *See e.g.* Case 24/86, Blaizot v Univ. of Liège, 1988 E.C.R. 379, para. 27; Case C-347/00, Barreira Pérez v. INSS, 2002 E.C.R. I-08191, para. 44; Case C-453/02, Finanzamt Gladbech v. Linneweber, 2005 E.C.R. I-01131, para. 41; Case C-292/04, Meilicke v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835, para. 34.

[145] *See* Case C-228/92, Roquette Frères SA v. Hauptzollamt Geldern, 1994 E.C.R. I-01445, para. 17.

[146] Case C-43/75, Defrenne v. Sabena, 1976 E.C.R. 00455, paras. 74–75.

[147] *See* Case C-4/79, Providence agricole de la Champagne v. ONIC, 1980 E.C.R. 02823, para. 45.

[148] *See* Case 109/79, Maïseries de Beauce v. ONIC, 1980 E.C.R. 02883, para. 44; Case 112/83, Société des produits de maïs SA v. Admin. des douanes et droits indirects, 1985 E.C.R. 00719, para. 17; Case C-33/84, Fragd v. Amministrazione delle finanze dello Stato, 1985 E.C.R. 01605, para. 17.

[149] *See* Case C-300/86, Van Landschoot v. NV Mera, 1988 E.C.R. 03443; Case C-333/07, Société Régie Networks v. Direction de contrôle fiscal Rhône-Alpes Bourgogne, 2008 E.C.R. I-10807; Case C-236/09, Assoc. Belge des

Generally speaking, the Court refers to "overriding considerations of legal certainty" to limit the retroactive effect of its ruling.[150] The position of the applicants is often examined, but comparable to its judgments under Article 263 TFEU, the Court infrequently excludes the applicants and others who had already started proceedings from the temporal limitation.[151]

2. Interpretative Judgments

Regarding the temporal limitation of interpretative judgments, the CJEU's case law evolved differently. After the *Defrenne* case, the CJEU recapitulated that it may only restrict the opportunity to rely on the given interpretation for legal relationships established in good faith prior to the judgment in exceptional situations.[152]

The CJEU only limits the retroactive effect on an interpretative judgment when four conditions (two substantive and two procedural) are met.[153] First, the decision of the CJEU needs to entail serious economic repercussions. The burden of proof in this regard is entirely on the governments of Member States.[154] Some authors are very critical of this condition because the most serious infringements may go uncorrected because of this limitation.[155] Second, those concerned need to have acted in good faith. The important

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Consommateurs Test-Achats ASBL and Others v. Conseil des ministres, 2011 E.C.R. 00000; Yves Thiery, *La fin de la tarification homme-femme en Europe—case note CJEU C-236/09* [*The End of Charging Men and Women in Europe—Case Note CJEU C-236/09*], JOURNAL DES TRIBUNAUX [J.T.] 344, 344–47 (2011).

[150] See *e.g.* Case 41/84, Pietro Pinna v. Caisse d'allocations familiales de la Savoie, 1986 E.C.R. 00001; Case C-228/99, Silos e Mangimi Martini SpA v. Ministero delle Finanze, 2001 E.C.R. I-08401; Case C-333/07, Société Régie Networks v. Direction de contrôle fiscal Rhône-Alpes Bourgogne, 2008 E.C.R. I-10807; Case C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen, 2010 E.C.R. I-11063.

[151] See *e.g.* Case 145/79, Roquette Frères v. Administration des douanes, 1980 E.C.R. 02917; Case 112/83, Société des produits de maïs SA v. Admin. des douanes et droits indirects, 1985 E.C.R. 00719; Case C-33/84, Fragd v. Amministrazione delle finanze dello Stato, 1985 E.C.R 01605; Case 41/84, Pietro Pinna v. Caisse d'allocations familiales de la Savoie, 1986 E.C.R. 00001; Case C-333/07, Société Régie Networks v. Direction de contrôle fiscal Rhône-Alpes Bourgogne, 2008 E.C.R. I-10807.

[152] *See* Case 61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl, 1980 E.C.R. 01205.

[153] *See* BARENTS, *supra* note 143, at 251–56; Lang, *supra* note 1, at 231-35.

[154] *See*, *e.g.I*, Case C-402/03, Bilka v. Jette Mikkelsen and Michael Due Nielsen, 2006 E.C.R. I-00199; Case C-313/05, Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie, 2007 E.C.R. I-00513; Case C-73/08, Bressol v. Gouvernement de la Communauté française, 2010 E.C.R. I-02735; Case C-242/09, Albron Catering BV v. FNV Bondgenoten and John Roest, 2010 E.C.R. I-10309; Mathieu Isenbaert, *Tempus fugit: de werking in de tijd vna een arrest van het Hof van Justitie inzake directe belastingen* [*Tempus Fugit: Operation in Time of a Judgment of the Court of Justice on Direct Taxes*], 358 TIJDSCHRIFT VOOR FISCAL RECHT [J. OF FISCAL RULES] 243, 245-246 (2003).

[155] *See* Balmes & Ribbrock, *supra* note 1, at 19.

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question for this condition is whether individuals and national authorities have been led into adopting practices which do not comply with Union legislation by reason of objective, significant uncertainty regarding the implications of Union provisions to which the conduct of other Member States or the Commission may even have contributed. Uncertainty towards the application of a certain provision is, for example, not possible when there is already well-established case law of the CJEU.[156]

Third, only the CJEU may limit the temporal effects of its interpretative judgments.[157] Fourth, such a limitation is only possible in the actual judgment ruling upon the interpretation sought.[158] Furthermore, when an interpretative judgment is given, the position of applicants and other pending cases is closely followed. The Court often excludes these applicants and cases from the temporal limitation.[159]

It is clear that the CJEU is stricter with regards to the limitation of an interpretative judgment than when the retroactive effect of an annulment or judgment of invalidity is concerned. The difference can be explained by the main purpose of the preliminary reference procedure: A uniform interpretation and application of EU law.[160] When the CJEU limits the retroactive effect of an interpretative judgment, the Court in fact maintains the effects of *national* legislation contrary to EU law, setting aside the principle of primacy of EU law. In contrast, when an annulment or a judgment of invalidity is at stake, the CJEU will maintain the effects of an annulled or invalid *European* legislative act, i.e. an act which is already consistently applied in all Member States.

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[156] *See, e.g.*, Case C-163/90, Admin. des douanes et droits indirects v. Legros, 1992 E.C.R. I-04625; Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, René Lancry v. Direction Générale des Souanes & Société Dindar Confort a.o., 1994 E.C.R. I-03957; Case C-57/93, Anna Adriaantje Vroege v. NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfonds NCIV, 1994 E.C.R. I-04541; Case C-437/97, Evangelischer Krankenhausverein Wien v. Abgabenberufungskommission Wien, 2000 E.C.R. I-01157; Case C-372/98, The Queen v. Ministry of Agric., Fisheries & Food, 2000 E.C.R. I-08683; Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-06193; Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, para. 75 (Opinion of Advocate General Jacobs); Case C-292/04, Meilicke a.o. v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835, para. 38 (Opinion of Advocate General Stix-Hackl).

[157] *See* Case 61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl, 1980 E.C.R. 01205.

[158] *See e.g.* Case 61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl, 1980 E.C.R. 01205; Cases 66/79, 127/79 & 128/79, Amministrazione delle finanze dello Stato v. Salumi a.o., 1980 E.C.R. 01237; Case C-57/93, Anna Adriaantje Vroege v. NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfonds NCIV, 1994 E.C.R. I-04541; Case C-292/04, Meilicke v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835.

[159] *See e.g.* Case 24/86, Blaizot v. Univ. de Liège, 1988 E.C.R. 00379; Case C-262/88, Barber v. Guardian Royal Exchange Assurance Group, 1990 E.C.R. I-01889; Case C-163/90, Admin. des douanes et droits indirects v. Legros, 1992 E.C.R. I-04625; Case C-437/97, Evangelischer Krankenhausverein Wien v. Abgabenberufungskommission Wien, 2000 E.C.R. I-01157; Wiedmann, *supra* note 1, at 199.

[160] *See* CHALMERS ET AL., *supra* note 140, at 171.

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Contrary to the actions for annulment and declarations of invalidity, the CJEU has not given an effect *pro futuro* to its interpretative judgments.[161] Again, the subject of the temporal limitation comes into play. When the CJEU maintains for a certain period the effects of a national norm contrary to EU law, a uniform application within all twenty-seven Member States is no longer possible.

3. Territorial Restriction of the Temporal Limitation?

Finally, it is not clear whether the temporal limitation imposed by the CJEU is restricted to the Member State that sought the ruling.[162] As stated before, a preliminary ruling does not have to be taken into account by only those Member States whose courts raised the preliminary question. The fundamental need for a general and uniform application of Union law gave rise to the rule that only the CJEU can limit the temporal effect of its judgments.[163]

On the other hand, the CJEU only limits the effect of its interpretative judgment when the Member State can prove that its judgment would entail serious economic repercussions and when good faith exists on behalf of the state. Advocate General Stix-Hackl emphasizes that any temporal limitation and any exception thereto will be based on an assessment of the situation in the specific Member State, and this assessment might be quite different with regard to other Member States that apply legislation with similar characteristics.[164]

When we assume that a temporal limitation is solely applicable to the Member State in question, there is one great issue left: Limitation is only possible in the actual judgment ruling upon the interpretation sought. The Advocates General in the *Banca Popolare* case

[161] Suggestions have been made. *See* Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, para. 86 (Opinion of Advocate General Jacobs); Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, para. 144 (Opinion of Advocate General Stix-Hackl); Francesco Nanetti & Guilio Mazzotti, *The (Un)lawfulness of IRAP in the European Legal System: The European Court of Justice's Potential New Trends with Regard to Temporal Limitation of its Interpretative Decision*, 15 EC TAX REV. 166, 169 (2006); Waelbroeck, *supra* note 1, at 123; Wiedmann, *supra* note 1, at 200–01.

[162] *See* Lang, *supra* note 1, at 236–37.

[163] *See* Case 61/79, Amministrazione delle finanze dello Stato v. Denkavit italiana Srl, 1980 E.C.R. 01205.

[164] *See* Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, at para. 181 (Opinion of Advocate General Stix-Hackl); Case C-292/04, Meilicke v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835, at para. 14 (Opinion of Advocate General Stix-Hackl); Wiedmann, *supra* note 1, at 199.

argued in favor of a revision of the CJEU's case law.[165] The Court did not find the national legislation contrary to EU law, therefore making a judgment on the temporal limitation unnecessary.[166]

Nevertheless, in 2004 the Court expanded the field of the temporal limitation of the 1992 *Legros* ruling.[167] The Court found that the "same considerations of legal certainty must be applied and consequently the temporal limitation set by the Court in *Legros and Others* must also be held to apply to claims for refunds of sums levied by way of the tax at issue in the main proceedings."[168] This judgment, however, did not announce a new approach by the ECJ. A few years later, the CJEU explicitly denied limiting the retroactive effect of its judgment in the *Meilicke* case given that in the previous preliminary ruling no limitation was granted. The Court emphasized that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to Union law under that law, while fulfilling at the same time the requirements arising from the principle of legal certainty.[169] To what extent are these principles of equal treatment and legal certainty safeguarded when a temporal limitation is territorially restricted?

The question whether the temporal limitation is territorially restricted is important. An affirmative answer would enable the CJEU to listen more carefully to the observations and remarks by the Member States and adopt a more flexible attitude towards their position.

II. Concurrence of Temporal Effects

The foregoing shows that the CJEU quite strictly holds on to the *ex tunc* effect of its decisions. As previously stated, it appears that this position cannot be easily reconciled with the need for flexibility. The German study suggests that the CJEU should take more national interests into account, e.g. the avoidance of regulatory gaps, the protection of the confidence of citizens, protection against disproportionate administrative efforts, the

[165] *See* Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, para. 86 (Opinion of Advocate General Jacobs); Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373, para. 183 (Opinion of Advocate General Stix-Hackl).

[166] *See* Case C-475/03, Banca popolare di Cremona Soc. coop. arl v. Agenzia Entrate Ufficio Cremona, 2006 E.C.R. I-09373.

[167] Case C-163/90, Admin. des douanes et droits indirects v. Legros, 1992 E.C.R. I-04625; Case C-72/03, Carbonati Apuani Srl v. Comune di Carrara, 2004 E.C.R. I-08027.

[168] Case C-72/03, Carbonati Apuani Srl v. Comune di Carrara, 2004 E.C.R. I-08027, para. 40.

[169] *See* Case C-292/04, Meilicke v. Finanzamt Bonn-Innenstadt, 2007 E.C.R. I-01835; *see also* Balmes & Ribbrock, *supra* note 1, at 19–20; Lang, *supra* note 1, at 236–37.

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avoidance of serious losses to state budgets, and other consequences affecting the common good. Under these circumstances the study proposes that the effects of judgments of the CJEU should be limited to an effect *ex nunc*, or even to an effect *pro futuro*, or that the national legislature will be responsible for correcting situations which are contrary to EU law.[170]

1. Primacy of EU Law

In two recent cases, the CJEU confirmed that the temporal limitation by a constitutional court does not affect the principle of the primacy of Union law. Consequently, national courts remain obligated to refuse the application of a national provision contrary to EU law. Furthermore, only the CJEU may limit this obligation in light of the considerations of legal certainty.

1.1 The Filipiak Case

In 2009, the CJEU gave its ruling in the *Filipiak* case. Mr. Filipiak was a Polish citizen who engaged in an economic activity in the Netherlands. He was subject to unlimited tax liability in Poland and paid social security and health insurance contributions in the Netherlands. These contributions failed to satisfy the criteria laid down in Polish national provisions, and therefore they could not be deducted from income tax in Poland. In its judgment on 7 November 2007, the Polish Constitutional Court found this provision contrary to Articles 2 and 32 of the Polish Constitution, which lay down the principle of social justice and the principle of equality before the law, respectively. In the same judgment, pursuant to Article 190(3) of the Polish Constitution, the Court decided to postpone the rescission to 30 November 2008.

The regional administrative court where Filipiak challenged the computation of his taxes referred two questions to the CJEU. First, the administrative court wondered whether the Polish provisions were contrary to the freedom of establishment and the freedom to provide services. The CJEU answered this question affirmatively.[171]

Second, the referring court asked whether the primacy of Union law obliges the national court to apply Union law in the proceedings before it, overruling contravening national law regardless of the decision of the national Constitutional Court to postpone the rescission.

The CJEU needed a mere handful of considerations to answer this second question. The CJEU emphasized that a national court applying Union law is under a duty to give full effect

[170] *See* HUFEN, *supra* note 19, at 11–12.

[171] Case C-314/08, Filipiak v. Dyrektor Izby Skarbowej w Poznaniu, 2009 E.C.R. I-11049, paras. 47–74.

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to those provisions and, if necessary, must refuse to apply any conflicting provision of national legislation. Therefore, even though the Polish Constitutional Court postponed the rescission, the referring court has to immediately decline to apply those national provisions which the CJEU holds to be contrary to Union law.[172]

Following the decision of the Polish Constitutional Court, the unconstitutional rule was applicable until 30 November 2008. However, the interpretative judgment of the CJEU has, as stated before, a retroactive effect. Courts must apply the interpreted rule even to situations and cases arising before the *Filipiak* judgment. Consequently, the effect *pro futuro* enters into sharp conflict with the effect *ex tunc,* generating considerable uncertainty.

Why did the CJEU not limit the retroactive effect of its judgment by giving it an effect *ex nunc*, or limit the retroactive effect until 30 November 2008? This way no uncertainty would remain. Such a specific limitation of the temporal effect is, of course, only possible under the assumption of territorial confinement of the temporal limitation to the Member State where the case originated. Furthermore, by imposing this limitation, the Court will have to diverge from the strict conditions that it imposes to make a limitation possible in case of an interpretative judgment. National constitutional courts are better suited to assess the possible consequences of an annulment or rescission. This way the CJEU was able to initiate a judicial dialogue and to provide a certain amount of flexibility.[173]

1.2 The Winner Wetten *Case*

Approximately one year later, the CJEU decided a similar question in the *Winner Wetten* case. This case was referred by the *Verwaltungsgericht* in Cologne.[174] The Law on Bets on Sporting Competitions of the Land Nordrhein-Westfalen required a prior authorization for companies taking bets on sporting competitions.[175] The Mayor of Bergheim prohibited Winner Wetten from carrying out that business. The *Bundesverfassungsgericht* decided that legislation creating a public monopoly on bets on sporting competitions was contrary to Article 12(1) of the German Basic Law, which guarantees the freedom of occupation. The Court did not annul the legislation in question, but declared it incompatible and

[172] *Id.* at paras. 81–85.

[173] *See* Willem Verrijdt, *Het Grondwettelijk Hof en het Unierecht: over een rechterlijke dialoog in de pluralistische rechtsorde* [*The Constitutional Court and European Union Law: A Judicial Dialogue in Pluralistic Law*], *in* DE INVLOED VAN HET EUROPEES RECHT OP HET BELGISCHE PRIVAATRECHT [THE IMPACT OF EUROPEAN LAW ON BELGIAN PRIVATE LAW] 41, 48–50 (Vincent Sagaert et al. eds., 2012).

[174] *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015.

[175] *See* Sportwettengesetz Nordrhein-Westfalen [Act on Bets on Sporting Competitions of North Rhine Westphalia], May, 3, 1955, SGV NRW 7126, art. 1(1) (Ger.).

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maintained its effects until 31 December 2007. By that date, the legislature should amend the contested legislation.

The *Verwaltungsgericht,* before which Winner Wetten brought an action, entertained doubts as to the compatibility of such a transitional period with the requirements arising from the primacy of Union law. This primacy forbids the application of national legislation contrary to Articles 49 TFEU or 56 TFEU.[176] The *Verwaltungsgericht* asked the CJEU whether national provisions that contain impermissible restrictions on the freedom of establishment and the freedom to provide services could be further applied for a transitional period, notwithstanding the primacy of Union law. And if it could, what conditions need to be met to allow a provision to temporarily violate the primacy of EU law, and how should the transitional period be determined?

The CJEU started its reasoning with considerations similar to those expressed in the *Filipiak* case.[177] The CJEU recalled the principle of primacy of EU law and emphasized that directly applicable rules of Union law must deploy their full effects—uniformly in all Member States—from their entry into force and throughout the duration of their validity. Pursuant to the principle of cooperation set out in Article 4, third paragraph, TEU,[178] national courts need to set aside national provisions contrary to EU law. Consequently, any provision set forth by a national legal system and any legislative, administrative, or judicial practice preventing national courts from setting aside national rules contrary to EU law, is incompatible with the requirements which form the very essence of Union law. The CJEU underlined the principle of effective judicial protection and the duty of the Member States under the principle of cooperation to ensure judicial protection of an individual's rights under Union law. The decision of the *Bundesverfassungsgericht* to postpone the annulment and to maintain the effects of unconstitutional legislation cannot prevent a national court, upon finding that the same legislation infringed with directly effective Union provisions, from setting aside that national legislation. Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law.

All nine Member States submitting observations recalled the case law developed by the CJEU on the basis of the second paragraph of Article 264 TFEU, which provisionally maintains the effects of measures of Union law annulled or held invalid by the Court.[179] Bearing this in mind, the Member States deduced that by analogy the provisional

[176] Formerly articles 43 and 49, respectively, of the Treaty Establishing the European Community.

[177] *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015, paras. 53–61.

[178] Formerly Article 10 of the Treaty Establishing the European Community.

[179] *See* TEFU, *supra* note 47, at arts. 263, 267.

maintenance of the effects of a national rule held contrary to a directly applicable Union rule is justified. The CJEU held that the maintenance of the effects of a Union measure may be justified to prevent a legal vacuum. Substantively, the Court requires this maintenance of effects to address overriding considerations of legal certainty for both public and private interests. As a formal determinant, the period of time of the maintenance of the effects should be tailored to allow the underlying illegality to be remedied.

The ECJ found that, even assuming that similar considerations were capable of leading, by analogy and by exception, to a provisional suspension of the ousting effect which a directly applicable rule of Union law has on contrary national law, such a suspension (which can only be imposed by the CJEU) must be excluded from the outset in this case. No overriding considerations of legal certainty were capable of justifying such a suspension.[180] The interventions of no less than nine Member States proved the significance of this judgment.[181] Even though the Court stated that it was not necessary to examine the second question given their answer to the first, the CJEU implicitly did clarify the conditions for a derogation from the principle of primacy.[182]

First of all, following the CJEU's previous case law on the temporal limitation of interpretative judgments, only the Court of Justice may determine the conditions of a suspension. Consequently, national courts are not allowed to set aside the principle of primacy. A strict interpretation of this condition obliges national courts to make a preliminary ruling each time they wish to maintain the effects of a national norm contrary to EU law.[183]

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[180] The national legislation at issue did not effectively contribute to limiting betting activities in a consistent and systematic manner. *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015, paras. 62–69.

[181] *See* Adam Lazowski, *Half Full an Half Empty Glass: The Application of EU law in Poland*, COMMON MKT. L. REV. 503, 548 (2011); Denys Simon, *Effet d'exclusion du droit national* [*Exclusionary Effect of National Law*], 12 EUR.-REVUE MENSUELLE 18, 18 (2010); Jerfi Uzman, *Noot onder HvJ C-409/06, Winner Wetten, 8 september 2010* [*Note Under HvJ C-409/06, Winner Wetten, 8 September 2010*], 15 JURISPRUDENTIE BESTUURSRECHT [ADIM. CASE. L.] 1213, 1223 (2010) (Neth.).

[182] *See* Beukers, *supra* note 1, at 2001.; Uzman, *supra* note 181, at 1223; Fabrice Picod, *Pas de maintien provisoire d'une réglementation contraire au droit de l'Union* [*No Interim Maintenance of Regulations Contrary to Union Law*], 39 LA SEMAINE JURIDIQUE–ÉDITION GÉNÉRALE [LEGAL WEEK—GEN. ED.] 1792, 1792 (2010).

[183] *See* Michel Aubert et al., *Pouvoir des juges nationaux* [*Power of National Courts*] ACTUALITE JURIDIQUE—DROIT ADMINISTRATIF [LEGAL NEWS—ADMIN. L.] 2305, 2306–07 (2010) (Fr.); Beukers, *supra* note1, at 1998–99; Rick van der Hulle & Rob van der Hulle, *Op weg naar een minder strikte toepassing van de voorrangsregel?* [*Towards a Less Strict Application of the Priority Rule?*], 12 TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT [J. OF EUROPEAN ECON. L.] 490, 499 (2012); Simon, *supra* note 181, at 19.

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Second, the continued application of a national provision contrary to EU law is only possible when overriding considerations of legal certainty are at stake. The CJEU seems to brush aside the strict conditions of good faith and serious economic repercussions in favor of promoting the general condition of legal certainty as put forward in its case law on the validity of EU law.[184]

Beukers observes that when the CJEU decides on the conditions of a suspension neither the German nor the national conception of legal certainty will be decisive. Instead, the European version—as interpreted by the CJEU—is determinative. He adds that this case needs to be understood in light of the broader judicial dialogue between the CJEU and national constitutional courts. To what extent can and will the CJEU put aside the reasons for a temporal limitation given by the national constitutional courts? Reference can be made to the relationship between the judiciary and the legislature, particularly the consideration that an effect *pro futuro* is often imposed to give the legislature time to amend the contested legislation.[185] Only future case law will tell.

Two important issues were left untouched by the CJEU. First, nothing was said about the position of the applicants before the national court who referred the question, or the status of related pending cases.[186] Under the Court's previous case law we cautiously assume that the CJEU will exclude these individuals from its temporal limitation.

Second, the CJEU did not mention the requirement that a temporal limitation is only possible in the actual judgment ruling upon the interpretation sought.[187] In the *Gambelli* judgment, no temporal limitation was imposed.[188] With this issue, the question regarding the territorial dimension of a temporal limitation arises. A provisional maintenance of national acts contrary to Union law is obviously only applicable in the Member State whose court raised the question. Consequently, the principle of "first come, first served" cannot be upheld. It cannot be that only the national provisions of the Member State whose court

[184] In this case, the CJEU found that there were no overriding considerations of legal certainty at stake, given that the German legislation did not effectively contribute to limiting betting activities in a consistent and systematic manner. Advocate-General Bot added that the reasons why the legislation was contrary to Union law arose from the *Gambelli* judgment which was delivered more than 18 months before the adoption of the contested German measures. *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015, para. 84 (Opinion of Advocate General Bot); Simon, *supra* note 181, at 20.

[185] *See* Beukers, *supra* note 1, at 2000; *see also* Uzman, *supra* note 181, at 1225.

[186] *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015, paras. 84, 104 (Opinion of Advocate General Bot).

[187] *Id.* at para. 116; Simon, *supra* note 181, at 20; Thomas Talos & Markus Arzt, *The Winner Wetten Case and its Implications on the Primacy of EU Law*, 5 EUR. L. REP. 172, 173 (2010).

[188] *See* Case C-243/01, Criminal proceedings against Piergiorgio Gambelli & Others, 2003 E.C.R. I-13031.

raised a certain question for the first time are eligible for a provisional maintenance. As a result, the CJEU will have to set aside the condition that a temporal limitation is only possible in the actual judgment ruling upon the interpretation sought.

Hopefully, the requirement that only the CJEU may set the conditions for a provisional maintenance will ensure the uniform interpretation of Union law in all Member States.[189] Will it be possible to achieve such a uniform application when every temporal limitation is based on the specific conditions of a certain Member State? Some authors have suggested that the CJEU should only define general—perhaps very strict—conditions under which the national courts can provisionally maintain the effects of the national legislation contrary to EU law. Two arguments support this proposition. First, without such provisional maintenance a legal gap is created and individuals slip into situations which do not necessarily align with EU law. Second, as it is not easy for the CJEU to assess all the possible consequences of its judgment in a specific Member State, the national courts are better fit to do this.[190]

Although this alternative seems plausible, it comes with several important disadvantages. This alternative would cause national courts to decide upon the temporal limitation of a national norm. Ordinary courts seldom enjoy the power to limit the temporal effect of their own decisions. Even some constitutional courts—Italy's, for example—may not dictate the temporal effect of their decisions.[191] They would have to employ a technique that they have not yet mastered. Additionally, it is very likely that different ordinary courts would impose different temporal limitations within the limits set by the CJEU.

In its recent decision in the *Stanleybet* case, the ECJ confirmed that by reason of primacy of directly applicable European Union law, national legislation concerning a public monopoly on games of chance that is incompatible with the freedom of establishment and the freedom to provide services cannot continue to apply during a transitional period. The Court added that, consequently, the national authorities may not refrain from considering applications (such as those at issue in the main proceedings) for permission to operate in the sector of games of chance during a transitional period.[192] Van der Hulle claims that this judgment was a missed opportunity for the ECJ to clarify the possibility laid down in the

[189] *See* Case C-409/06, Winner Wetten v. Bürgemeisterin der Stadt Bergheim, 2010 E.C.R. I-08015, para. 115 (Opinion of Advocate General Bot).

[190] *See* Aubert et al., *supra* note 183, at 2307.

[191] *See supra* part C(II)(1.1)(a) Constitutional or legal basis?

[192] *See* Cases C-186/11 and C-209/11, Stanleybet and Sportingbet v. Ypourgos Oikonomias kai Oikonomikon, 2013 E.C.R. 00000, paras. 38–39.

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Winner Wetten case. Specifically, they could have addressed the possibility of temporarily deviating from the rule establishing the primacy of EU law.[193]

2. National Procedural Autonomy

The *Filipiak* and *Winner Wetten* cases made clear that only a temporal limitation given by the CJEU can set aside the principle of primacy of EU law. The CJEU, however, took an unexpected turn two years later.[194]

The Walloon Government introduced an action program regarding the sustainable management of nitrogen in agriculture, implementing Directive 91/676/EEG and complying with the CJEU's decision in *Commission v Belgium*.[195] The CJEU stated in the first *Inter-Environnement Wallonie* case that this action program fell within the scope of Article 3(2)(a) of Directive 2001/42/EC, which implies that prior to its adoption, this program should have been subject to an assessment of its environmental effects.[196] Because such an assessment was not carried out and because the CJEU did not limit the effects of its judgment in time, the Belgian Council of State should have annulled the program. However, the Council of State asked the CJEU whether it could not defer in time the effects of its annulment for a short period[197] in order to maintain in European Union environmental law a degree of specific implementation without any discontinuity.[198]

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[193] Rob van der Hulle, *Een gemiste kans? Case note CJEU C-186/11 and C-209/11 Stanleybet [2013]* [*A Missed Opportunity? Case Note CJEU C-186/11 and C-209/11 Stanleybet [2013]*], 5 SOCIAAL-ECONOMISCHE WETGEVING [SEW] 239, 241 (2013).

[194] *See* Case C-41/11, Inter-Environnement Wallonie ASBL & Terre wallonne ASBL v. Région Wallonne, 2012 E.C.R. 00000.

[195] *See* Arrêté du Gouvernement wallon de 15 février modifiant le Livre II du Code de l'Environnement constituant le Code de l'Eau en ce qui concerne la gestion durable de l'azote en agriculture [Order of the Walloon Government of 15 February Amending Book II of the Environmental Code Constituting the Water Code Regarding the Sustainable Management of Nitrogen in Agriculture] of February 15, 2007, MONITEUR BELGE [M.B.] [Official Gazette of Belgium] Mar. 7, 2007, 11,118; *see also* Case C-221/03, Comm'n v. Belgium, 2005 E.C.R. I-08307.

[196] *See* Cases C-105/09 and C-110/09, Terre wallonne ASBL & Inter-Environnement Wallonie ASBL v. Région wallonne, 2010 E.C.R. I-05611.

[197] From 15 February 2007, the date of the old action program, until 6 May 2011, date of the entering into force of the new action program.

[198] *See* Conseil d'État [CE] [Council of State] Jan. 18, 2011, Inter-Environnement Wallonie, No. 210.483, *available at* http://www.raadvst-consetat.be/Arrets/220000/900/220914.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=22339&Index=c%3a\software\dtsearch\index\arrets_fr\&HitCount=14&hits=1fc+1fd+62c+62d+785+786+859+85a+985+986+e58+e59+f98+f99+&0846272013410 (Belg.).

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Under the CJEU's previous case law, CJEU presumably would have given a negative answer. The Court, following the opinion of Advocate General Kokott, ruled in a surprisingly different way.[199] The Court held that the judgment in *Winner Wetten* and the principle of the primacy of EU law did not constitute an appropriate basis on which the question of the Belgian Council could answer.

The CJEU underlined the principle of cooperation in good faith laid down in Article 4(3) TEU, which requires Member States and their national courts to nullify the unlawful consequences of a breach of Union law. The procedural rules applicable to actions which may be brought against an action program are, given the lack of procedural provisions in Directive 2001/42, a matter for the domestic legal order of each Member State. This is due to the principle of procedural autonomy of the Member States, provided that the rules are not less favorable than those governing similar domestic situations (i.e. the principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (i.e. the principle of effectiveness).[200] The CJEU recognized the reasons given by the Belgian Council of State. The annulment of the action program would create a legal vacuum incompatible with Belgium's obligation to adopt measures to implement Directive 91/676 and measures in order to comply with the judgment in the case of *Commission v. Belgium*.

According to the ECJ, the protection of the environment is an overriding consideration enabling the Belgian Council of State to exceptionally rely on its national competence to maintain the effects of an annulled national regulation as long as four specific conditions are met. These conditions include: the national measure transposes Directive 91/676 correctly; the adoption and entry into force of the new action program be unable to reverse the effects on the environment resulting from the annulment; the annulment would result in a legal vacuum that would be more harmful to the environment; and the effects of the annulled action program be maintained only for the period of time which is strictly necessary to adopt new measures.

This decision may come across as striking at first because neither the *Filipiak* nor the *Winner Wetten* judgment provided for an exception based on procedural considerations. Additionally, it is hard to define the right to an environmental assessment as a simple formal step in the procedure.[201] Nevertheless, there is an important difference between

[199] *See* Case C-41/11, Inter-Environnement Wallonie ASBL & Terre wallonne ASBL v. Région Wallonne, 2012 E.C.R. 00000, paras. 16-47 (Opinion of Advocate General Kokott); Case C-41/11, Inter-Environnement Wallonie ASBL & Terre wallonne ASBL v. Région Wallonne, 2012 E.C.R. 00000, paras. 39–63.

[200] *See* Case C-41/11, Inter-Environnement Wallonie ASBL & Terre wallonne ASBL v. Région Wallonne, 2012 E.C.R. 00000, paras. 32-47 (Opinion of Advocate General Kokott).

[201] *Id.* at para. 37.

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the *Filipiak* and *Winner Wetten* cases and the case at hand. This difference lies within the reasons given to further apply a national norm contrary to EU law. In the first two cases the reasons were rooted in the legal order of the Member States, i.e. to avoid a legal vacuum within national law, whereas in the *Inter-Environnement Wallonie* case, the only reason to maintain the national norm was to comply with Union law.[202]

Nevertheless, one could ask whether this alternative approach giving deference to national procedural autonomy is preferable. The present case differs in two important respects from previous ECJ cases in which national procedural autonomy, including the principles of effectiveness and equivalence, were at stake. First, the Belgian procedural rule to maintain the effects of an annulled norm—i.e. Article 14*ter* of the Coordinated laws on the Council of state—is a non-mandatory procedural rule which the Belgian Council of State only applies in exceptional circumstances.[203] The Council could have declared the program void. Second, the reason to apply this article 14*ter* was not found in the national legal order, but only in the EU's legal order.[204]

The preliminary reference by the Belgian Council confronted the CJEU with the boundaries of its rigid case law regarding the temporal effects of judicial decisions. After all, according to its own case law, the ECJ will only limit the temporal effect of its interpretative decisions when the Member State acted in good faith and indicates that the preliminary ruling would entail serious economic repercussions. Consequently, the ECJ could not even decide to maintain the effects in the first *Inter-Environnement Wallonie* case[205] as environmental protection was the only reason to do so.

The CJEU thus departed from its case law based on the primacy of EU law and used the principle of national procedural autonomy as an alternative. The very specific bases of the CJEU's considerations demonstrate the highly exceptional character of this divergence. The CJEU provided a ready-made solution that cannot be seen as a new general principle by strongly emphasizing the specific facts and circumstances of the case.[206]

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[202] *See* Tobias Lock, *Are There Exceptions to a Member State's Duty to Comply with the Requirements of a Directive?: Inter-Environnement Wallonie*, 50 COMMON MKT. L. REV. 217, 225–26 (2013).

[203] Article 14*ter* states: "Where the Council so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions of administrative regulations are to be considered maintained or be provisionally maintained for the period appointed by the Council". *See* Sarah Verstraelen, *Artikel 14ter RvS-wet als alternatief voor legislatieve validatie? Of hoe het ene probleem door het andere vervangen wordt*, 2 TIJDSCHRIFT VOOR BESTUURSWETENSCHAPPEN EN PUBLIEKRECHT [TBP] 100, 100–13 (2012); Verstraelen, *supra* note 81, at 356–60.

[204] *See* Lock, *supra* note 202, at 222–23.

[205] *See* Cases C-105/09 and C-110/09, Terre wallonne ASBL & Inter-Environnement Wallonie ASBL v. Région wallonne, 2010 E.C.R. I-05611.

[206] *See* Verstraelen, *supra* note 81, at 358-59.

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Two questions remain. Will the CJEU tolerate the deviation from a Directive when national provisions protect an essential objective of the European Union, but are contrary to procedural requirements of EU legislation?[207] This question is difficult to answer. Given the specific considerations of the judgment, a mere copy of these criteria will not be possible. This, however, would not prevent the CJEU from giving another ready-made solution when it deems necessary.[208] Additionally, it will be difficult to establish whether an objective constitutes an essential objective of the European Union.[209]

Second, will the principle of deference to national procedural autonomy provide an acceptable outcome when fundamental rights are at stake? To put this question in a broader context, is temporal limitation a national procedural aspect by which national courts can limit the application of national legislation deemed contrary to EU law by the CJEU? The answer is no. The principle of equivalence requires the referring court to have the power, even at the national level, to temporarily maintain provisions after an annulment. As previously stated, generally only constitutional courts and highest administrative courts have such power. Furthermore, the principle of effectiveness raises larger concern. It goes without saying that a temporal limitation of an interpretative judgment of the CJEU renders the application of Union law impossible or excessively difficult. For a certain period of time the national legislation contrary to EU law will be applied, setting aside the basic principle of primacy of EU law.[210]

E. Conclusion

The case law of all constitutional courts shows that it is the court's flexibility to deviate from the general rule that is most important, not the initial choice for either one of the three main categories (i.e. the effect *ex nunc, ex tunc* or *pro futuro*). Avoiding regulatory gaps, allowing the legislator to amend the contested norm, and avoiding disturbing financial consequences, are commonly used justifications to impose an effect *ex nunc* or an effect *pro futuro*. An effect *ex tunc* by which applicants and pending cases may benefit from the rescission or declaration of unconstitutionality is also of great importance. The

[207] Henri de Waele, *Noot onder HvJ C-41/11, Inter-Environnement Wallonie, 28 februari 2012* [*Note on HvJ C-41/11, Inter-Environnement Wallonie, February 28, 2012*], 6 JURISPRUDENTIE BESTUURSRECHT [ADMIN. CASE L.] 450, 451–52 (2012)(Belg).

[208] *See* Cases C-186/11 and C-209/11, Stanleybet & Sportingbet v. Ypourgos Oikonomias kai Oikonomikon, 2013 E.C.R. 00000, paras. 70-71 (Opinion of Advocate General Mazák).

[209] Lock, *supra* note 202, at 227–29.

[210] *See also* Adelina Adinolfi, *The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary?*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES 281, 291–96 (Hans W. Micklitz & Bruno De Witte eds., 2012).

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need for flexibility is common to every legal order and becomes apparent when examining the case law of the constitutional courts.

The CJEU demonstrated this need for flexibility by extending its own power under Article 264, second paragraph, TFEU to a provisional maintenance in annulment proceedings, and by an extension to the effects in preliminary reference procedures.

Nevertheless, the CJEU will only limit the retroactive effect of its interpretative judgments when four conditions are met. Given the purpose of this strict position, to ensure a uniform application of EU law, the approach of the Court may not come as a surprise. As previously stated, alternative solutions will not lead to a uniform application of EU law; if the ECJ only sets forth general conditions under which national courts can provisionally maintain the effects of national legislation contrary to EU law, various national solutions will appear. The same can be said when the limitation of the temporal effect of an interpretative judgment is seen as a mere national procedural aspect; the principle of effectiveness would be infringed.

Consequently, it has been established that, in order to assure a uniform application of Union law, only the ECJ can limit the retroactive effect of its decisions. The Court should, however, abandon the four strict conditions imposed on such decisions. In addition, the prerequisite of serious economic repercussions should be broadened. Inspiration for ways in which this prerequisite can be broadened can be found with the annulment procedure and judgments on validity where the Court looks for overriding considerations of legal certainty. A first initiative for this broader scope can be found in the *Winner Wetten* case where the Court emphasized that in that specific case no overriding considerations of legal certainty were capable of justifying a suspension of the ousting effect which a directly applicable rule of Union law contradicts national law. A broad approach would open the possibility for a real dialogue between the ECJ and the Member States, especially when a national constitutional court already limited the temporal effect of its own decision. Such was the case in *Winner Wetten* and *Filipiak*.

If other reasons could constitute the basis for a temporal limitation, it also becomes possible to discard the territorial restriction that serious economic repercussions automatically entails. Also, the question arises as to what extent a territorial restriction at all may contribute to the uniform application of EU law.

The Court could, of course, maintain the idea that a temporal limitation is territorially restricted to the Member State which asked the question, but this condition is very hard to reconcile with the condition that a temporal limitation is only possible in the actual and first judgment ruling upon the interpretation sought. The affirmation of the principle “first come, first served” must be avoided at all times. In conclusion, it can be said that the Court needs to choose. It’s first option is to impose a temporal limitation only in the first ruling, but allow this limitation to be applicable in all Member States with similar national

regulation contrary to EU law. Alternatively, the Court must hold that every temporal limitation is territorially restricted, but provide the possibility to impose a temporal limitation in later decisions. This way the need for flexibility and the quest for uniformity may be reconciled.

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