

§1. Introduction

This paper aims at studying the restoration of the European Legal Order after the European Court of Justice (hereafter, ECJ) declares the voidness of an act of an Institution of the European Community. It will analyze and compare the mechanisms to face the effects that this act has produced before the declaration of voidness as stated in the treaties, and the solution that the ECJ gives in the practice. For this purpose, I will first tackle with the general idea of nullity in the European legal order and with the manner by which this nullity is declared. The next step will be to examine the evolution of the legal reasoning of the ECJ and the way in which it has solved some cases. In particular, the argument will focus on those decisions that do not apply the effects of voidness prescribed by the treaties, effects that are also generally accepted by the legal theorist, because of the undesirable consequences that this could produce.

§2. The nullity in the European Legal Order

The model of validity that the European legal order has assumed is a quiet complex issue, and has been analyzed by scholars from several points of view. We can identify two types of validity relations: one is the one that operates in the relationship between the European order and the national legal systems; the other is the one that exist inside the European legal order. For the purpose of this paper, we will only focus on how the model of validity operates inside the European legal order, and we will not discuss the functioning of the model validity in the level of relations between legal orders, that is still a problematic issue. The later is so because the relationship between the European order and the national legal systems is a topic that cannot be examined neither under the prism nor the traditional categories that so far have been used in Law¹. The notions of hierarchy and validity of norms, for example, have still not been coherently developed at this level of interaction between European and national legal systems and,

¹ See BARENTS (2004): p. 167ff.

consequently, an accurate account of the sources of the European Legal order and the relations among them is still an unresolved and permanently debated issue in European Law.

By contrast, inside the European legal order, we can identify the adoption of a traditional model of derivate validity in the same way as we can identify it in the national legal orders. This traditional model of derivate validity applies not only in the relation between European legal order and national level, but also inside the European legal order itself, that means, in the framework of the norms generated by the different European centres of law-making. Thus, we can recognize several bodies in charge of the law-making process, a group of norms with superior hierarchy than others that establish the parameter of the Community legality, a procedure of control of this legality upon the acts of inferior hierarchy that contravene this parameter, and a Court that has the power to declare the natural sanction for the cases of unlawfulness, that is it the nullity of those illegal acts. In consequence, it can be said that the community regulation has followed a traditional pyramidal scheme in which the inferior norms exist or are valid as long as they are enacted in accordance to the superior norm.

The effects that the nullity has in the European legal order, then, are the same that it has at national levels and that constitute a general feature of this legal institution: nullity quashes the decision² and produces the elimination of all the effects generated by that decision³.

In this sense, article 231 EEC clearly states that if the judicial review action is well founded, “the Court of Justice shall declare the act concerned to be *void*”. Several translations of this article in other official European languages are still more expressive. For instance, the Spanish translation says that the Court “*declarará nulo y sin valor ni efecto alguno el acto impugnado*”, which means that the Court shall declare void and *without any effects* the contested act⁴.

² About the types of acts subjected to control, see CRAIG & DE BÚRCA (2003): p. 483ff.; HARTLEY (2003): p. 336ff., or MIGLIAZZA (1960): p. 1489ff. New types of acts subjected to revision like control of coalitions or those that impose sanctions are analyzed in SCHWARZE (2004): p. 99ff. The problem of the deciding character of the act is analyzed in NERI (1967), p.462 ff and in MIGLIAZZA (1960): p. 1494, among others.

³ Case *Commission v. Council*, March 31, 1971 (C-22/70). Among the scholars, see LENAERTS & ARTS (1999): p. 203 or LEWIS (1996): p. 261. For some, this would be a consequence of the objective character of the control of legality. See BOULOUIS, DARMON & HUGLO (2001): p. 218.

⁴ In the same line are the French version (“la Cour de justice déclare *nul et non avenu* l’acte contesté”) and the Italian version that emphasise that the unlawful act would be “*nullo e non avvenuto*”. On the contrary, the German and the Portuguese version only says that the act will be “*nichtig*” or that the Court

The effects of this sanction are strong because the nullity is a cornerstone institution within legal systems, since it defines the limits of what is legal and what is not. This means that the nullity identifies the legal framework in a negative sense, delimitating what is compulsory, permitted and prohibited⁵. The obedience of the EU rules and principles is guaranteed by a sanction to the unlawful acts, and this sanction imposes the necessary equilibrium between the different bodies that coexist in the European Community sphere⁶.

§2.1. The Features of the European nullity.

This apparent simplicity of the European nullity system is drawn, on the one hand, by the norms of the European community and, on the other hand, by the features that the scholars and the European case-law have attributed to that system. A review of these features can illustrate better this simplicity:

§2.1.1. Quashing the norm

As we mentioned above, article 231 EEC is clear when it says that the act is void and it cannot produce valid effects. The same content could be read in article 147 of the Euratom Treaty⁷.

Therefore, this declaration of nullity will produce in the legal order two kinds of effects. Firstly, the normative act will be unable to generate a “protection effect”, which means that the act will not support the factual situations derived from it and that are afterwards quashed by the decision of voidness. Secondly, the act cannot produce a “recognition effect” in other norms that find their legal support on it. In summary, the quashing effect of an unlawful act will produce the “abandon”, or better, it will leave unprotected both the situations that are hypothetically based on the quashed

“*anulará o acto impugnado*” respectively. But all these ideas express the same argument. In fact, the concept of *void* and the idea of *nichtig* are more loyal with the idea of *nullum* (*nullis, nulla, nullius momenti*) with which Roman law identified that some clauses did not exist. See DI PAOLA (1966): p. 73ff. This nullity as *nullum* is the one that now we know as *inexistence*; GUZMÁN (2001): p. 24. Thus, the concepts of *null* and *void* incorporate the ideas of a total ineffectiveness and impossibility to produce valid effects. GARRIDO (1991): p. 265.

⁵ FORSYTH (1998): p. 142.

⁶ MIGLIAZZA (1960): p. 1485.

⁷ A good comparison of the different nullity remedies in the European treaties can be found in WOLTERS (1960): p. 165-184.

act, and the norms that, as applications of the unlawful act, attempt to improve or introduce changes in the legal order⁸.

The declaration of nullity will have then “suppressive effects”, that means, it will claim the impossibility of the act to generate valid effects, both to the past and to the future⁹. For that reason, if we would like to maintain some situations or norms as valid we must invoke another legal title for that validity¹⁰.

Finally, the decision of voidness will produce the effect of legally settled matter. Consequently, if a citizen claims a new remedy against the same rule to quash it, it must be rejected for lacking of object¹¹.

§2.1.2. *Erga omnes* effects

From a subjective point of view, the nullity produces effects with respect to everyone, i.e. it has general effects. This conclusion can be supported as long as the decision implies an objective analysis of the unlawfulness¹². It represents a judgement about the norm in abstract. This kind of analysis can only lead, if the unlawfulness is established, to one result: the complete removal of the norm from the legal system¹³. The total elimination cannot provide personal exceptions or cannot affect only some kind of situations. This drastic consequence is based on the necessity to ensure a strict observance of the EU law¹⁴ and to promote the equal treatment in all the legal relations.

⁸ For that reason, it is possible to say that the main problem here is these collateral effects of the nullity rather than the nullity itself. BEBR (1981): p. 149.

⁹ CRAIG & DE BÚRCA (2003): p. 541; HARTLEY (2003): p. 433ff.; VANDERSANDEN & BARAV (1977): p. 214ff.; PLOUVIER (1975): p. 96; ISAAC (1999): p. 261; NICOLAYSEN (2002): p. 381. GRABITZ & HILF (1998): p. 3 (art. 174 par. 6); TOHT (1978): t. II, p. 93.

¹⁰ Of course the declaration of nullity will affect only the part of the act that is unlawful. It is possible, then, a declaration of partial voidness. BERGÈRES (1994): p. 224; MIGLIAZZA (1960): p. 1534. See also: *Karl Könecke Fleischwarenfabrik GmbH & Co. v. Commission*, March 5, 1980, (C-76/79) o *Consten and Grundig v. Commission*, July 13, 1966 (C-56 and 58/64); *Germany v. Commission*, September 30, 2003 (C-239/01).

¹¹ See case *ASSIDER v. High Authority*, February 11, 1955 (C-3/54).

¹² See SCHWARZE (1992): p. 242, or VANDERSANDEN & BARAV (1977): p. 218. In the same sense, see case *ASSIDER v. High Authority*, February 11, 1955 (C-3/54).

¹³ JOLIET (1981): p. 111.

¹⁴ MIGLIAZZA (1960): p. 1531.

Therefore the nullity will produce *erga omnes* effects, that is, for all purposes¹⁵.

§2.1.3. *Ab initio* effects

From the perspective of the effects that the nullity decision produces related to the life-time of the unlawful act, or in other words, the question about since when are we suppose to consider the act void, can be answered affirming that it is clear that the decision produces suppressive effects on all the life-time of the act. The decision recognizes the impossibility of the act to produce valid effects at any time. Therefore it is binding that all the situations created on the basis of the unlawful act are restored to the moment before of its enactment¹⁶. Indeed, it is a nullity with retrospective effects¹⁷, which are normally considered as an inherent element of voidness¹⁸.

This conclusion has, however, an important exception that we will study below in §3.1.

§2.1.4. Restricted effects of the decision

Finally, the European Legal order recognizes only a “suppressive competence” to the ECJ. Hence, when the Court considers that an act is unlawful, it can only declare that the act is void. In fact, it has no power to modify or replace it¹⁹. Thus, we can say that the court has only a repressive competence but not a repairable power.

Moreover, it is possible to say that with the quashing decision of the unlawful act the case is finished and, after that, we need only to execute that decision. On the other hand, the process of execution of the decision will be

¹⁵ Case *ASSIDER v. High Authority*, June 28, 1955 (C-5/55). The same idea appears in case *France v. High Authority*, December 21, 1954 (C-1/54). See also VERHOEVEN (2001): p. 329; NICOLAYSEN (2002): p. 381; CHALMERS (2006): p. 456; VIDAL (1999): p. 473; BEBR (1981): p. 149; DAIG (1985): p. 201; TOHT (1978): p. 93-96.

¹⁶ As the ECJ said in *Commission v. Council* “la délibération du Conseil devant être considérée comme inexistante dans la mesure où elle aurait fait l’objet d’une annulation judiciaire, les parties au litige seraient replacées dans la situation antérieure et elles auraient à reprendre l’examen des questions litigieuses pour les résoudre conformément au droit communautaire”. Case *Commission v. Council*, March 31, 1971 (C-22/70).

¹⁷ SAURON (2004): p. 26; NICOLAYSEN (2002): p. 381; CHALMERS (2006): p. 457; GRABITZ & HILF (1998): p. 3 (art. 174/par. 6); BEBR (1981): p. 149; TOHT (1978): p. 94.

¹⁸ VANDERSANDEN & BARAV (1977): p. 214.

¹⁹ SCHERMERS (1975): p. 141. Supporting the same position see case *Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, February 23, 1961 (C-30/59).

decided and implemented not by judges but inside the Administrative bodies that enacted the act²⁰.

According to article 233 EEC, “the institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice”. In that way, the process of execution will not have the objective of eliminating the unlawful act because the decision will produce effects *eo ipso*, that means, by itself. The execution of the decision will provide the fulfilment of the duty to restore the legal order as it was before the existence of the quashed act²¹. This restoration of the *statu quo ante* will not admit fields of discretion and it should be accomplished in the right way and within a reasonable period²². The doubts that could appear can be solve only by appealing to a “finalist interpretation” of the decision, that is, searching the reasons and purposes that were taken into account in the declaration of unlawfulness²³.

§3. The manipulative powers of the ECJ

As we have seen above, the model of nullity that the European legal order settles has a clear pretension of simplicity and coherence. The ECJ should quash the decision as soon as it appears that that decision is contrary to the community treaties. This declaration has, in general terms, the consequence of depriving the effects of this normative act. The act must be expelled of the legal system and any situation that relied on that act will be left without legal support. Moreover, this declaration should be executed by the administrative community organs and the execution will consist in the elimination of all the consequences of the unlawful act.

However, this apparently simplicity and coherence of the way to restore the communitarian legality begins to disappear when we look at a group of exceptions and attitudes of the judges founded in the necessity of counteracting the extreme rigidity of the traditional model of nullity. The courts search more flexibility and this search reflects on several kinds of decisions that have modified - either founded in a legal rule, or in a judicial construction of the own ECJ - the natural and traditional effects of voidness.

This kind of decisions can be considered as “manipulative decision”, in the same sense that, in the framework of the constitutional judicial

²⁰ See BEBR (1981): p. 152; DAIG (1985): p. 203ff.

²¹ Case *Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, February 23, 1961 (C- 30/59). See also, BEBR (1981): p. 149ff.; BACIGALUPO (1995): p. 68.

²² Case *European Parliament v. Council*, July 5, 1995 (C-21/94)

²³ Case *Asteris v. Commission*, April 26, 1988 (97, 99, 193 and 215/86).

review, this concept is used to refer to those decisions of the constitutional courts that modify (or manipulate) the normal effects of the declaration of voidness²⁴.

Let us see in what follows those ways used by the courts to manipulate the consequences of the nullity.

§3.1. The conversion *a posteriori* of affected situations in legal, or the legalization of affected situations

Despite the wording of article 231 EEC, the treaty settles, at the same time, a legal exception completely innovative in legal techniques. In fact, in its paragraph 2, and in the same sense in article 147 of the Euratom Treaty, it establishes an important exception when it regulates the effects of the voidness in case of regulations. This exception, that confirms the general rule of retroactivity before enunciated, prescribes that “[i]n the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive”.

In this case, the same legal order has stated an exception, giving the ECJ a power to "moderate" or "manipulate" the effects of its declaration of nullity.

The problems and contradictions that the declarations of general and total nullity of an unlawful communitarian act generate can explain the attribution of this power to the ECJ. Even though the negation of validity of the act is settled for protecting the European legality, the cost that it could cause to legal certainty is so hard that it cannot be assumed by the legal system. We are, in fact, before a conflict of interests, legal goods, or principles - legality versus legal certainty - both protected by the European legal order, and this is the conflict that the ECJ must solve.

But although the EEC treaty has given this manipulative power to the ECJ, and in this sense, it is not supposed to justify its use more than by claiming to the competence settled by the law as an authoritative reason, the Court uses in its decision several arguments to justify it. Legal certainty is one of the most used²⁵. The content of this principle is well known

²⁴ See ZAGREBELSKY (1977); RUOTOLO (2000); RUGGERI & SPADARO (2001), among others.

²⁵ The expression “legal certainty” can be found now in more than 1911 cases in EUR-Lex, compared with the 900 cases that resulted from the same search in LEXUS in 1997. See RAITIO (2003): p. 125.

See cases *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, April 8, 1976 (C-43/75); *Blaizot v. University of Liège and other*,

ambiguous. However, several decisions have argued that their purpose is to guarantee the predictability of the situations and legal relationships inside the European legal order²⁶. For instance, legal certainty has an important role when the court claims that the statute of limitation of actions must be fixed in advance and the delimitation of its duration and the detailed rules for its application falls within the competence of the Community legislature²⁷. The justification of the statute of limitation has been based also in legal certainty since it is understood as an instrument of reconciliation between “the requirements of legal certainty and those of legality, on the basis of the historical and social circumstances prevailing in a society at a given time”²⁸. And for those cases in which the statute of limitation does not exist, legal certainty imposes also that the nullity action should not be exercised in undetermined terms²⁹.

On the other hand, legal certainty is applied as a requirement of clarity and precision of the legal rules, “so that individuals may be able to

February 2, 1988 (C-24/86); *Evangelischer Krankenhausverein Wien*, March 9, 2000 (C-437/97); among others.

²⁶ See case *Sumitomo Chemical Co. v. Commission*, October 6, 2005 (T-22/02 and T-23/02). In the same sense, *Duff v. Minister for Agriculture and Food, Ireland*, February 15, 1996 (C-63/93); *Hult v. Commission*, January 31, 2002 (T-206/00).

²⁷ See cases *ACF Chemiefarma v. Commission* July 15, 1970 (C-41/69); *Geigy A.G. v. Commission*, July 14, 1972 (C-52/69); *Falck and Acciairie di Bolzano v. Commission*, September 24, 2002, (C-74/00 P and C-75/00 P); *International Power v. NALOO*, October 2, 2003, (C-172/01 P, C-175/01 P, C-176/01 P and C-180/01).

²⁸ See case *Sumitomo Chemical Co. v. Commission*, October 6, 2005 (T-22/02 and T-23/02).

²⁹ See case *Sumitomo Chemical Co. v. Commission*, October 6, 2005 (T-22/02 and T-23/02). See also *François v. Commission*, June 10, 2004 (T-307/01). The Advocate General Ruiz-Jarabo said in his opinion in the case *Commission v. AssiDomän Kraft Products*, “I prefer injustice to disorder! With these blunt words - the absoluteness of which I hasten to repudiate - Johann-Wolfgang von Goethe took sides in what is probably the most complex dilemma in law as a whole: the tense relationship between the desire for justice and the need for certainty”. And he continues: “In reality, however, legality and certainty, more than principles or mechanisms, constitute values which shape a State governed by the rule of law. In that sense, certainty, far from being counterposed to legality, is one of its manifestations: the requirements of certainty are also those of legality. Thus, for example, institutions such as usucapion or limitation of actions, the immediate aim of which is certainty in legal relations, contribute, to the same extent as actions for recovery, the system of remedies or the principle of *res judicata*, to attainment of the objectives of legality which are inherent in every legal order. No system of law can allow the validity of the legal situations which arise within it to be questioned indefinitely”.

ascertain unequivocally what their rights and obligations are and may take steps accordingly³⁰. Finally, legal certainty has also been applied as a requirement of publicity of the communitarian rules³¹, as a way of making effective the coherence of the European legal order, and as an instrument for protecting the member states³².

At this point of the analysis, we can say that the principle of legal certainty is synthesized by the idea of stability. This stability could be understood in two ways: a stability of the legal relationships (of those subjects of rights in front of the legality), and a stability of the legal system as a whole. A second reading of these two ways of stability could be made if we consider it, on the one hand, from the perspective of the interveners or private actors that act inside the community framework³³, and on the other hand, from an institutional perspective³⁴, that is, from the stable functioning

³⁰ See case *Bélgium v. Commission*, April 14, 2005 (C-110/03). For the same argument, see also *Administration des douanes v Société anonyme Gondrand Frères*, July 9, 1981 (C-169/80); *Gebroeders van Es Douane v. Inspecteur der Invoerrechten en Accijnzen*, February 13, 1996 (C-143/93).

³¹ See case *Consorzio del Prosciutto di Parma v. Asda Stores Ltda*, May 20, 2003 (C-108/01). In the same sense *United Kingdom v. Commission*, October 1, 1998 (C-209/96).

³² See TRIDIMAS (1999): p. 248ff.

³³ The facts in the case *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, April 8, 1976 (C-43/75) are very illustrative in this sense. In fact, the *ECJ* say that “[a]ttendu que les gouvernements de l’Irlande et du Royaume-Uni ont attiré l’attention sur les conséquences de caractère économique qui pourraient découler de la reconnaissance, par la Cour, de l’effet direct des dispositions de l’article 119, du fait qu’une telle prise de position pourrait déclencher, dans de nombreuses branches de la vie économique, des revendications remontant à la date à partir de laquelle cet effet se serait produit” ;

“Que, compte tenu du nombre élevé des personnes intéressées, de telles revendications, imprévisibles pour les entreprises, pourraient avoir des *effets graves sur la situation financière* de celles-ci, au point d’ acculer certaines d’entre elles à la *faillite*;

“Attendu que, si les conséquences pratiques de toute décision juridictionnelle doivent être pesées avec soin, on ne saurait cependant aller jusqu’ à infléchir l’objectivité du droit et compromettre son application future en raison des répercussions qu’ une décision de justice peut entraîner pour le passé”. (Emphasis added).

³⁴ The arguments used by the ECJ to manipulate the effects of its decision can illustrate how the court understands the idea of legal certainty. “D’ une part, l’ invalidité dont s’ agit en l’ espèce pourrait donner lieu à un recouvrement de montants indûment payés par des entreprises intéressées dans des pays à monnaie dépréciée, et par des administrations nationales concernées dans des pays à monnaie forte, ce qui, étant donné le manque d’ uniformité des législations nationales applicables, serait susceptible d’ occasionner des

of the European institutions. Accordingly, inside the legal orders of the member states it seems to be good for the national judges to have a State that works with a certain order, and in which their normative framework would not be gravely altered. In this level, for instance, is pertinent to put attention to the financial consequences that a decision of nullity could cause. This idea of legal certainty is, for example, stated in the Portuguese Constitution (art. 284.4) as an element to take into account to limit the effects of the decision. The same approach has motivated the Italian *Corte costituzionale* to create an “Office for the documentation and financial quantification” that calculates the financial incidence of the eventual decisions of the Court. From this perspective, the principle of legal certainty guarantees the stability and optimization of the state system³⁵.

The protection of legitimate expectation is a further principle used by the ECJ to support the manipulation of the effects of its decisions of nullity. Indeed, this principle has been considered as a fundamental principle of the European Community³⁶ and the majority of the legal systems of the member states share it³⁷. Although the difference between the protection of legitimate expectations and legal certainty is not so clear³⁸, it was used for a wide

différences de traitement considérables et, partant, de causer de nouvelles distorsions de la concurrence. D' autre part, il ne peut être procédé à une évaluation des désavantages économiques résultant de l' invalidité de la fixation des montants compensatoires monétaires résultant du système de calcul adopté par la commission sans faire des appréciations que seule cette institution est tenue de faire en vertu du règlement n° 974/71, en tenant compte des différents facteurs pertinents, par exemple la répartition du montant plafonné sur les différents produits dérivés ou dépendants”. *Providence agricole de la Champagne v. ONIC*, October 15, 1980 (C-4/79).

³⁵ The use of the argument of legal certainty has been strongly contested. The opening to discretion that decisions of the courts based on legal certainty has produced has been criticized by some scholars that consider that it becomes a real “alibi” of the Court to defend the financial interests of the European Union, when, truly, it should privilege its “essential” character of being “protector rights”. See BOULOIS (1982): p. 12. In a national level see RUIZ ZAPATERO (2006): p. 142ff.). As one scholar says, an abusive use of the argument of legal certainty should be avoided because the legal system has already created other mechanisms to protect this same interest, like the principle of legally settled matter or the changes that the democratic bodies could introduce. WAELBROECK (1981): p. 121.

³⁶ See *Vereniging voor Energie v. Directeur van de Dienst uitvoering en toezicht energie*, June 7, 2005 (C-17/03); *Atlanta v. Commission and Council*, October 14, 1999 (C-104/97); *Di Leonardo and Dilexport v. Ministero del Commercio con l'Estero*, July 15, 2004 (C-37 and 38/02).

³⁷ See SCHWARZE (1992): p. 868ff.

³⁸ In fact, the ECJ does not always make a distinction between these concepts. See cases *Amministrazione delle finanze dello Stato v. Industria Salumi*, November

number of legal systems since the 70s although with not so clear features. Afterwards, this profile became more consistent mainly thanks to the contributions of the German, French or English thought expressed in the opinions of some Advocates General³⁹.

As the principle of legal certainty, the protection of the legitimate expectation has, as well, an important dose of ambiguity. We can say, however, that its object is to protect the trust on the permanency of the situations that the person that reports benefit of them has, or the trust on a constant way of developing that situation⁴⁰. The consolidation as a legal principle is a response to a social intention of protecting those behaviours and predictions that with good faith are kept in mind by the citizens⁴¹.

Therefore, the main point in the task to understand the idea of protection of legitimate expectation is the determination of which are the necessary conditions for the legal order - through the judicial recognition – to ascribe the quality of a legitimate expectation to a determinate position. The scholars and the Courts are still working on this task to develop a better conceptual framework for this institution⁴².

However, the determination of the contents of this principle is not enough because, as well as with the principle of legal certainty, they are not principles that can be applied alone, but as a matter of degree or balance with other principles. In summary, it is a matter of weight (or counterweight) between the different principles applied to the case. For that reason, in many cases the ECJ continues preferring the legality and it annuls

12, 1981(C-212 and 217/80) or *Mulder v. Minister van Landbouw en Visserij*, April 28, 1988 (C-120/86). However there are good attempts to elaborate a distinction between them. According to Sanz, “mientras que el principio de seguridad jurídica *stricto sensu* exige que las actuaciones públicas se adecuen a una regla objetiva de seguridad (estabilidad de regulaciones y de situaciones jurídicas), el principio de confianza legítima tiene por objeto proteger la confianza que los destinatarios de aquellas actuaciones pueden tener en la estabilidad, al menos por un cierto tiempo, de las situaciones establecidas sobre la base de dichas reglas”. SANZ (2000): p. 100-101.

³⁹ Like Lagrange, Roemer, Reischl o Warner. See SCHWARZE (1992): p. 940.

⁴⁰ This principle is applied “to any individual who is in a situation in which it appears that the administration’s conduct has led him to entertain reasonable expectations”. Case *Vassilis Mavridis v. European Parliament*, May 19, 1983 (C-289/81).

⁴¹ Cases *Société nouvelles des usines de Pontlieue Aciéries du Temple - SNUPAT v. High Authority*, March 22, 1961 (C-42 and 49/59). See also TRIDIMAS (1999): p. 251ff.

⁴² In this sense, see BARRETT (2001): p. 205ff.; SANZ (2000): p. 112ff.

or revokes an act even though it is against those acquired expectations⁴³. Consequently, the balance of the competing principles is the core of the problem in the application of the principles of protection of the legitimate expectation and of legal certainty.

Finally, we can mention other principles that the judges could take into account for justifying its manipulative powers, like the avoidance of legal vacuum or the absence of necessity to take specific measures to quash acts derivate from the voidness act. In addition, the difficulties to unscrambling the effects of the unlawful act⁴⁴, the continuity of the service⁴⁵, the equity⁴⁶ and the protection of other public interests are other kind of elements that can be taken into account for the same justificatory purpose⁴⁷.

§3.2. Extending the sphere of application of the exception of art. 231(2) EEC Treaty

As we already noted above, the exception established by art. 231(2) EEC applies to the nullity of regulations. This express restriction is not strange, since in most of the national legislations the effects of the nullity of regulations receive also a special treatment. This is so because of the several problems that the restoring of legality after the declaration of nullity causes⁴⁸. Normally, this type of regulations generates other acts of application – that legally recognize several factual situations - which turns it really complex to eliminate all these acts after the declaration of nullity of a regulation. The retroactivity, as a salient feature of the system of total elimination of effects, could produce in this case very negative consequences.⁴⁹ Legal certainty arises as a superior value of the system that has to be protected by all the possible means⁵⁰.

⁴³ See cases *Algera v. Common Assembly*, July 12, 1957 (C-7/56, 3/57 a 7/57); *Alpha Steel v. Commission*, March 3, 1981 (C-14/81); *Consorzio Cooperative d'Abruzzo v. Commission*, February 26, 1987 (C-15/85); *Commission v. United Kingdom*, May 4, 2006 (C-508/03).

⁴⁴ HARDING (1981): p. 111; WAELBROECK (1999): p. 714.

⁴⁵ Thus, PAULIS (1987): p. 247-248.

⁴⁶ WAELBROECK (1999): p. 717.

⁴⁷ SCHWARZE (2000): p. 1977.

⁴⁸ In the case of the nullity of regulations or of general administrative norms such as the town planning acts, there is a clear tendency to conserve the applicative acts. Regarding to the later, see, in the Spanish sphere, DOMÉNECH (2002); ASIS (1989); GARCÍA DE ENTERRÍA (1990); GÓMEZ-FERRER (1977).

⁴⁹ HARTLEY (2003): p. 433.

⁵⁰ “La raison profonde - sostiene Paulis - de ce traitement différent est que l’annulation rétroactive des actes réglementaires, à cause de leur caractère général, est plus susceptible de perturber l’ordre juridique que celle des actes individuels”. PAULIS (1987): p. 245.

However – and this is what has transformed the topic under study in an important one – this exception, that applies in principle only to regulations, has acquired a clear general applicability through time⁵¹. In several cases, the ECJ has widened its manipulative competences, using them in normative acts that are not regulations; referring to the later, some authors, trying to justify the attitude of the Court, have asserted that the Court has always used this restrictively⁵², conclusion that is not that clear when analysing the case law.

Due to the features of generality and abstraction⁵³ of directives, the exception of art. 231(2) has been easily extended to the nullity of this kind of norms⁵⁴. In this sense, the ECJ has expressly affirmed that “important grounds of legal certainty, comparable to those which arise when certain regulations are annulled, can justify the Court using its power under the second paragraph of Article 231 EEC to decide to maintain the effects of the acts which have been declared void”⁵⁵. In the case of *European Parliament v. Council*⁵⁶, the ECJ avoided the deregulatory effects that the voidness of the Directive 90/366 (ruling student’s right of residence for vocational training purposes) could cause. Following the model of total elimination of effects could deeply damage the exercise of that right to vocational training, and that can explain that “important reasons of legal certainty” influenced the decision to maintain for the time being all the effects of the Directive “until such time as the Council has replaced it with a new directive adopted on the proper legal basis”, using by analogy the competence conferred by art. 231(2). The same happened in other case *European Parliament v. Council*⁵⁷, where both the effects of the discontinuity in the programme for the harmonization of transport taxation and the legal uncertainty that the annulment of all the effects of the Directive 93/89 wanted to be avoided.

⁵¹ For some authors, this extension has taken place in the ECJ “en coherencia con la dirección eminentemente teleológica en favor de la integración que ha dado siempre su jurisprudencia”. VIDAL (1999): p. 473. Vid. TOHT (1978): p. 94.

⁵² Thus, SCHERMERS & WAELBROECK (2001): p. 511. See also BERTEA (2005): p. 163ff.

⁵³ The general and abstract feature of the regulations is the reason that supports, ultimately, the creation of the exception of art. 231(2) EEC.

⁵⁴ In a first moment, the ECJ had rejected this option, declaring inadmissible (and therefore, without pronouncing itself directly about the extension) some challenges to directives. See the cases *Joseph Flourez v. Commission*, December 7, 1988 (C-138/88); *Fédération européenne de la santé animale v. Council*, December 7, 1988 (C-160/88). See also, ORTEGA (1999): p. 64ff.

⁵⁵ Case *The Netherlands v. Commission*, June 18, 2002 (C-314/99).

⁵⁶ Case *European Parliament v. Council*, July 7, 1992 (C-295/90)

⁵⁷ Case *European Parliament v. Council*, July 5, 1995 (C-21/94)

The broader and most contested extension of the sphere of application of the exception of art. 231(2) has been the one that the ECJ exercises within the jurisdiction of art. 234(b), that is, those competences used in a preliminary ruling in which the Court judges the validity and interpretation of acts of the institutions of the Community and of the ECB⁵⁸. Here, however, reaching to this point took more time. As it is known, at the time of entering into force the Treaty there was clarity in the fact that the judgment that declared the invalidity within the procedure of a preliminary ruling (art. 234 EEC) only produced effects concerning the national judge that raised the question and only concerning the particular case brought before the Court⁵⁹. This rule was derived from an analogical application of the effects that the decisions of invalidity given in procedures of exceptions of illegality had in the national jurisdictions⁶⁰.

Nevertheless, since rather a considerable long period that this rule – i.e., the declaration of invalidity in a preliminary ruling only produces effects concerning the national judge that raises the question and only for the particular case – has been breached widening considerably the effects of that decisions⁶¹. Thus, for example, the scope of influence of the decision was extended to jurisdictions that went beyond the judge that had raised the preliminary ruling. This meant that the invalidity declared for one judge and for one specific case could also affect other judges and other similar cases⁶². Reasons of legal certainty and uniformity of law gave advice to follow this practice⁶³. It seems also that it was coherent to apply the adage “where there

⁵⁸ See case *Pinna v. Caisse d'allocations familiales de la Savoie*, January 15, 1986 (C-41/84) where we can read that “lorsque d’impérieuses considérations le justifient, l’article 174, alinea 2, du Traite réserve a la Cour un pouvoir d’appréciation pour déterminer concrètement, dans chaque cas particulier, les effets d’un acte réglementaire déclaré nul qui doivent être maintenus”. In some cases, that extension has been justified expressly based on the argument from analogy. See cases *Silos e Mangimi Martini v. Ministero delle Finanze*, November 8, 2001 (C-228/99); and *Criminal proceedings against Thomas Edward Lomas and others*, March 10, 1992 (C-38/90 and C-151/90).

⁵⁹ MEGRET, C. (1984) “La portée juridique et les effets de droit de la déclaration d’invalidité d’un acte communautaire prononcée par la Cour de Justice des Communautés Européennes dans le cadre de la procédure instituée par l’article 177 du Traité”, in *Études de Droit des Communautés Européennes. Melanges offerts à P.H. Teitgen*, Pedone: Paris, p. 312.

⁶⁰ MEGRET (1984): p. 312.

⁶¹ An interesting analysis of this evolution is done by TOTH (1984): p. 61 ff.

⁶² HARDING (1981): p. 101-102.

⁶³ In the case *International Chemical Corporation v. Amministrazione delle finanze dello Stato*, the ECJ incorporates, in the resolution of the judgment, the following rule that curiously has such level of generality that seems as being directed to a really universal audience. “La sentenza della Corte – says the court

is the same reason, there ought to be the same law” (*Ubi eadem ratio, ibi idem lex*)

Accordingly, the features of the judgments that decide a preliminary question have changed in extension. A further element in this evolution is related to the effects through time of a judgment of invalidity⁶⁴. The possibilities were to give to the judgments effects *ex nunc* or *ex tunc*, and the later prevailed⁶⁵. To ensure a uniform application of the community law was an imperative that justified the option of the effects *ex tunc*⁶⁶. Besides, the idea of interpretation contained in art. 234(b) conditioned this option, since the activity of interpretation has always been understood as the discovery of the meaning that the norm has had since it has entered into force⁶⁷. This makes sense, also, with the notion of nullity as an objective judgment against the act, with necessary efficacy *erga omnes* and *ab initio*. In addition, the ECJ began to understand that the utterances “legality” of art.

- che accerti, in forza dell'art. 177 del trattato, l'invalidità di un atto di un'istituzione, in particolare di un regolamento del Consiglio o della Commissione, sebbene abbia come diretto destinatario solo il giudice che si è rivolto alla corte, costituisce per qualsiasi altro giudice un motivo sufficiente per considerare tale atto non valido ai fini di una decisione che esso debba emettere; poichè tale constatazione non ha tuttavia l'effetto di privare i giudici nazionali della competenza loro attribuita dall'art. 177 del trattato, spetta a tali giudici stabilire se vi sia interesse a sollevare nuovamente una questione già risolta dalla corte nel caso in cui questa abbia constatato in precedenza l'invalidità di un atto di un'istituzione della comunità. tale interesse potrebbe, in particolare, esistere qualora sussistessero questioni relative ai motivi, alla portata ed eventualmente alle conseguenze dell'invalidità precedentemente accertata”. Case *International Chemical Corporation v. Amministrazione delle finanze dello Stato*, May 13, 1981(C-66/80). See the comments to this sentence in LABAYLE (1982): p. 492 ff and in BEBR (1981b): p. 483ff.

⁶⁴ With respect to this point, see HARDING (1981): p. 102ff.

⁶⁵ The ECJ held, in other judgment, in which it includes a kind of rule of universal audience, that “l'interpretazione di una norma di diritto comunitario data dalla Corte di giustizia nell'esercizio della competenza ad essa attribuita dall'art. 177 chiarisce e precisa, quando ve ne sia bisogno, il significato e la portata della norma, quale deve, o avrebbe dovuto, essere intesa ed applicata dal momento della sua entrata in vigore. Ne risulta che la norma così interpretata può, e deve, essere applicata dal giudice anche a rapporti giuridici sorti e costituiti prima della sentenza interpretativa, se, per il resto, sono soddisfatte le condizioni che consentono di portare alla cognizione dei giudici competenti una controversia relativa all'applicazione di detta norma”. Case *Amministrazione delle Finanze v. Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi*, March 27, 1980 (C-66, 127 and 128/79).

⁶⁶ MEGRET (1984): p. 316.

⁶⁷ WAELBROECK (1981): p. 115. xxx

230 EEC and “validity” of art. 234(b) had, in fact, the same meaning⁶⁸. The weight of the traditional idea of the total elimination seemed to dominate completely.

Yet, - and here is the immediate extension of 231(2) EEC – even when the ECJ opts for giving effects *ex tunc* to a decision of invalidity, it states, at the same time, the possibility of modulating the effects that the judgment could caused in past situations. Thus, the ECJ assumes, analogically⁶⁹, the competence given only for the action of nullity against regulations by art. 231(2) EEC⁷⁰. This extension, however, has been not free of controversy⁷¹. Indeed, it is well-known the sentence of the Court of First Instance of Lille, of 15 July 1981, by which this court refused to apply a sentence of the ECJ that, based on the principle of legal certainty and through analogy, modulated the effects of the declaration of invalidity of a community act sent for revision in a preliminary ruling. The tribunal of Lille argued the absolute incompetence of the ECJ for doing this modulation⁷².

In this way, the approximation of the action of nullity (art. 230 EEC) and the action of invalidity (art. 234(b)) has produced a real fusion of both

⁶⁸ In this sense, case *Internationale Crediet en Handelsvereniging “Rotterdam” v. Netherlands Minister of Agriculture and Fisheries*, February 18, 1964 (C-73 and 74-63).

⁶⁹ The argument from analogy has been constantly used by the ECJ for supporting this extension. Thus, it is used, for example, in *Providence agricole de la Champagne v. ONIC*, October 15, 1980 (C-4/79) when it affirms that “En l’occurrence, l’ application par analogie de l’ article 174, deuxième alinéa, du traité, selon lequel la cour peut indiquer quels effets d’ un règlement déclaré nul doivent être considérés comme définitifs, s’ impose pour les mêmes motifs de sécurité juridique que ceux qui sont à la base de cette disposition”. See the comments to this decision in BROWN (1981): p. 517.

⁷⁰ The court says that “[s]oltanto in via eccezionale la Corte di giustizia, come ha essa stessa riconosciuto nella sentenza 8 aprile 1976 (causa 43/75, Defrenne c/ Sabena, racc. pag. 455), potrebbe essere indotta, in base ad un principio generale di certezza del diritto, inerente all’ordinamento giuridico comunitario, e tenuto conto dei gravi sconvolgimenti che la sua sentenza potrebbe provocare per il passato nei rapporti giuridici stabiliti in buona fede, a limitare la possibilità degli interessati di far valere la disposizione così interpretata per rimettere in questione tali rapporti giuridici”. Case *Amministrazione delle Finanze v. Meridionale Industria Salumi, Fratelli Vasanelli and Fratelli Ultrocchi*, March 27, 1980 (C-66, 127 and 128/79). An interesting historical review of this extension can be found in ISAAC (1987): p. 452ff.

⁷¹ Vid. MEGRET (1984): p. 311-326.

⁷² Concerning this aspect, see the interesting comment of Jean Boulois. BOULOIS (1982): p. 9-13.

under the common expression of “actions of invalidity”⁷³. These actions have transferred reciprocally their features and elements, generating a unified system of control of the community legality in which the generality of the community acts can be controlled⁷⁴ and in which the effects of the declaration of the community illegality can be generally modulated or manipulated⁷⁵.

Several scholars, however, continue insisting on the differentiation between the temporal effects that both kinds of declaration of invalidity generate, even if arguing not always in a convincingly way⁷⁶. Others have stressed on the adverse effects caused by the extension of competences of the ECJ regarding the declaration of invalidity of 234(b)⁷⁷.

Finally, the same arguments of legal certainty and, specially, of protection of legitimate expectations, justify also the manipulation of the effects of the nullity of the community acts of particular content⁷⁸.

Consequently, we could state a general rule for the manipulation of the effects of invalidity as follows: the court declares the nullity of the regulation (via art. 231(2) EEC) or of the community act (normally without pointing any particular norm⁷⁹ or directly through analogy⁸⁰) or the “invalidity” of such act (via art. 234(b)), but, at the same time, the court argues that some of its effects (of protection and of recognition) will continue to be in force, that means, will continue to find support in the legal order. The ambiguities that we mentioned regarding the functioning of the exception of art. 231(2) and the reasons that justify those manipulations (§3.1.1 y §3.1.2) are also applicable here.

After all, this extension of the sphere of application of the manipulative competences can be easily understood when compared with

⁷³ Or like “deux modalités du contrôle de légalité organisé par le traité”. Case *Produits de maïs v. Administration des douanes et droits indirects*, February 27, 1985 (C-112/83)

⁷⁴ See BROWN (1981): p. 516. The indeterminacy of the “revisable acts” via art 234 TCE starts to be transferred also to the direct action of nullity of art. 230 TCE.

⁷⁵ The commonalities and differences between both systems can be consulted in MEGRET (1984): p. 325.

⁷⁶ Thus, see the several positions adopted by some Advocates General in BEBR (1981b): p. 494ff.

⁷⁷ LABAYLE (1982): p. 504ff.

⁷⁸ PAULIS (1987): p. 249ff.; RAITIO (2003): p. 227ff.

⁷⁹ Case *Simmenthal v. Commission*, March 6, 1979 (C-92/78). Here there is a manipulation of the effects of nullity in relation to the restriction of the *erga omnes* character of the nullity, even when the challenged act was a decision and not a regulation.

⁸⁰ Case *SARL Maïseries de Beauce v. Office national interprofessionnel des céréales (ONIC)*, October 15, 1980 (109/79).

the identical path followed by the national systems concerning the effects of the voidness of legislative acts at the level of constitutional justice. The constitutional courts did not need an express norm for modulating the effects of their judgments of nullity. The consolidation of this common practice inside the national legal systems was justified, as we have already argued, by the necessity to give reasonable answers in certain cases.

On the other hand, the parties involved in a dispute of annulment of a community norm – specially when the controversy is between the organs of the European Union – usually agree in the restrictive application of the retroactive effects of the nullity for reasons of legal certainty, so the ECJ has it more easy when it has to decide on the temporal limitation of the effects⁸¹.

Some authors have attempt to systematize the rules of the effects of a judgment of annulment, in order to generate a more coherent system that the one that operates now, much more casuistic than dogmatic. According to Paulis, for example, it is necessary to distinguish between the nullity that affects a regulation and the nullity that affects an act that is not a regulation. If the act annulled is a regulation, the general rule is that the judgment produces “ipso jure and with retroactive effects the annulment of every *regulation* that has its condition of existence in the annulled act”⁸². On the contrary, this nullity cannot entail the annulment ipso jure in the case of singular acts. Yet, it will affect the future singular acts that derive their validity of the regulation annulled. In turn, the nullity of a singular act will produce the consequence of destroying the “future” legal effects of the annulled act. Regarding the effects generated in the past, only the legal effects that this author calls “direct” (rights and duties contained in the initial act) can be covered by the nullity. The “indirect” effects (rights and duties derived from the acts of execution of the initial act), in principle, cannot be reached by the nullity, due to the same principles that govern the nullity of acts of application of the void regulations, that is, respect for vested rights, continuity of public service⁸³, etc. Nevertheless, the indirect past effects of singular acts will be covered by the nullity in two cases: a) when these indirect effects have the purpose of specifying or developing the legal situation of the *direct addressee* of the decision annulled, that is, the one identified directly and individually in that decision, or, in the case of partial nullity, in the part annulled by the decision, and all this as long as the person who asks for the nullity can justify a special interest in the destruction of those indirect effects; and b) when these effects are linked to

⁸¹ See, in general, case *European Parliament v. Council*, July 5, 1995 (C-21/94).

⁸² PAULIS (1987): p. 246.

⁸³ Cases *European Parliament v. Commission and Council*, March 26, 1996 (C-271/94) and *Council v. European Parliament*, December 7, 1995 (C-41/95).

the annulled decision in such a way that the existence or the content of that decision determines the existence of the act of application, or when the illegality exists in both of them. In a certain way, these effects are tightly indivisible with the annulled decision⁸⁴.

Until now, the classification proposed by Paulis has not been applied. The ECJ continues solving the cases in a very casuistic way, and it is only in the execution of the judgment – that most of the time leaves little traces – where the real effects that the decision produced can be seen.

§3.3. The alterations of the personal effects of the annulment decision

As we explained in §2.1.2., the nullity of a community legal act represents an objective judgment that must eliminate completely the normative content of that act from the normative legal order in force. This judgment does not admit exceptions regarding particular situations, which means that the nullity shall clearly operate with general effects or *erga omnes*.

However, this general effect of the annulment decisions is far from corresponding to the judicial practice. The same reasons of legal certainty have led to a progressive abandon of this option. In fact, since the first cases brought to the ECJ it is possible to note how the court has annulled several times the same legal norm in judging different cases. Thus, for example, the decision N° 18-59 of the High Authority was annulled by the judgment of the case *Italy v. High Authority*⁸⁵, and in the same day was once again annulled in the case *Holland v. High Authority*⁸⁶.

A recent example of this dilemma can be seen in the case *Commission v. AssiDomän*⁸⁷. In that case, a group affected by a Decision of the Commission challenged it before the ECJ, which decided to annul it partially benefiting, consequently, the claimants. After that judgment, *AssiDomän Kraft Products* and other affected persons that had not appeal in the first action of nullity asked the Commission to revise their legal situation according to the new judgment of annulment and to give them back the fines that they had paid. The answer of the Commission was categorical: “As your clients’ payment is based on a decision which still stands with regard to them, and which is binding not only on your clients but also on the Commission, your request for reimbursement cannot be granted”. Once the case reached the ECJ, this court concluded that the community judge that

⁸⁴ PAULIS (1987): p. 250.

⁸⁵ Case *Italy v. High Authority*, July 15, 1960 (C-20/59)

⁸⁶ Case *The Netherlands v. High Authority*, July 15, 1960 (C-25/59).

⁸⁷ *Commission v. AssiDomän Kraft Products*, September 14, 1999 (C-310/97)

takes cognizance of an action of annulment cannot judge *ultra petita*, which means that “the scope of the annulment which it pronounces may not go further than that sought by the applicant”. Therefore, “if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Community judicature relates only to those aspects of the decision which concern that addressee. Unchallenged aspects concerning other addressees, on the other hand, do not form part of the matter to be tried by the Community judicature”. The contradiction between the principle of *erga omnes* efficacy that characterizes the annulment judgments and the principle of legal certainty is clear when the court affirms that “although the authority *erga omnes* exerted by an annulling judgment of a court of the Community judicature attaches to both the operative part and the *ratio decidendi* of the judgment, it cannot entail annulment of an act not challenged before the Community judicature but alleged to be vitiated by the same illegality”.

The reasoning developed in *Commission v. AssiDomän* had already been used in several previous cases, in which the ECJ estimated necessary to limit the decision of annulment only to the intervenient parties. In the Case *Simmenthal v. Commission*⁸⁸ the court asserted that “for reasons of legal certainty and taking special account of the established rights of those participants in the invitation to tender whose tenders have been accepted having regard to the minimum price fixed by the commission the annulment must be restricted to the specific decision to reject the applicant’s tender...”. The declaration of illegality, in consequence, should have limited effects not only for preserving the principle of legal certainty, but also for not affecting the rights or interests of third parties⁸⁹. The effects of the annulment should only reach the parties really interested in the nullity and, therefore, as a general rule it could only be accepted that the nullity of general measures (*law-making measures*) could have general effects really *erga omnes*. As Toth says, regarding individual measures (as, for example, decisions), they will only produce a “limited *erga omnes* effect”⁹⁰, exclusively concerned with the parts directly affected by the challenged measures⁹¹. Seen from the perspective of the challenged measure, if the nullity has been declared in a trial in which a certain measure is challenged, this declaration can only

⁸⁸ Case *Simmenthal v. Commission*, March 6, 1979 (C-92/78)

⁸⁹ TOTH (1984): p. 49.

⁹⁰ TOTH (1984): p. 49. Or a ‘quasi *erga omnes*’ effects, as Isaac indicates regarding the declaration of invalidity. ISAAC (1987): p. 458.

⁹¹ In this sense, see case *Collotti v. ECJ*, July 7, 1964 (C-70/63) and its effects in the cases *Loebisch v. Councils*, July 14, 1965 (50, 51, 53, 54 and 57/64).

affect that measure, and not other similar measures that had the same ground, but that affect persons different from the claimants⁹².

The conflict between legality versus legal certainty produces its effects here by means of the limitation of the personal sphere of influence of the judgment of annulment.

The discussion about the personal scope of the judgments of annulment continues. For many scholars, the nullity should only produce effects with respect to those whose rights and interests have been affected by the measure annulled, and, consequently, only the general regulations – that, as such, affect to the generality of people – should have genuine *erga omnes* effects. The nullity of individual measures, as decisions, should only produce effects with respect to the persons affected by those measures⁹³. Others, however, continue to defend – in an attempt to transpose their domestic law in contentious-administrative matters – the absolute effects of the judgments of annulment⁹⁴.

§3.4. The alterations of the material effects of the nullity

As we examined in §2.1.4, the ECJ has a restrictive competence for declaring the nullity of a challenged community norm. The court must limit itself to declare the nullity and cannot try to restore the normative legal order after the extraction of the norm.

Any deviation of that rule will lead us to the sphere of the manipulation of the *substantive content* of the legal norm that is being challenged or of the legal power that the ECJ would have to fill the normative gaps of the treaty. Yet, this field has not been explored by the community case-law, even when the attempts to avoid legal gaps through the manipulation of the temporal effects of the decision of annulment are seen, by some, as interventions in the substantive content of the norms⁹⁵.

Nevertheless, it would maybe not take so long for the ECJ to start to explore these lands. We should not forget that the national constitutional courts expressed the same resistance few years ago. Today, instead, the once challenged “additive sentences”⁹⁶ – in which the courts add normative content to the legal system in order to overcome the illegality and protect both the legal certainty and the integrity of the normative system - are very

⁹² TOTH (1984): p. 50.

⁹³ Vid. HORSPOOL (2004): p. 261ff.

⁹⁴ PLOUVIER (1975): p. 99.

⁹⁵ LABAYLE (1982): p. 484.

⁹⁶ See ROMBOLI (1996): p. 65.

frequent. They assume, by this way, this special competence to “restore” the normative system after the declaration of unconstitutionality⁹⁷.

§4. The problems of the restoration

The way that the EU law has faced the nullity and the restoration systems leads to several problems with respect both to the theoretical framework that presents them as coherent systems and to the practice that applies them.

We will briefly analyze some of these problems, which are: 1) the legitimacy of these manipulative decisions of ECJ, 2) the ambiguity of the justification for exercising this power, 3) the rigidity of the restoring system, and 4) the difficulty to frame the restoring system inside the theory of nullity.

§4.1. The legitimacy of the manipulative decision of the ECJ

As we have seen above, the ECJ has conferred itself general powers to manipulate the effects of its decisions of nullity. However, this attitude has been criticized from different points of view. One of those perspectives points that this approach opens the debate about the legitimacy of the court to make this kind of manipulation.

One of the most important arguments against this power claims explains that through this road the court is invading the separation of powers stated by the EU law. Thus, the court would become a new Legislative Power. In addition, this attitude would also be against the traditional conception of the role of judges as "executors", and not creators, of the law⁹⁸.

This argument, however, loses force if we realize that the social perception of the activity and role of judges is not that they apply general rules mechanically, but that their participation in the interpretation and creation of norms is essential, and not merely necessary.

Related to this point, we can see that in the framework of manipulative powers exercised in the national sphere of legislative judicial review, the scholars have answered with several arguments against the critic of the destruction of the balance of powers that this manipulation of effects could produce. One very radical position has understood that the constitutional judges are also representatives of the citizens in the preservation of the Rule of Law. According to Dominique Rousseau, the generation of the legal rules is not an exclusive power of the legislative bodies, but rather the Constitutional court has competences to complete the

⁹⁷ POLITI (1997): p. 249.

⁹⁸ WAELBROECK (1981): p. 117ff.

law, specify its application, suppress some of its norms, declare other legal rules without legal effects, etc⁹⁹. The same kind of arguments can be found in scholars that defend a renewed understanding of the nature of the “legislative act”¹⁰⁰, a change towards a heterointegration of the legal order¹⁰¹, or an idea of a general participation of the judiciary in the construction of the legal order¹⁰². A different line of argument highlights that now the function of the constitutional courts is not only to “discover” the meaning of the legal rules, but they have also the task to “update” the legal rules and solve cases that the legislator does not thought of or could not imagine and that was not binding for him to thought about¹⁰³. In this sense, the constitutional courts will work as a “bridge” between the past and the present.

A further critic that some scholars address against these powers of the ECJ is that the judges could be tempted to adopt different decisions without thinking on universalizing them¹⁰⁴. If the court makes justice for a concrete case, it could generate incoherencies in the legal order or inequalities in the application of the law.

Nevertheless, the reasons in favour of these powers are also sound. The realistic argument to avoid the undesirable consequences that the retrospective decisions can cause is a strong one¹⁰⁵. On the other hand, if it is true that the judges must have an active role in the creation of rules, it does not seem reasonable that we limit - in the same way that neither the Parliament is limited - the power to determine the moment in which their decisions come into force. The legal certainty, the protection of legitimates expectations, the avoidance of legal vacuum and the impossibility to order a complete *restitutio in integrum* are elements, among others, that the courts cannot avoid, even when the legal rules do not tackle with them expressly¹⁰⁶.

§4.2. The ambiguity in the justification of manipulative powers

We could maybe agree on the fact that it is necessary to give the ECJ a general power to manipulate the effects of its decisions. Yet, it is

⁹⁹ See ROUSSEAU (1999): p. 363-376. See also ROUSSEAU (1998): p.153-154.

¹⁰⁰ See SPADARO (2000): p. 365ff.

¹⁰¹ See RUGGERI & SPADARO (2001): p. 209.

¹⁰² See ZAGREBELSKY (1992): p. 177ff.

¹⁰³ The legislator is a common person and not a “genius or a prophet”. SPADARO (2000): p. 352.

¹⁰⁴ See WAELBROECK (1981): p. 117-118.

¹⁰⁵ But we must think that a general rule of prospective decision is not the best option because it could discourage futures claimants. For that reason, it is necessary to have more flexible answers. WAELBROECK (1981): p. 118.

¹⁰⁶ See HARDING (1981): p. 108-111.

important, at the same time, to search for some parameters within which this power must be exercised. Only through the identification of parameters that are, in turn, limits to the powers of the court, we will be able to evaluate as correct or incorrect the decisions of the courts.

However, until now, this task has been difficult both for courts and scholars due to a double ambiguity. In fact, the ECJ uses the arguments of legal certainty and protection of legitimate expectation as a counterweight for the preservation of legality in the following way: the final norm (F_n) that will solve the case applying retroactive or prospective effects is obtained through the balance (b) between a general norm that imposes a total restoration with *ab initio* effects (N_r) and a norm that imposes a protection of this relevant principle (N_{pp}). This can be represented as follows:

$$F_n = b (N_r \wedge N_{pp})$$

However, this general formulation has some problems:

A) The first problem is the determination of which kind of elements participate in the balancing.

As we said above, the concepts of legal certainty and protection of legitimate expectations are not clear, but have a big dose of ambiguity.

In relation with the norm that imposes a total restoration (N_r) we can say that it operates more clearly in practice. Actually, this kind of restoration does not need a different proof but the own unlawfulness. Under normal circumstances, the complete restoration is binding, which means that the decision of nullity will have retrospective effects. In summary, the final norm that will solve the case (F_n) will be the norm that imposes a total restoration (N_r). Only in case of competing principles the situation could change. Thus:

$$- N_{pp} \rightarrow (F_n \rightarrow N_r)$$

In contrast, the norm for the protection of relevant principle only has sense if we compare it against the norm of total restoration.

B) The second problem is the determination of what balance means. The following lines are dedicated to this point.

§4.2.1. The balance as an “alibi”

Usually, the ECJ justifies its manipulative decisions through the idea of balance between the norm of total restoration (normally under the principle of legality) and the principles of legal certainty or protection of

legitimate expectations¹⁰⁷. As we know, these last principles cannot be applied in the way of all-or-nothing but they must be weight or balance for determining the specific way of applying them¹⁰⁸. Accordingly, in some cases the financial consequences that a decision could produce in a member state will not justify the manipulation of the effects of the nullity¹⁰⁹. In contrast, in other cases these consequences are the best argument to justify the manipulation of those effects¹¹⁰. The questions of what balance is or of which kinds of operations is balance constitute of are, thus, the core of the problem. Only after identifying these operations, it is possible to judge the correctness or incorrectness of the balance.

Of course, the balance is not an average but a more complex operation. According to Prieto Sanchís, balance is the action of considering in an impartial way both the competing aspects in something or the equilibrium between the weights of two things. In the idea of balance there are always competing reasons or competing interests or goods. In short, norms can give different justifications to support a decision¹¹¹. But in the case of law applying these norms, and by this way, their justificatory reasons, interests or good, it is impossible to arrive to a perfect equilibrium. Only the idea of balance can provide a solution that displaces or defeats one of the competing reasons related to the case. As the same author says, balance is the search for the best decision when we have competing reasons with the same value and the case cannot be solve by the hierarchical, temporary or specialization criteria¹¹².

¹⁰⁷ See case *Société nouvelles des usines de Pontlieue Aciéries du Temple - SNUPAT v. High Authority*, March 22, 1961 (C-42 and 49/59) where it is affirmed that “ le principe du respect de la sécurité juridique, tout important qu’ il soit, ne saurait s’appliquer de façon absolue, mais que son application doit être combinée avec celle du principe de la légalité; que la question de savoir lequel de ces principes doit l’emporter dans chaque cas d’ espèce dépend de la confrontation de l’intérêt public avec les intérêts privés en cause...”. See also BEBR (1967): p. 27.

¹⁰⁸ RAITIO (2003): p. 187. Other scholars say that the tension between a fundamental right and some objective or goal of the community is not solved applying are all-or-nothing criteria fixed by a legal rule, but through a compromise between the competing reasons. See BENGOETXEA, MACCORMICK & MORAL (2001): p. 71.

¹⁰⁹ Case *The Queen v. Secretary of State for Health*, October 19, 1995 (C-137/94). In the same sense, see cases *Roders v. Inspecteur der Invoerrechten en Accijnzen*, August 11, 1995 (C-367 and 377/93) or *Dansk Denkavit v. Skatteministeriet*, March 31, 1992 (C-200/90).

¹¹⁰ See *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, April 8, 1976 (C-43/75).

¹¹¹ PRIETO (2003): p. 137.

¹¹² PRIETO (2003): p. 137

However, at this point we cannot say that we have made a big progress in the task to understand which kind of parameter we should build for judging if a certain decision of the court is or not correct.

Alexy attempts to contribute in carrying out this task. In his opinion, the balance will be correct if in the action of balancing we observe the principle of proportionality¹¹³ that could be formulated as follows: the greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other¹¹⁴.

At a first glance, Alexy seems to give us a “procedure” by which we could control the correctness of the decisions of the judges. Instead, if we look with attention we can see that we are in the same position than before. In fact, this idea that the elements that interact in the relation of balance are mutually dependent on each other; in other words, none of this elements can be independently determined. In summary, this procedure is composed by a rule without content. To say that the weight of A is 100 and of B is 30, means that if we want to weight B in 30 (degree of non-satisfaction), A has to weight 100 (degree of the importance of satisfaction), or its degree of satisfaction would have to be 120, if the degree of non-satisfaction of B weights 50. At the end, the problem is to understand why the difference between A and B is 70 and not 30 or why B is more lightweight than A¹¹⁵.

In conclusion, the rule of proportionality involves a well-known reality. The decision is taken only as a result of the action of interpretation¹¹⁶. Thus, the work of the ECJ is to assign weight to each interest or good applicable to the particular case and present in the legal order in force. The balance is, thus, the interpretation in the particular case about what legal certainty or legitimate expectation means and how much these elements matter for the legal system. This interpretation permits to settle the restrictive consequences that these principles will have on the effects of the decisions of nullity. This action of giving meaning is full of subjectivity but it would be difficult to expect a better situation when we are dealing with open-texture principles. The fixation of parameters through which the correction of the interpretation of these contested concepts could be judged, will continue to be controversial especially when we see that the question of what kind of society we want do not have an unique but different answers.

¹¹³ Called proportionality in the narrower sense. See ALEXY (2003): p. 433- 449. See also BERNAL (2005); BARNES (1998); SARMIENTO (2004), among others.

¹¹⁴ See ALEXY (2002): p. 161.

¹¹⁵ DE LORA (2000): p. 363.

¹¹⁶ In this sense I follow García Amado. See GARCÍA (2005): p. 1595-1608.

§4.3. The rigidity of the system of restoration

In §2.1.4. and §3.4. above, we comment that the power of the ECJ is only suppressive. The court cannot introduce changes in the legal rule with the purpose of avoiding the unlawfulness. Moreover, the court can neither give orders for doing the restoration to the *ex ante* situation. A decision in this sense would be beyond the powers that the treaties have given to the court related to the judicial review¹¹⁷. In brief, the ECJ annuls and the administrative bodies restores¹¹⁸.

In fact, the ECJ itself considers that it has no powers to restore the legality, even if this implies that claimants get no effective solutions for their cases¹¹⁹. Thus, each year a big number of the lawsuits are brought to the Court asking for this kind of restoration. All of them, however, are systematically rejected¹²⁰.

What is more, the ECJ recognizes itself as having only limited powers to control the way in which the administrative body adopts the measures to comply with the judgment of the court (art. 233 EEC)¹²¹. In this sense, it has ruled that it cannot neither order the Commission the way in which it must take the measures to comply the judgement of nullity¹²² nor give it orders for future cases¹²³. However, the most frequently way in which

¹¹⁷ In this sense the *CFI* has said that “the claim that the Court should declare that the applicant is entitled to the balance of the ESF assistance is inadmissible since it exceeds the powers conferred by the Treaty on the Community judicature in an action for annulment”. *Caso Frinil-Frio Naval e Industrial SA v. Commission*, February 10, 1994 (T-468/93). In the same line, see cases *Fred Pfloeschner v. Commission*, December 14, 1995 (T-285/94); *ENS v. Commission*, September 15, 1998 (T-374/94 and T-375/94, T-384/94 and T-388/94); or *Ladbroke Racing v. Commission*, January 27, 1998 (T-67/94).

¹¹⁸ See the opinion of the Advocate General Lagrange in the case *Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, February 23, 1961 (C-30/59)

¹¹⁹ See WARD (2000): p. 335.

¹²⁰ WARD (2000): p. 250

¹²¹ See *Oliveira v. Commission*, May 7, 1991 (C-304/89). According to Ward, this situation would lead to a contradiction because the same court has decided that it has the power to penalize the *CFI* in the case of delay in taking decisions. WARD (2000): p. 335. See also case *Baustahlgewede GmbH v. Commission*, December 17, 1998 (C-185/95).

¹²² See case *Società Finanziaria Siderurgica Finsider v. Commission*, December 15, 1994 (C-320/92).

¹²³ See *VIHO Europe BV v. Commission*, January 12, 1995 (T-102/92) or *Ladbroke Racing v. Commission*, January 24, 1995 (T-74/92). In this sense and related to the action of nullity Hard says that “there is no evidence that Court of Justice concern for the application of effective remedies has spill over to the range of sanctions provided under Article 230”. “[T]he Community judicature has indicated that it will strictly adhere to principles supplied by the EC Treaty, and

the court exercises some kind of extension of this power is by giving a few indications about what should be the aim that those measures must follow to comply with the decision of nullity¹²⁴.

In addition, this constraint to give orders to the administrative bodies have been so strong that in some cases the ECJ has considered that also the direct consequences of the nullity, that is, the specification of which acts are in fact void, must be determined by the administrative body and not by the own court. That was the criterion, for instance, in *Société nouvelles des usines de Pontlieue Aciéries du Temple - SNUPAT v. High Authority*¹²⁵. In the later case the court decided that some exemptions were unlawful and that the High Authority had to take the necessary measures to withdraw them. The court did not decide if these exemptions had to be with retroactive effects or only with *ex nunc* effect. In fact, the judgement stated that the question whether a withdrawal with retroactive effect was advisable would depend on an appraisal of the different factors set out in the judgment, and held that this evaluation was firstly the duty of the authority empowered to withdraw exemptions. The court explains this reasoning by affirming that it “cannot put itself in the place of the High Authority and must consequently confine itself to referring the matter back to the High Authority so that it may make that appraisal in accordance with article 34 of the treaty”¹²⁶.

Certainly, this kind of decision does not mean that the court gave or transferred its own powers to the High Authority. As it after was sustain “to recognize the High Authority's power of appraisal is not to deny the jurisdiction of the Court of Justice to see whether the decision of the High Authority rests on a correct application of the treaty, of the basic decisions

confine Article 230(4) relief to declaration that a given measure is void”. WARD (2000): p. 335.

¹²⁴ In fact, the court has said “consequently the Commission, pursuant to the first paragraph of article 176 of the EEC Treaty, has to reconsider the particular situation of the applicant and adopt another decision affecting it through the competent intervention agency”. “It will be for the Commission to adopt its decision with due regard to the grounds of this judgment and especially after taking account of the fact that the system introduced by the new article 14 of Regulation N° 805/68 may in no circumstances have the effect of ensuring that the processing industry buys intervention meat at a price lower than the price for reducing intervention agency stocks usually charged at the relevant terms in the case of meat of the qualities in question”. Case *Simmenthal v. Commission*, March 6, 1979 (C-92/78).

¹²⁵ *Société nouvelles des usines de Pontlieue Aciéries du Temple - SNUPAT v. High Authority*, March 22, 1961 (C-42 and 49/59).

¹²⁶ Case *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority*, July 12, 1962 (C-14/61).

and of the rules recognized by the SNUPAT judgment and whether it is accordingly justified in law¹²⁷.

In this state of affairs, the position of citizens is not that favourable. In several cases, the decision that they really expect only arrives by the measures adopted by the own defendant (the respective European institution)¹²⁸.

Two are the reasons that the court has invoked for these self-restrictions on its powers. Firstly, the court does not want to interfere in the administrative and normative powers of the EU institutions¹²⁹. Secondly, the court is of the opinion that this option give the claimant the possibility to challenge the measures of execution that the institution could adopt¹³⁰.

But, as we said above, the court can control the execution of its decisions. Indeed, the administrative bodies have not complete discretion to execute those decisions, because the court can always examine if these measures are or not lawful, in the sense that they apply or not correctly the judgment¹³¹. In the same vein, the infringement that some administrative bodies can make in performing this task could cause the liability of those bodies, and in these cases the Court can order a compensation for the citizen, by applying its general power to solve liability lawsuits¹³².

As we can see, the powers of the court are enlarged in some circumstances and restricted in other. But in any of both cases it is unreasonable that the citizens do not obtain a definitely solution of its case. According to art. 230 EEC, any natural or legal person may institute proceedings against EU decisions. But it does not seem reasonable that if the person institutes this proceeding then he or she cannot receive a final solution for its case. If we accept that the later is reasonable, then we would understand that the claimant is only a collaborator of the European institutions instead of a citizen with rights enforceable before courts.

§4.4. The difficulty to frame the restoring system inside the theory of nullity

It is not enough that we can identify these practical problems in the European system of nullity and restitution. Those practical problems have

¹²⁷ Case *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority*, July 12, 1962 (C-14/61).

¹²⁸ See WAELBROECK (1999): p. 695ff.

¹²⁹ See BEBR (1981): p. 152.

¹³⁰ *Ibidem*.

¹³¹ Case *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority*, July 12, 1962 (C-14/61).

¹³² See PLOUVIER (1975): p. 110.

lead to theoretical problems, such as the need to reconstruct some analytical and conceptual tools so as to explain in a suitable way the issues of validity and nullity of the European acts.

If we could summarize the current state of the relation between nullity and restoration this would be the following: the Community legality demands the completely elimination both of the unlawful act and of its effects, *erga omnes* and *ex tunc*. However, in the moment of judging this legality, other elements enter into the judicial reasoning generating a decision with different effects.

The problem arises when the European judge has two or more competing principles or interests that apply to the concrete case and he must choose between them. Thus, on the one hand, he has the legal rule that demands him to protect the legality of the treaties, and on the other hand, it stands the necessity to protect those relevant interests through the manipulation of the traditional effects of the nullity. As a result, the Court will have to balance those principles.

But really this manipulative power exercised by the court both because the treaties gives it (art.231(2) EEC) and because the court assumes it, reveals the current problems of building a coherent legal system and allocating these kind of powers inside the traditional theory of nullity.

On the one hand, the necessary flexibility of the effects of the nullity seems to have stronger weight as an argument to prevail¹³³ because is relatively easy to find the undesirable effects that the rules of the nullity could produce. But, on the other, hand the objections of these kinds of powers are still powerfully present. The democratic objection and the invasion of powers are very strong arguments¹³⁴. Nevertheless, a general evaluation of both arguments gives some advantage to the necessity of flexibility¹³⁵.

Inside a systematic perspective is quite difficult to make compatible the procedure of nullity of the act and the procedure of restoration. We can arrive to this conclusion because it is easy to see a strong contradiction between the two decisions that the court adopts. The Court declares simultaneously *no A* ("the act is void") and *A* (some effects of the act are still into force). We can imagine two alternative answers to this conundrum.

¹³³ Many works have written about this topic in the field of the judicial review of legislation. Among others, see MISHKIN (1966). A good summary about the pro and contras of those manipulative powers can be found in WAELEBROECK (1981): p. 115-123.

¹³⁴ See ISAAC (1987): p.468.

¹³⁵ Especially if we say that it is only an exceptional power. See TESAURO (2003): p. 238.

One can be called “independence thesis” and the other one “partial nullity thesis”.

A) The independence thesis. According to this answer, we can interpret that when the judge affirms “no A” it does not make any mention to the effects of restoration, that means that the judge does not decide anything about which effects of the act must be eliminated. The decision of quashing the act and the decision about the restoration are, thus, independent.

This kind of answer leads immediately to a further doubt. What does it mean when the judge says that the act is void? An answer could be that this decision pursues only a control of the legal order or some purification of it, both based in the old French idea of the “process against the act”. The court would search only that the other courts do not continue to solve cases with that unlawful rule. However this answer is not convincing. Two arguments arise against it. Firstly, in some cases the satisfaction of the claimant coincides with the elimination of the rule, like when some decisions have only one addressee and the rule is already consummate. For example, in a process of restitution of amounts paid on the basis of a void act, the “elimination of the act” will be the answer to the question about what can we do with those amounts. The acts are really its effects, and who speaks about nullity must attend to its consequences. Secondly, if the court does no mention to the effects that shall be considered as definitive according to art. 234(2) EEC, it does not mean that the administrative bodies can decide with absolute discretion which effect should be eliminated and which not. Thus, both decisions are obviously connected. The decision of the administrative body is linked with the voidness’ content of the decision of the court¹³⁶.

A second objection could be directed against the answer of independence, arguing that it does not explain clearly the support of validity of all these effects that the court considered as definitive. We could reply that the support in this case is the law of the treaty or the same judicial decision. But if this is true, how can we explain that the consequences of the act, that is, form, date and content continue to be understood as caused by the act?

B) The partial nullity thesis. A second attempt of answer is to say that the decision “A” is only a way to determine a partial nullity. The quashing decision and the restoring decision are part of a more complex decision that only quashes the effects of an act to the extension that they need to be eliminated. The effects that the court considers as definitive are part of the

¹³⁶ See the critic that the court did in *Koninklijke Nederlandsche Hoogovens en Staalfabrieken N.V. v. High Authority*, July 12, 1962 (C-14/61).

act that the court has not annulled. The act will be null only in the measure of the effects that the court wants to eliminate.

This reasoning has the advantage that provides a good explanation of the support of validity of those effects that the court wants to maintain, because this support continues to be the act itself.

The problem of this explanation is that it cannot be grounded in the text of the treaties, which do not contain any reference to partial nullity. But the main problem of this explanation is that both decisions have a different “time-point of reference”¹³⁷ from which the judge appreciates the legality of the act, and this is why it is difficult to see those decisions like a unity. In fact, the judgement of nullity and the judgment of restoration do not pursue the same objective and do not solve the same problem. In the judgment of nullity, the ECJ considers the normative and factual situation at the moment in which the act came into force. We can say that this judgement controls an “historical act”. The system of control of the Community legality forces to make a contrast between an act and a superior norm, and this task can only be done in relation to the moment in which the act came into force. If the court wants to judge the act, it must consider the time of the act. As Waelbroeck says, the decision of the court must search the applicable law to the facts in the time they occur. Thus, this decision will be always a retrospective decision¹³⁸.

On the contrary, in the restoration judgement the arguments that the judge uses have a different time-point of reference because they examine the effects that some decision of restoration could produce in the moment in which the decision is taken. It is in this time when the legal certainty, the protection of legitimate expectation, the difficulties to unscrambling the effects of the act, the continuity of the service, the equity or the protection of public interest appear as values or principles that deserve protection.

As we can see, both decisions solve different problems with different objectives and temporal points. For that reason, the construction of a coherent system by which we can coordinate the judgement of nullity and the judgement of restoration is a task that needs more deep reflection.

§5. Conclusions

The total nullity, *ab initio* and *erga omnes* built from the traditional idea of a derivative validity of the norms, is *prima facie* the model by which we can explain the reaction of the EU legal order against unlawfulness. In

¹³⁷ In the same sense of the German concept of *Maßgeblicher Zeitpunkt*. See, for instance, KOPP, F. (1989): p. 1301ff.

¹³⁸ WAELBROECK (1981): p. 120.

this model, the main decision that judges take is the decision to quash the illegal act.

This model, however, is inefficient in its application, since it is unable to restore the legal order. This is the reason why the nullity framework tends to become more flexible. The exception provided in art. 231(2) EEC is an example of that necessity. But as this exception does not cover all the cases, the ECJ has extended its competence and created a general power to manipulate the effects of its decision of nullity or invalidity.

This situation faces serious problems, mainly related to build a general and coherent framework to explain the coordination and relation between the judgement of nullity and the judgement of restoration.

However, we can ascertain that the judgment of restoration is progressively increasing its importance and capturing the attention of the scholars, meanwhile the old judgment of nullity loses its traditional and protagonist role. Only through an efficient restoration process it could be tackled both the control of the institutional European power and the protection of the rights of the citizens.

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