

THE ROLE OF *EFFET UTILE* IN PRESERVING THE CONTINUITY AND AUTHORITY OF EUROPEAN UNION LAW: EVIDENCE FROM THE CITATION WEB OF THE PRE-ACCESSION CASE LAW OF THE COURT OF JUSTICE OF THE EU

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Effet utile is one of the most contested terms in European case law. The present article empirically analyses its occurrences in the case law across time, legal fields and argumentative contexts. It thereby demonstrates that the main function of effet utile is to mitigate the entrenchment and extension of fundamental doctrines: primacy, direct effect and human rights. On this basis, the article argues that effet utile is primarily a rhetorical instrument used by the Court of Justice of the European Union to decouple legal principles from the practical effects of its decisions with the objective of persuading Member States to accept the authority of European law without compromising its normative coherence and continuity. The analysis is an important contribution to a comprehensive understanding of effet utile and offers a deeper insight into the long-term maintenance of supranational judicial authority.

Keywords: effet utile of EU law, Court of Justice of the European Union, supranational judicial authority, incrementalism, coherence.

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I. INTRODUCTION

The success of international and supranational courts hinges upon a capacity for yielding to national sensitivities and avoiding open conflict with major political actors. Yet, the authority of international and supranational courts relies on being able to demonstrate that they enforce the rule of law rather than the political interests of individual governments. Thus, effective and legitimate international and supranational adjudication largely depend on whether courts can balance the demands of law with the social, economic and political concerns of the individual states concerned.¹

The achievement of the Court of Justice of the European Union (the Court) has been extraordinary in this regard. It has experienced occasional friction with national governments and with courts in individual Member States; and it has been subjected to mounting academic criticism. However, the Court remains an influential political player that enjoys considerable interpretive (semantic) authority. Some accounts proffer it as one of the most powerful higher courts in the world.² Various scholars (largely from the fields of social and political science) have explained the remarkable success of the Court with reference to broader historic trends³ and political theory (functionalism).⁴ Others have isolated individual factors such as the mobilization of transnational legal elites;⁵ the fostering of support from EURO-associations (in particular FIDE);⁶ the manner in which legalism as an approach to the study of law has underpinned the

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¹ Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale LJ 273, 114.

² Alec Stone Sweet, 'The European Court of Justice', in P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 121.

³ In particular the global diffusion of judicial constitutional review post World War II; see Martin Shapiro, 'The European Court of Justice' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (OUP 1999) 321.

⁴ Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

⁵ Antoine Vauchez, 'How to Become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)', in Hanne Petersen and others (eds), *Paradoxes of European Legal Integration* (Ashgate 2008); Antoine Vauchez, 'Communities of International Litigators', in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2014).

⁶ Karen J Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) 52 International Organization 121, 131; Laurence R Helfer and Karen Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 Theoretical Inquiries in Law, 487; Karen J Alter, *The European Court's Political Power: Selected Essays* (OUP 2009).

(uncritical) acceptance of the case law;⁷ and the protracted passivity of national governments.⁸ From a legal point of view it has been suggested that the Court's interpretive authority has been secured by formal reasoning⁹ (tempered with majoritarian activism)¹⁰ and step by step decision making (incrementalism).¹¹ In these ways, the Court has cultivated the image of a politically neutral institution applying the *law* rather than political programs or policy agendas.¹²

The majority of explanations address the question of how the Court's jurisprudence has been received rather than particularities characteristic of it, and rarely scrutinise how societal concerns and constraints are transformed into the legal logic of the case law.¹³ There has been a notable lack of quantitative empirical studies endeavouring to systematically unpack the legal mechanisms that enable the Court to fit the law to the facts of individual cases without compromising the overall coherence and consistency of jurisprudence.¹⁴

The present article engages in this type of empirical inquiry. Its central premise is that external constraints and judicial sensitivities are reflected in judicial outcomes and in judicial language. This is particularly evident in prefabricated judicial formulas and locutions which are used to project the

⁷ Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165; Harm Schepel, 'The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law' (2007) 32 *Law & Social Inquiry* 183; J H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403; Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' (2010) 16 *European Law Journal* 1.

⁸ Weiler (n 7) 2447

⁹ *ibid* 2447, Miguel P Maduro, *We, the Court : The European Court of Justice and the European Economic Constitution : A Critical Reading of Article 30 of the Ec Treaty* (Hart 1998), 10.

¹⁰ Or more specifically, formalism on the level of judicial language was mitigated with underlying policy authority in the form of majoritarian approach to the review of state regulation. See Maduro (n 9) 10.

¹¹ Trevor C Hartley, *The Foundations of European Union Law : An Introduction to the Constitutional and Administrative Law of the European Union* (7th edn, OUP 2010) See also Helfer and Slaughter (n 1) 315

¹² Burley and Mattli (n 4) 69; Maduro (n 9) 11.

¹³ See however a comprehensive analysis of the case law in term of reasoning and outcomes in Maduro (n 9).

¹⁴ For systematic qualitative empirical studies see for example Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice : Unfinished Business* (CUP 2014); Mattias Derlén and Johan Lindholm, 'Goodbye Van Gend En Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual Cjeu Judgments' (2014) 20 *European Law Journal* 667; Loïc Azoulay, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *EJLS* 192.

autonomy, neutrality, and universality of jurisprudence.¹⁵ The article's case study is one of the most familiar formulations in European law, the so called argument of *effet utile* or the effectiveness of European law. The study unpacks the nature and the role of this term, and demonstrates that *effet utile* occurs in a specific area in a particular period and in particular argumentative contexts. Namely, it is revealed as having a distinct function: to balance the entrenchment and expansion of the fundamental doctrines of European judge-made law, primacy, direct effect and human rights. At times, this entails a full (or at least a partial) decoupling of principles from remedies or other tactics that effectively mitigate the effects of pronounced principles and doctrines either in individual cases or lines of cases. This is what scholars have described as incrementalism. Having examined the necessary empirical data concerning this, the current article argues that *effet utile* is a rhetorical instrument used to persuade Member States to accept judicial doctrines and the ensuing powers of the Court without having to compromise the coherence and continuity of law in the process.

The development of *effet utile* is usually studied as a concept of EU law within the framework of the interpretative methods and legal principles developed by the Court. This article combines such in-depth legal analysis with "citation network analysis" and "classification of cases on the basis of language use", and produces what is currently the most nuanced portrait of the Court's decision making. By underpinning qualitative legal research and a close legal reading with quantitative empirical methods, this study yields more reliable results than a purely quantitative or a purely qualitative method. The analysis seeks to broaden the legal debate on methods of interpretation and legal development, and to add to a lively but largely theoretical debate on the subject of judicial law making by international courts.¹⁶ Its main contributions stem from creating a more comprehensive understanding of *effet utile* and a more detailed portrait of the long-term process of maintaining supranational judicial authority.

¹⁵ On the latter point see Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986-1987) 38 *Hastings LJ* 814, 820.

¹⁶ The creative aspect of adjudication has long been underplayed in continental legal thought. However, in recent decades it has become widely accepted that international and supranational courts make law when they interpret legal text and that they have considerable influence on international legal development. For legal debate on the subject see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012); Jacob; Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (OUP 1993); Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 *European Journal of International Law* 7.

Section Two of this work delimits the research objective and outlines the empirical materials and the approach. Section Three presents the empirical properties of the *effet utile* case law. It identifies instances of the Court's recourse to *effet utile* in the sample of historic case law,¹⁷ and contrasts them with the whole sample of historic case law, the effectiveness cases, and the entire dataset. Section Four discusses the distinct characteristics of the landmark *effet utile* cases and their influence on European law, and undertakes closer scrutiny of individual cases and groups of cases to interpret the findings qualitatively. Section Five provides a summary of the main arguments and presents the article's conclusions.

II. DELIMITING THE OBJECT OF INQUIRY

1. Effet utile: A circle whose centre is everywhere and nowhere

Like most international legal orders, the EU legal order has no centralised European enforcement mechanism. It must continually rely on national authorities to give it full effect. Within this framework, judicial constructs and formulas are expected to work like incantations which will trigger national compliance. Among the best known are the formulas of effectiveness of Treaty Articles and other provisions of European law, and the prohibition of unilateral measures that would damage the unity and efficacy of the common market.¹⁸

Effet utile is a familiar term in national and international law.¹⁹ It has become central in European jurisprudence: a staple in the case law of the Court of Justice for five consecutive decades, and a sturdy, constant presence in volumes of legal scholarship. Broadly speaking it is possible to paint two diverging portraits of *effet utile*, contingent on the approach taken. While the first approach can be described as more conceptual or positivist, the second is more contextual and inspired by the legal realist tradition.

¹⁷ The Court uses the term "historic case law" (in French: *jurisprudence historique*) when it refers to the important pre-accession case law, which was identified, selected and assembled for the purposes of three successive enlargements and translated into the languages of accession countries. For a detailed description please see the following section and the Court's website: http://curia.europa.eu/jcms/jcms/Jo2_14955/ (accessed 27 April 2015).

¹⁸ The paper distinguishes between *effet utile* cases and cases which deal with effectiveness in the procedural sense: namely, principle of effectiveness and equivalence cases (Rewe/Comet formula). The latter category of cases is excluded.

¹⁹ Scholars have traced the origin of useful effect back to Roman times. Anna von Oettingen, *Effet Utile Und Individuelle Rechte Im Recht Der Europäischen Union* (Nomos 2010), 25.

A large proportion of scholarship is focused on the legal nature of *effet utile* and conceptualises it as a legal principle²⁰ associated with the liberal statutory interpretation, either as a sub-category of dynamic interpretation (“the most usual functional criterion”)²¹ or as an independent method.²² Thus defined, *effet utile* is afforded a distinct and distinctive role as “*un outil indispensable*”²³ to the process of constructing the central doctrines of EU law such as direct effect, indirect effect, supremacy, and Member State liability in damages.²⁴ In this framework of understanding, *effet utile* is deemed to have wide structural effects on the European legal space.²⁵

By contrast, a narrower segment of the scholarship analyses *effet utile* from a socio-legal and more critical angle. In these accounts, *effet utile* is an empty if not a misleading rhetoric employed by the Court to “justify” innovation and divergent outcomes without substantively engaging with the goals of integration and the arguments of the parties.²⁶ This line of reasoning culminates in the definition of *effet utile* as a facade for

²⁰ *Effet utile* is often associated with the “liberal interpretation” of the Treaty. Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006), 419. The same holds for German speaking scholarship. (See the literature cited in Oettingen (n 19). See also Michael Potacs, ‘Effet Utile Als Auslegungsgrundsatz’ (2009) EuR). Recent literature broadens the legal context of *effet utile* considerably, discussing it against other principles of European law such as loyalty. For instance, Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014). Other scholars have focused on the context of justification and argumentation, for example Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009) See also Jacob (n 14) 25. Nevertheless, scholarship continues to treat *effet utile* as an interpretive instrument (Klamert (n 20) 255.) either in the form of an emerging constitutional principle (Malcolm Ross, ‘Effectiveness in the European Legal Order(S): Beyond Supremacy to Constitutional Proportionality?’ (2006) 31 EL Rev 476); a meta rule of interpretation (Stefan Mayr, ‘Putting a Leash on the Court of Justice? Preconceptions in National Methodology V Effet Utile as a Meta-Rule’ (2012/13) 5 European Journal of Legal Studies 8); or a meta-policy of the Advocates General and the CJEU (Lasser (n 20) 212).

²¹ Bengoetxea (n 16) 254.

²² Sibylle Seyr, *Der Effet Utile in Der Rechtsprechung Des Eugh* (Duncker & Humblot 2008), 367.

²³ José Luís da Cruz Vilaça, ‘Le Principe De L’effet Utile Du Droit De L’union Dans La Jurisprudence De La Cour’ in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe : Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press & Springer 2012) See also Tridimas (n 20).

²⁴ See for instance Paul Craig, ‘The ECJ and *Ultra Vires* Action: A Conceptual Analysis’ (2011) 48 CMLR, 400.

²⁵ *Effet utile* is seen as the principle which more than any other structured this relationship and the European legal space more generally. Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’ *Common Market Law Review*’ (2014) 51 *Common Market Law Review* 59, 64.

²⁶ Lasser (n 20) 236; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 117.

potentially unbridled policymaking under the guise of interpretation.²⁷ Contrary to this, the present inquiry treats *effet utile* as a routine linguistic formulation in the case law of the Court rather than a rhetorical disguise or a legal principle. Its nature and role are explored in relation to the chain of argumentation (argumentative context) in which it is embedded and in relation to case outcomes.

2. *Materials and Approach*

When the new Member States acceded to the EU in 2004, 2007 and 2013 it was decided that selected, important pre-accession case-law (referred to as the historic case law) of the Court had to be translated into the languages of acceding Member States. The case law initially selected for the 2004 accession countries consisted of 948 judgments, opinions, and orders of the Court and the Court of First Instance (now General Court), dating from 1956 to April 2004. However, only 57 cases (50 decided by the Court and 7 by the General Court) were translated at the Commission's expense. The same exercise was repeated in 2007 with subsequent accessions of Bulgaria and Romania, and in 2013 when Croatia joined the EU. This assemblage of 50 cases of the Court, it has been argued, is a tribute to the judicial construction of the European legal order.²⁸

Such a selection might offer a near perfect platform for examining the tools and techniques that enabled the Court to construct the European legal order were it not for the Court's irregular and imprecise use of language and terminology. It is not possible to successfully use the standard automated search techniques employed to identify all instances where a term occurs and compile a complete sample, to arrive at a clear delimitation of the object of inquiry.²⁹ Multilingualism, often cited as the usual culprit when it comes to European terminology and concepts,³⁰ is not to blame. In French alone, the Court has referred to *plein effet*,³¹ *pleine*

²⁷ Hjalte Rasmussen, *The European Court of Justice* (Gadjura 1998); Hartley (n11) 74.

²⁸ Urska Sadl and Mikael R Madsen, 'Becoming European (Legally): Unpacking the Self-Portrait of the Eu Legal Order in the Pre-Accession Case-Law Dossiers' (Annual Conference of the Empirical Legal Studies (CELS), Berkeley November 2014).

²⁹ For instance, EurLex and Curia do not find all the usages of a term, providing an incomplete and biased sample that can best be analysed qualitatively.

³⁰ Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 *European Law Journal* 395; Mattias Derlén, 'Multilingual Interpretation of CJEU Case Law: Rule and Reality' (2014) 39 *European Law Review* 295

³¹ Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR I, para 4: "[i]f the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect [plein effet] of the measures adopted in implementation of those rules. Any other solution would be incompatible with the objectives of the Treaty and the character of its rules on competition."

effectivité, la pleine application, or simply *efficacité*³² while in English translations and linguistic versions the Court has used full effect, *effet utile* (in brackets after the English translation, or left untranslated), effectiveness, efficacy, practical effect and full effectiveness, often interchangeably.³³

Consequently, the selected historic case law examined in this article is first explored by looking for the following word combinations: effectiveness, practical effect, full effect, efficacy, *effet utile*, *plein effet*, *efficacité*, and *pleine application* in the full text of the judgments in English and French language versions. These instances are then recorded systematically.

Cases in which any of these formulations occur at least once are treated as “historic *effet utile* cases.” Their empirical properties such as their subject matter, reporting judges, Advocates Generals, the principles that they established, and their “importance scores” are then recorded and compared to the selected historic case law (fifty cases), to the full network consisting of 9500 judgments of the Court, and to the larger effectiveness dataset consisting of all judgments of the Court in which *effet utile*, effectiveness or *plein effet* appear in the text or the title of the document (1707 cases).³⁴

The “importance score” is assigned to cases on the basis of quantitative and qualitative criteria. In terms of the former, the article draws upon political science literature which uses Jon Kleinberg’s hub and authority scores³⁵ and adapts the method used in social and academic citation network analysis to study the structure of the case law of courts.³⁶ By way of comparison: in academic citation networks, the importance (centrality) of a scientific paper depends both on the number of citations it receives

³² Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

³³ A good example is the Court’s judgment in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

³⁴ The database is created by iCourts as a part of the project on international courts. <http://jura.ku.dk/icourts/>

³⁵ Hub and authority scores are calculated for each case by modelling the network with the adjacency matrix A of the network graph. The vectors x and y , representing all hub and authority scores in the network, can be computed as $x = A^T y$ and $y = Ax$, A^T being the transpose of A . Kleinberg was able to show that after a number of iterations, vectors x and y converge to x^* and y^* the principal eigenvectors of ATA and AAT , respectively. In less technical terms, hubs and authorities result from a mutually reinforcing citation setting which takes into account the number and the importance of citations. A good hub is one that points to many good authorities; a good authority is one that is pointed to by many good hubs. Jon M Kleinberg, ‘Authoritative Sources in a Hyperlinked Environment’ (1999) *Journal of the ACM (JACM)* 465, 604.

³⁶ For the first study of citation to case law see James H Fowler and others, ‘Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents’ (2007) 15 *Political Analysis*.

and on the importance of subsequent scientific papers which cite it. Similarly, the centrality of the individual case in the case citation network depends on the number and the centrality of subsequent cases that directly refer to it. Thus, in this methodology it is important to be cited; but it is more important still to be cited in important papers and cases.

The article re-works this method further to study how the influence of individual cases varied over a longer period of time, from the mid-1950s to 2013. To this end, citation graphs are constructed for each year from 1954 onwards and centrality scores for each graph are computed.³⁷ The qualitative criteria for assigning importance to cases are based on scholarly commentary (which sometimes refers to several of them as the “classics of EU law”)³⁸ and on a legal analysis of the principles which they established, expanded or reaffirmed.

III. EMPIRICAL PROPERTIES OF *EFFET UTILE* CASE LAW

This section identifies and examines the main empirical properties of the historic *effet utile* cases in a systematic manner. The first sub-section looks at the general properties of the empirical materials using descriptive statistics, the second sub-section reviews and systematises the materials on the basis of their content, and the third sub-section studies their citation patterns and the network structure using the tools of citation network analysis.

1. *Quantitative Properties of Historic Effet Utile Cases*

Of the 50 cases in the pre-accession package, 21 cases can be categorised as “historic *effet utile* cases” on the basis that they contain an express reference to either *effet utile* (9 cases), *efficacité* (6 cases), *plein effet* (1 case), *pleine efficacité* (4 cases) and *pleine application* (1 case) in the French language version. Three cases refer to two or three of these expressions interchangeably.³⁹

As a group, the historic *effet utile* cases have some general properties which must be noted at the outset. Regarding timeframe, one case was decided in the 1960s, seven cases were decided during the 1970s, eight during the 1980s, and five in early to mid-1990s. Hence, they are fairly evenly distributed between 1970s and 1990s. In terms of subject matter, according to the Court’s classification most historic *effet utile* cases are related to the internal market. In particular, they relate to the free

³⁷ This yields the charts of so-called initial authority and hub scores of 50 cases in the network, indicating the relative significance of individual cases over a more than half a century.

³⁸ Miguel Poineres Maduro and Loïc Azoulai, *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

³⁹ For instance *Simmmenthal* (n 33).

movement of workers and freedom of establishment, to social provisions, and to competition, as shown in Figure 1. By comparison, the largest proportion of cases in the pre-accession package, also presented in Figure 1, concerns the freedom of movement of goods (FOG, 20.41%), followed by common agricultural policy (CAP, 10.20%), competition law (COMP, 14.29%), European institutions (EU INSTIT, 10.20%) and social policy (SP, 10.20%).⁴⁰

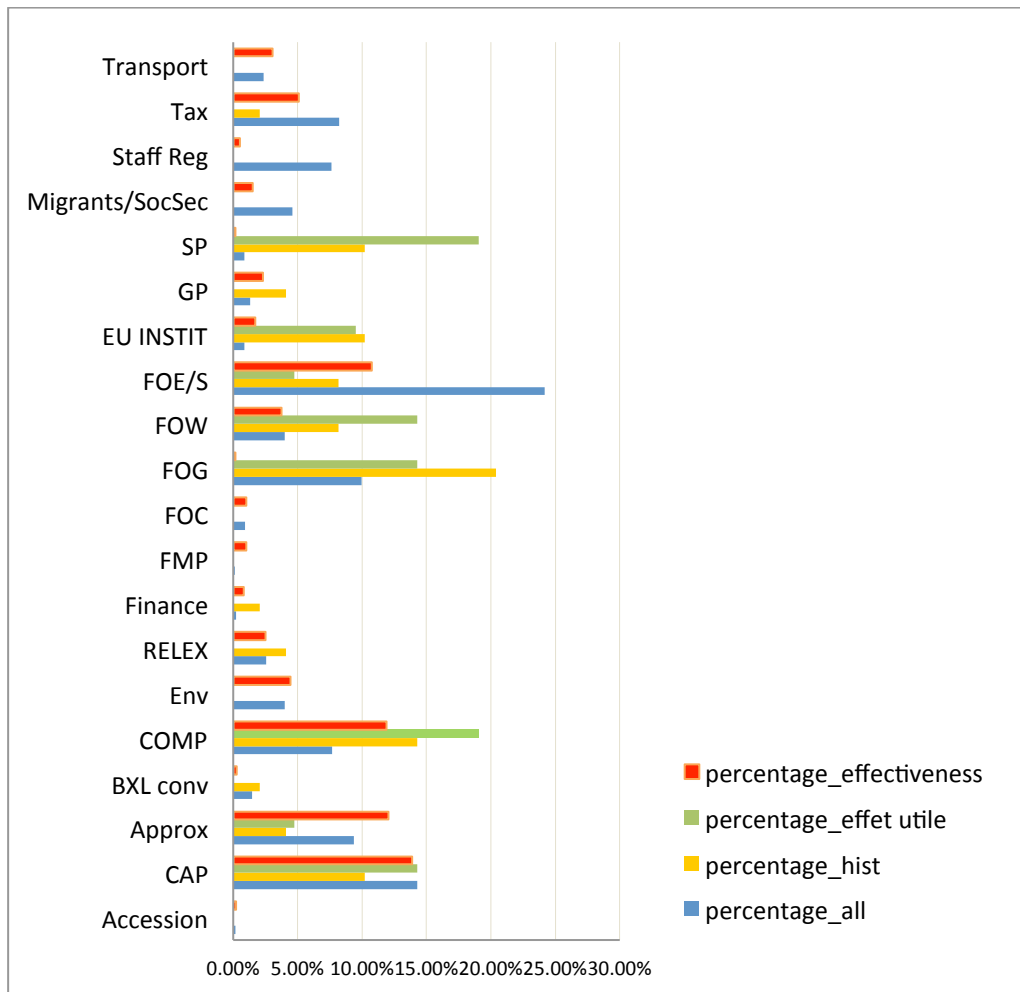


Figure 1: Subject matter (in percentages) of *effet utile* cases compared to historic case law of the Court, the effectiveness cases and all cases decided by the Court from 1954 - 2013

Lastly, historic *effet utile* cases were reported by 14 different reporting judges and accompanied by the opinions of 15 Advocates General. Thus,

⁴⁰ By comparison, in the full dataset (9581 judgments) the freedom of services and establishment (FOS/E) and common agricultural policy (CAP) are on the top of the list accounting for 24.19% and 14.26% of all cases, followed by approximation of laws (Approx, 9.37%) and the free movement of goods (FOG, 9.94%), as well as competition law (Comp) with 7.66%. Staff Regulation cases (Staff Reg), meaning the disputes initiated by the employees of EU institutions against their employers, including courts, make up 7.64% of case law and so on.

the Court's use of the term seems unrelated to the specific reporting or sitting judges or the Advocates General.

2. *Categories of Historic Effet Utile Cases Based on Qualitative Criteria*

Historic *effet utile* cases can be further systematised according to four qualitative criteria: (1) the scope of protection (the level of generality); (2) the object to which the Court's argument of *effet utile* is directed (namely, the interest it aims to protect); (3) the Court's "law-making" initiative and its practical effects (establishment of new judge-made principles and judicial consequences); (4) the argumentative context in which the term *effet utile* occurs.

The basis for the first classification (the scope of protection, or the level of generality) is the texts of individual judgments alone. The Court can either invoke the *effet utile* of the Treaty as a whole (*Reyners*⁴¹), or of European law (*Hauer*,⁴² *Factortame*⁴³), or of a specific policy area (*effet utile* of competition rules as in *Van Eycke*⁴⁴), or of a specific Treaty article (former Article 48 EC in *Bosman*⁴⁵). Most historic *effet utile* cases (13 out of 21) invoke the useful effect of Community law or norms/acts of Community law in general, while 5 invoke the effectiveness of a certain policy area, and 3 invoke the useful effect of a specific Treaty Article.

The basis for the second classification (the interest that the Court aims to protect) is not exclusively the text of the judgment but also other qualitative criteria such as the language of the Court, the subject matter assigned to the case by the Court, the keywords that accompany each judgment, and the case-law directory in which the case is placed. Concerning the object or aim of protection, *effet utile* arguments can be addressed to the (proper) functioning of the internal market (for instance *Albany*⁴⁶), the general principles of the legal order (*Hoechst*⁴⁷), the authority of EU law (*Simmenthal*⁴⁸), or the protection of the individual (*Becker*,⁴⁹ *Von Colson*,⁵⁰ or *Johnston*⁵¹). Out of 21 *effet utile* cases there are 10 cases whose

⁴¹ Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 00631.

⁴² Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727.

⁴³ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.

⁴⁴ Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769.

⁴⁵ Case C-415/93 *Union royale belge des sociétés de football association v Jean-Marc Bosman* [1995] ECR I-04921.

⁴⁶ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.

⁴⁷ Joined cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.

⁴⁸ *Simmenthal* (n 33).

⁴⁹ Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

⁵⁰ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

main object of protection is the individual (there are 16 cases in the historic case law in this category), 1 case that deals with the authority of EU law (out of 8 cases in the historic case law), 4 cases that address the general principles of the legal order (out of 9 cases in the historic case law that can be classified as such), and 6 *effet utile* cases that concern the functioning of the internal market (out of 15 included in the historic case law).

The third classification (the law making initiative) takes into account the same factors as the second classification, as well as scholarly commentary or *notes de doctrine* (case comments) discussing individual cases as judicial contributions to the *acquis*. The vast majority of cases in which the Court relied on *effet utile* establish principles or rules that can be labelled as judge-made law (16 out of 21), a finding that holds for the majority of the pre-accession cases included in the package. In 18 out of 21 historic *effet utile* cases there are features with additional pertinence for this study. Frequently, the abstract rule or principle are disconnected from their effects (14 cases). Less often, *effet utile* appears together with a reference to the fundamental principles of the EU and common traditions (4 cases). In the aforementioned ‘disconnected’ group (14 cases), the Court delayed the effect of the principle in 4 cases and also partly or fully decoupled the principle from the remedy. In the rest of historic case law (29 cases) the Court limited the effects of the judgment only once.⁵² The 3 historic *effet utile* cases where none of the above occurs are *Cassis de Dijon*,⁵³ *Factortame* and *Becker*. *Cassis de Dijon* is a marginal case by this study’s criteria because the reference to effectiveness occurs in the context of effective fiscal supervision as a justified impediment to the internal market. *Factortame* and *Becker* are not marginal in this way. Both concerned the enforcement of directly effective rights of individuals, and the Court ruled that national courts had to protect those rights by granting a remedy, either by interim relief (*Factortame*, decided in 1990) or by directly applying EU law in cases where the Member State did not take the necessary measures to transpose the Directive (*Becker*, decided in 1982).

The fourth classification is based on the same criteria as the second classification along with a close reading of historic *effet utile* cases. The Court used the argument of *effet utile* initially in the argumentative context

⁵¹ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁵² In Case 45/86 *Commission v Council* [1987] ECR 01493 concerning the legal basis for Community measures; the Court annulled the regulation in question but considered that for reasons of legal certainty its effects were to be declared definitive pursuant to Article 264 TFEU (then Article 174 EEC). As opposed to other historic effect utile cases, this mitigation of consequences was envisaged by the Treaty.

⁵³ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

of direct effect: to extend it, clarify it, or to adapt it to triangular situations. Subsequently, the Court grounded its reasoning in *Simmenthal* in the language of effectiveness to entrench primacy and link its rationale to the rationale of direct effect (*Van Duyn*,⁵⁴ *Hauer*, *Reyners*, *Commission v Belgium*⁵⁵). Lastly, the Court justified the establishment of new principles using *effet utile* (*Johnston*, *Francoovich*⁵⁶), reinforced already established principles (*Hauer*), or did both (*Brasserie*,⁵⁷ *Factortame*).

3. Empirical Properties of Historic *Effet Utile* Cases Based on Citation Network Analysis

The above findings can be further refined using the tools of network analysis. The results indicate that as a group historic *effet utile* cases are more authoritative than other groups of cases. The average authority score of all 21 *effet utile* cases is 1.45 times higher than the average authority score of the selected pre-accession case law, 5.5 times higher than the average authority score of effectiveness cases, and ten times higher than the average authority score of all cases in the network.⁵⁸ The average hub score of historic *effet utile* cases is equivalent to the average hub score of all cases in the network.⁵⁹ This means that as a group, historic *effet utile* cases had a comparatively higher impact on EU law.

In order to illustrate which individual historic *effet utile* cases were the most influential (and in which specific periods) initial authority scores can be calculated for each case in the group. The initial authority scores chart in Figure 2 presents the relative salience of selected individual historic *effet utile* cases over a time span of 50 years.⁶⁰ We can observe that two cases in particular, *Simmenthal* and *Defrenne*,⁶¹ decided in 1978 and 1976, stand out as most authoritative. The fluctuations in their citation scores indicate that they had an uneven impact on the law over time, and the surge in initial authority scores in the early-eighties followed by another surge in the mid-

⁵⁴ Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337, paragraph 12.

⁵⁵ Case 149/79 *Commission v Belgium* (interim judgment) [1980] ECR 3881.

⁵⁶ Joined cases C-6/90 and C-9/90 *Andrea Francoovich and others v Italy* [1991] ECR I-05357.

⁵⁷ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-01029.

⁵⁸ For the definition and the method of calculation of hub and authority scores see (n 35).

⁵⁹ The averages of authority and scores of the groups of cases are based on the calculations of hub and authority scores using HITS algorithm.

⁶⁰ The initial authority scores for every case represented in Figure 3 are calculated from the date when the case was decided until 2013 when the last acceding nation became a full member of the EU. We take a snapshot of the network for every year and compute the initial hub and authority scores. We then extract the initial authority scores of the selected cases which are represented in the Figure.

⁶¹ Case 43/75 *Gabrielle Defrenne v Sabena* [1976] ECR 00455.

eighties means that they had the most impact on the case law in those periods.

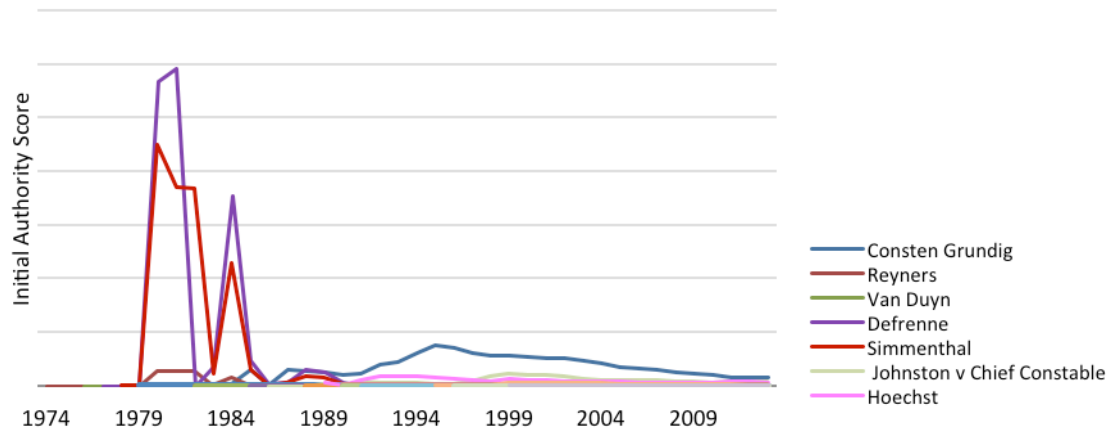


Figure 2: The chart of initial authority scores of selected influential historic *effct utile* cases

Below, Figure 3 represents a network of cases which are directly or indirectly linked to *Defrenne* and *Simmenthal*. Namely, a network encompassing cases which explicitly refer to either of these judgements, or cases linked by citation to earlier direct references to them.⁶² The network structure attests to the far-reaching impact of *Defrenne* and *Simmenthal*, especially on the law of remedies and the protection of the individual. Figure 3 also shows the proximity of *Defrenne* and *Simmenthal* to *Van Gend*⁶³ and *Costa v ENEL*,⁶⁴ which further confirms the link between historic *effct utile* cases and the cases which proclaim the distinctiveness of the legal order and its authority.

In fact, as demonstrated in Figure 4, *Van Gend*,⁶⁵ *Defrenne* and *Simmenthal* have nearly identical citation patterns. Moreover, the peaks in their

⁶² The network in Figure 3 is a sub-network of the full network, whereby the latter consists of all judgments of the Court. The sub-network in Figure 3 is built by extracting a smaller segment from the full network, concretely the *Simmenthal* and the *Defrenne* cases and their inward and outward citations using Gephi software (union of ego networks, depth 1). It is composed of all cases that *Simmenthal* and/or *Defrenne* cite, and the cases which cite *Simmenthal* and/or *Defrenne*, and cases that are directly connected to the latter cases with a citation.

⁶³ Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I.

⁶⁴ Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585.

⁶⁵ *Van Gend* was not cited much until the late-seventies and the early-eighties. This is partly due to the Court's practice of not referring to case law directly which changed in the late-seventies. However, other historic cases decided in the same period have higher citation scores (notably *Reyners*, Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 83, and Joined cases 56 and 58/64 *Consten and Grundig* [1966] ECR0299).

authority scores correspond to a period of integration that has been characterised as constitutional mutation in the form of expansion of Community jurisdiction and the de facto disappearance of the principle of enumerated powers.⁶⁶

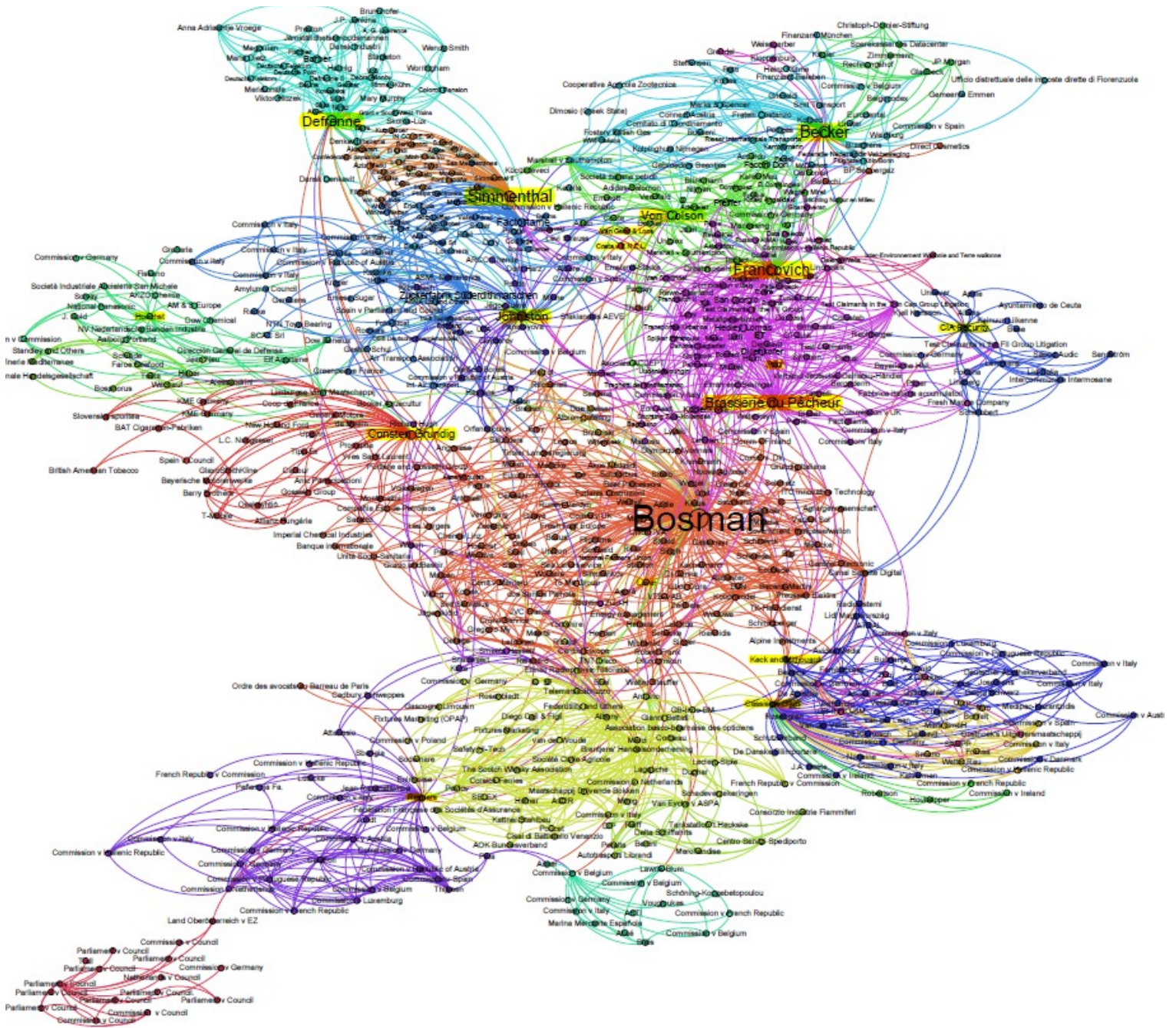


Figure 3: The sub-network of *Defrenne* and *Simmenthal*

⁶⁶ Weiler (n 7) 2435.

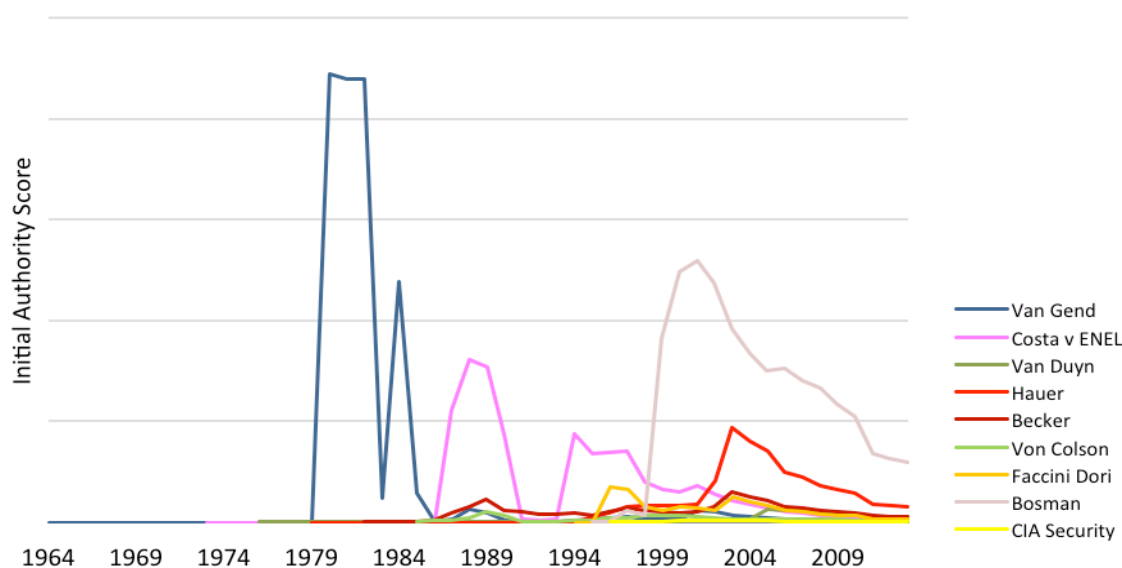


Figure 4: The initial authority scores of selected historic case law

By contrast, *Defrenne* and *Simmenthal* have a shorter incubation period compared to *Van Gend* and *Costa v ENEL*, and to similar cases in the historic case law package such as *ERTA*⁶⁷ or *Les Verts*⁶⁸ which are considered to be of fundamental importance to EU law. On average, historic cases peak about 10 years after they are handed down. These findings strongly suggest that the full effect of direct effect and primacy was delayed.

To sum up, the findings of this empirical analysis suggest that *effet utile* cases have three distinct characteristics. First, they are more authoritative. Second, their impact on the case law is considerable but uneven in terms of the object of protection and with regard to the time period. Third, they are characterised by selective application of the principles that they proclaim. In the following section these characteristics will be explored in greater detail.

IV. THE ARGUMENT OF *EFFET UTILE* IN HISTORIC *EFFET UTILE* CASES: A LEGAL ANALYSIS

The argument of *effet utile* first appeared in 1961 in the *Steenkolenmijnen Limburg*⁶⁹ case alongside the so-called retained powers formula (one of the most frequently used and well-known formulas of European law).⁷⁰ The Court used it to balance the Community of Six's interest in healthy competition against Germany's interest in giving bonuses to workers which created a competitive advantage for German companies that

⁶⁷ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

⁶⁸ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

⁶⁹ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1.

⁷⁰ Azoulai (n 14) 192.

distorted competition. The problem was how to establish authority in the fields related to competition such as the social security and labour market to which the German bonuses were related. The Court stressed that the Community could impinge on national sovereignty (directly translated from the French: permit the incursions of Community competence) only in order to ensure that the *effet utile* of the Treaty was not *considerably* weakened and its aims and purposes were not *seriously* compromised.

The Court did not use the classical formulation of *effet utile* in *Van Gend* and *Costa v ENEL*, but referred to the executive force of Community law (*Costa v ENEL*), the effectiveness of public enforcement procedures (*Van Gend*), and to the vigilance of the individuals whose rights were at stake to *effectively* enforce European law (*Van Gend*). This may have been due to the fact that the term had hitherto only been used to negotiate the division of competences and not to refer to a special character of European law; or it may have been an indication that the Court felt encouraged by the strong support of FIDE and the Commission which rendered legal diplomacy unnecessary.⁷¹

In historic *effet utile* cases, the reasoning of *Steenkolenmijnen* is reinforced by creating links to either the rationale of *Van Gend* (the protection of the individual) or *Costa v ENEL* (the autonomous legal system which prohibits subsequent unilateral measures). However, as will be demonstrated, the concrete consequences of the judicial extensions of doctrines are rarely severe for the Member States involved. The following sub-sections present three distinct uses of the argument of *effet utile* by the Court in more detail: (1) the decoupling of the legal principle from the concrete remedy which is the most pervasive use; (2) the repeated appeal to fundamental legal principles of EU law; and (3) the evocation of common goals and unity in prefabricated formulas and locutions.

I. Principle and Practice

In several historic *effet utile* cases the Court completely or partially detached the practical effects of the judgments from the declared legal principles and newly established abstract concepts. In other cases, the consequences of particular decisions in terms of remedies for the applicants affected the concerned Member State only marginally.

In *Van Duyn* (1974) the Court used *effet utile* to extend direct effect to directives. In the concrete case in question, this also implied that in principle the Member States lost the ultimate authority for the

⁷¹ See Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' See also Morten Rasmussen, 'From Costa V. Enel to the Treaties of Rome – a Brief History of a Legal Revolution', in Luís Miguel P Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

interpretation of the concept of public policy (which was to become subject to control by the institutions of the Community, notably the Court). Nevertheless, the Court conceded that under “particular circumstances” the competent national authorities should be granted discretion.⁷² This effectively decoupled the newly extended doctrine of direct effect of directives and the proclamation of authority of the Court from the remedy in the concrete case. The UK could effectively refuse entry to Ms Van Duyn for being a member of the church of scientology.

Reyners (1974) relaxed the conditions for direct effect in the area of freedom of establishment. Following this case, Treaty articles that required implementing measures could in principle have direct effect contrary to what was a clear requirement of the condition of unconditionality for direct effect which was set in *Van Gend*. The ruling seems bold, encroaching upon the freedom of the Member States to draw up a list of professions reserved for their nationals. Yet, while the applicant in the national court may have been a Dutch national, he was also a Belgian lawyer (a native Dutch speaker with a Belgian law degree; hardly a foreigner). While the principle was demanding, the remedy was not.

In both cases the Court renegotiated the executive force of Community law in terms of *effet utile*, and reiterated the argument from *Costa v ENEL* (“to avoid the effectiveness of the Treaty being defeated by unilateral provisions of Member States”⁷³). According to the Court, the “Community character of the limits imposed”⁷⁴ by the EU on permissible exceptions to the principle of freedom of establishment and the free movement of workers prevented the Member States from unilaterally and individually drawing up a list of professions reserved for their own nationals (*Reyners*), or unilaterally defining public policy (*Van Duyn*). The move was rhetorical in *Reyners*, but practical in *Van Duyn*. Both cases were decided in 1974. Interestingly, the Court did not extend its reasoning in *Reyners* to the free movement of workers in a subsequent case that involved professions connected to the exercise of State authority in *Commission v Belgium*.

In *Commission v Belgium* (1980) the Court’s central argument was closer to its reasoning in *Hauer* and in *Internationale Handelsgesellschaft*.⁷⁵ The Court reiterated the formulation of the unity and efficacy of Community law to balance the legitimate interests of individual Member States with a common interest in ensuring the effectiveness of the Treaty and the equality of treatment of *all* nationals of *all* Member States. Concretely, it held that as a matter of principle domestic laws of individual Member

⁷² *Van Duyn*, para 18.

⁷³ *Reyners*, para 50.

⁷⁴ *Reyners*, para 50.

⁷⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

States could serve as a basis for the interpretation of the Community concept of public service. Nonetheless, the Court decoupled the principle from the remedy and softened the expansion of the autonomous legal order in practice.⁷⁶ It issued an interim judgment requesting that the Commission and the Member States draft a list of professions that would be reserved for nationals. The Court only delivered the final ruling two years later, after an extension of the deadline prompted by the disagreements between the Commission and the Member States participating in the negotiations.⁷⁷

In *Defrenne* (1976) the separation of the principle from the remedy is very evident, both linguistically and in terms of its effects in practice. The Court extended direct effect to private disputes (the so called horizontal direct effect) via effectiveness, which required a considerable re-balancing of the social and the economic objectives of the common market (in favour of the former)⁷⁸ as well as of the Court's authority to attribute different weight to these principles. The establishment of the principle (and the Court's authority to re-interpret common market objectives) was mitigated by a temporal limitation of the effects of the judgment based on the considerations of legal certainty and the importance of "affected interests."⁷⁹ This reconciliatory gesture from the Court in *Defrenne* did not escape criticism. While some gave the Court credit for accepting "the responsibility to mould constitutional doctrine in order to make more acceptable the practical effects of judicial decisions"⁸⁰ others found this type of "amnesty" unacceptable.⁸¹ Additionally, the Court did not address the entire spectrum of situations that could/would lead to discrimination, but only addressed direct and overt discrimination which could be determined by "legal means."⁸² This narrowed the potential application of the judgment to a greater extent.

In *Von Colson* (1984) the Court established the doctrine of so-called indirect effect, sometimes referred to as the principle of conform interpretation.⁸³ It relied on the useful effect of directives to stress the

⁷⁶ *Commission v Belgium*, paras 23 and 24.

⁷⁷ Case 149/79 *Commission v Belgium* (final judgment of the Court of 26 May 1982) [1982] ECR 1845.

⁷⁸ *Defrenne* (n 61) para 10.

⁷⁹ *ibid*, para 74.

⁸⁰ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986), 438 and seq.

⁸¹ A comment by Christian Philip (1976) *Revue trimestrielle de droit européen* 529.

⁸² *Defrenne* (n 61) para 18.

⁸³ On the principle of conform interpretation as a method for finding compatibility between legal norms belonging to different but coordinated systems, or for finding coherence within the system, see Joxerramon Bengoetxea, 'Conform Interpretation

obligation of national courts to provide effective remedy in cases involving gender discrimination. The Court did not consider purely nominal compensation such as reimbursement of the expenses incurred in connection with the application as adequate, effective and deterrent, but stopped short of imposing a particular sanction and gave national courts considerable discretion. Even if in principle the national courts were to interpret all national law in the light of EU law, in a concrete case a national court could implement the newly established principle by deciding the case in accordance with - ultimately - national law.

In *CIA Security* (1994)⁸⁴ the Court was called to rule on the question of whether directives could have effect on third parties: the so called incidental effect of directives. It recognised that a Member State breach of the obligation to notify the Commission regarding technical standards could affect the rights of private parties in private disputes and impact upon the greater effectiveness of Community control over internal market regulation and compliance. However, it held that in the concrete case in question a provision such as Article 4 of the 1990 Belgian Law which provided that no one may run a security firm without approval from the Home Affairs Ministry was judged compatible with Article 30 of the Treaty.

In *Bosman* (1995), which has been the Court's most intensively cited judgment, the Court dampened its ruling against the obstacles to free movement imposed by football associations by temporarily limiting the resultant economic consequences, namely the payments of the transfer fees. By contrast, the Court refused to limit the effects of the judgment related to the nationality clauses which stemmed from its previous rulings.⁸⁵

2. *The Foundations of the Community and its Fundamental Principles*

As noted, the Court has used *effet utile* to extend the doctrine of primacy (*Costa v ENEL*) by referring to the foundations of the Community (doing so more prominently still in *Simmenthal*). A shared concern resonates here: if (directly applicable) Community law were not to take precedence over national law, the foundations of the Community would be at stake. The similarity is most evident in the French language versions of the judgements where the Court uses the same expression, namely the (legal) basis of the Community. In *Simmenthal*, to recognise any legal effect of posterior national measures would amount to the denial of effectiveness of the obligations of the Member States which "*mettrait ainsi en question les*

as a Method for Balancing Autonomy and Heteronomy: Introduction' Oñati Socio-Legal Series via <http://opo.iisj.net/index.php/osls/index> (accessed 18 April 2015).

⁸⁴ Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201.

⁸⁵ *Bosman*, para 145.

*bases mêmes de la Communauté*⁸⁶ (*Simmenthal*, paragraph 18). In *Costa*, the reading is that domestic provisions which could override Community law would “*mise en cause la base juridique de la Communauté elle-même*”⁸⁷ (*Costa v ENEL*, paragraph 3, third indent).

The extension of primacy in *Simmenthal* came at the expense of the competence of national constitutional courts to police the coherence of national legal orders. To compensate for the loss of authority, as a matter of principle the Court granted the Italian Constitutional Court a de facto authority to rule on the compatibility of national measures with the national constitution. The Italian Constitutional Court had previously set aside the Italian measures deemed incompatible with European law,⁸⁸ making the ruling of the Court of Justice declaratory.

As Figure 3 illustrates, *Simmenthal* is directly linked to the liability of the Member States for breaches of European law (*Francovich* and *Brasserie*), as well as to the area of judicial remedies and judicial review (*Factortame* and *Johnston*). It is well-documented that these doctrines are based directly on the effectiveness of the legal order and the ensuing obligations of the Member States. They impinge on the autonomy of the Member States to use national remedies and procedures. Figure 3 highlights the manner in which both are linked to the liability of Community institutions (*Zuckerfabrik*⁸⁹) and individuals (*Courage*⁹⁰).

Francovich established the principle of Member State liability, but initially only in cases where directives lacked direct effect. According to the Court, the existence and scope of liability “must be considered in the light of the general system of the Treaty and its fundamental principles,” including direct applicability, primacy and the duty of national courts to protect individual rights,⁹¹ which until *Francovich* did not include the granting of EU remedy in the form of damages against a Member State. The Court relied primarily on effectiveness to stretch the reach of EU law in protecting individual rights. At the same time, the Court granted a certain leeway to the Member States in terms of procedural effectiveness, invoking the *Rewe/Comet*⁹² formula of procedural autonomy.⁹³ The case

⁸⁶ This is translated as “without the legal basis of the Community itself being called into question”.

⁸⁷ Translated as “would thus imperil the very foundations”.

⁸⁸ *Simmenthal*, paras 8 and 9 (n 33).

⁸⁹ Case 5-71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

⁹⁰ Case C-453/99 *Courage Ltd v Bernard Creban and Bernard Creban v Courage Ltd and Others* [2001] ECR I-06297.

⁹¹ *Francovich* (n 56), para 30.

⁹² Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 and Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.

seemed initially to evince strong rhetorical and doctrinal positions. However, in practice *Francovich* was the sequel of a lengthy dispute between Italy and the Commission, and followed Italy's "previous conviction" by the Court in 1989 for not implementing the directive at stake.⁹⁴ In a subsequent ruling the Court accepted Italy's interpretation of Directive 80/987/EEC, limiting compensation according to national law and regulations pertaining to insolvency procedures. The compensation to the plaintiffs was ultimately denied.⁹⁵

In *Brasserie du Pêcheur*⁹⁶ the Court extended the *Francovich* liability to the legislative branch. It relied on *Francovich*, paragraph 33 to stress the adverse effects of the breaches of Community law on its full effectiveness. According to the Court, this also held true in cases of directly effective provisions of Community law. In fact, it was deemed "even more so" in those cases, since damages were a "necessary corollary of the direct effect." In *Francovich*, paragraph 34, however, the Court held that the possibility to claim damages was "*particularly indispensable where [...] the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.*"⁹⁷ Again, the effectiveness argument of *Francovich*, which justified damages in the absence of direct effect, was extended to cases where Community provisions were directly effective, whereby the formulation remained basically unchanged. In both instances, the *a fortiori* argument was employed to underpin the Court's line of effectiveness reasoning.

In *Brasserie*, the extension of Member State liability was counter-balanced by the Court's conciliatory provisions. First, the Court stressed that it would take into account the "accepted methods of interpretation, in particular the fundamental principles of the Community legal system."⁹⁸ Second, the Court relied on the importance of uniform application for the Community legal order,⁹⁹ an instrument discussed in the next sub-section. Although the Court did not effectively detach the remedy (the potential payment of damages) from the principle, it relaxed the link between them by counterpoising rather concrete common guidelines for reparation with allowances for the Member States to apply the principle of Member State liability within their own statutory framework.¹⁰⁰

⁹³ *Francovich* (n 56), paras 42 and 43.

⁹⁴ Case 22/87 *Commission v Italy* [1989] ECR I43.

⁹⁵ Case C-479/93 *Francovich v Italy* [1995] ECR I-03843.

⁹⁶ *Brasserie* (n 57).

⁹⁷ *Francovich* (n 61) para 34.

⁹⁸ *Brasserie* (n 57) para 27.

⁹⁹ *ibid*, para 33.

¹⁰⁰ *ibid*, paras 83 and 90.

3. Common Interests and the Unity of EU Law

Historic *effet utile* cases gradually link the primacy reasoning of *Costa v ENEL* to the rationale of unity and efficacy of EU law. The cases that concern the development of human rights protection situate a new field's burgeoning power and influence in an appeal to the common interest and common goals. This is particularly evident in the link between the rationale of the protection of fundamental rights and the rationale to accord primacy to EU law, illustrated below.¹⁰¹

In *Hauer*, the Court did not invent a common standard for human rights protection, but rather reaffirmed that the Community standard, articulated in *Internationale Handelsgesellschaft* (1970), was autonomous.¹⁰² In order to attenuate the entrenchment of the autonomous standard of protection, the Court referred to the common constitutional traditions of the Member States and to the Convention as factors which were already binding all Member States *before* the Court's ruling.

The reference to the constitutional traditions of the Member States as indirect sources of European human rights protection in *Hauer* is taken from *Internationale Handelsgesellschaft*, while the reference to the international treaties (in particular the ECHR) is taken from *Nold* (1974).¹⁰³ Both are used to support the argument that a common (unified) system of protection is justified because the protection of human rights is a common goal of all Member States.¹⁰⁴

The Court's rationale in *Hauer* is closely related to its rationale in *Costa v ENEL*. In *Hauer*, paragraph 14, the Court reasoned that the question of a possible infringement of fundamental rights by Community institutions could only be judged in the light of Community law, namely by the Court. The introduction of special criteria stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the common market and jeopardise the cohesion of the Community. The Treaty would be deprived of its character as Community law.¹⁰⁵ The last part of the argument is repeated verbatim from

¹⁰¹ In the English language version the French formulation "l'unité et l'efficacité du droit Communautaire" is sometimes translated as "uniformity and efficacy of Community law" (*Internationale Handelsgesellschaft*, para 3) and sometimes as "unity and efficacy" (*Hauer*, para 14) or "unity and effectiveness" (Case C-399/11 *Stefano Melloni v Ministero Fiscal* NYR, para 60).

¹⁰² Robert Schütze, *European Constitutional Law* (CUP 2012), 414.

¹⁰³ Case 4/73 *Nold v Commission* [1974] ECR 491, para 13. Judge Pescatore was the reporting judge in all three cases.

¹⁰⁴ The Court actually lists the provisions of national constitutions and Member States' national legislation in support. *Hauer*, paras 20 to 22.

¹⁰⁵ *Hauer*, para 14.

Costa v ENEL.¹⁰⁶ In the latter case, the Court held that if the Member States were allowed to adopt subsequent unilateral measures inconsistent with the EU legal system, the executive force of the Treaty would vary from one Member State to another, which would compromise the attainment of the Treaty objectives and give rise to discrimination on the basis of nationality, prohibited in Article 7 EEC (now Article 18 TFEU, included in Part II TFEU, Non-discrimination and Citizenship of the Union).

Thus, an underlying common goal of individual protection frames and informs the entrenchment of human rights as a general principle of EU law and the autonomy of the EU system of protection. The coupling of the appeal to effectiveness (*effet utile*) to the demand of the uniformity of European law allows the Court to replace the interpretation of the Treaty based on consensus (the standard common to the Member States and the ECHR) with an autonomous (European) interpretation of the standard of human rights protection. The common goal, which justifies a unified approach, does not merit an approach based on a standard common to all Member States. Hence, the cases not only declare respect for human rights, but also the primacy of EU law and supranational judicial authority. This additional effect became fully apparent decades later, in *Melloni*. The Court held that:

where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.¹⁰⁷

V. CONCLUDING DISCUSSION

In this article I have empirically investigated the role of *effet utile* in the case law of the Court. This section summarises the findings and discusses their implications. Our discussion has primarily been concerned with the Court, but the main conclusions arising from this study relate to the nature and techniques of judicial decision making and the maintenance of judicial authority in ways which invest these findings with a broader pertinence and validity.

Most importantly, the analysis strongly suggests that the law making function of *effet utile* has been narrower than commonly assumed in the

¹⁰⁶ *Costa v ENEL* (n 64), para 3.

¹⁰⁷ *Melloni*, para 60. For an analysis of the “new formula” see Leonard F M Besselink, ‘The Parameters of Constitutional Conflict after Melloni’ (2014) 39 *EL Rev* 531, 547.

literature: narrower in terms of time, scope, and judicial confidence.¹⁰⁸ The Court has used *effet utile* primarily to balance the developments of abstract doctrines and principles with societal concerns. This implies that *effet utile* is not merely a technique of functional (dynamic) interpretation¹⁰⁹ or a mask for unbridled policy making. Nor is it a tool of judicial innovation. Instead, it is a legal judicial means which allows the Court to develop a coherent body of case law without risking major political backlash from the Member States.

This study's data has shown that although individual historic *effet utile* cases had a long-lasting and far-reaching impact on EU law, the Court did not use *effet utile* to extend the limits of European competence in all directions, nor did it resort to it when the law was exhausted. In fact, the most authoritative historic *effet utile* cases work to mitigate the potential impact of allowing any separate, contending, entrenched realm of authority based on primacy, direct effect, and human rights. An overwhelming majority of *effet utile* cases concern the protection of the individual, either through direct effect, or an autonomous system of protection of fundamental rights. A smaller number of such cases consolidate the authority of EU law and link it to the rationale of direct effect. Both groups of cases gravitate towards the creation of a uniform system of remedies, a layer that "truly differentiates the Community legal order from the horizontality of classic public international law"¹¹⁰ and does not tolerate separate and diverging standards.

This analysis has also demonstrated that the Court counterpoises an insistence on the *effet utile* of EU law with a willingness to include limiting provisions regarding the practical effects of its judgments along with rhetorical concessions to national sensitivities.¹¹¹ It is salient that in almost all cases the Court effectively limited the practical effects of proclaimed principles. In terms of language used, the Court moderated the explicit

¹⁰⁸ "[t]he judges explained that this method of interpretation forced their hands to entrench the telos in rules of Community law that could be applied in practice. Since the union-telos was imbued with normativity, the judges professed that *effet utile* left them without any real margin of discretion." Rasmussen, *The European Court of Justice* (n 80) 31. See also Lasser (n 20).

¹⁰⁹ In fact, the *effet utile* reasoning of the Court often does not satisfy the requirements of the arguments of second order justification. When is an argument a "genuine" argument from consequences? On this issues see generally Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005).

¹¹⁰ Weiler (n 7) 2419.

¹¹¹ As already emphasised, the approach taken is empirical. The answer to the question regarding whether this approach of the Court is normatively justified will therefore be unsatisfactory. It is unjustified if we accept the formalist definition of law and the strict separation of law from politics, which also presupposes that interpretation without law making is possible and that neutral judicial bodies follow the letter of the law.

pronouncements of supranational judicial authority and the distinctiveness of the supranational legal order by making appeals to the common goals, unity and the foundational principles of the EU legal order. *Cassis de Dijon*, *Factortame* and *Becker* are exceptions to this pattern, but their context indicates that the Court will entrench its authority only when it can safely preserve it, usually when the principles are well-established in the case law and the case is straightforward in terms of its facts.¹¹²

The above findings support the conclusion that the role of *effet utile* is to stabilise the law (the formulation remains linguistically stable over time regardless of individual case outcomes) and also to convey an impression of doctrinal continuity, effectiveness and relevance. At the same time, the rhetorical appeal to *effet utile* or the effectiveness of EU law is detached from the questions of *de facto* effectiveness in terms of compliance with the rulings.

This has broader, substantial implications for our understanding of how courts maintain their authority. In general terms, when courts settle novel questions concerning the most fundamental rules, their authority to decide such questions is accepted after the questions have arisen and the decision has been given;¹¹³ or, in Hart's famous phrase: all that succeeds is success.¹¹⁴ The success of international courts depends on the extent to which they are able to make their generalisable principles "palatable to the Member States concerned."¹¹⁵ Scholars have noted that the Court's strategy for enhancing the authority of its sphere of law and upgrading its own powers¹¹⁶ was to establish its doctrines gradually, mitigating legal innovation either by delaying the full practical effects of established

¹¹² *Factortame* was part of a long saga, beginning with the measures taken by the UK against the so-called "quota hopping," which the Court considered conditionally compatible with EU law in previous cases, giving the UK the possibility to pass compatible legislation (Case C-3/87 *Agegate Ltd* [1989] ECR 4459 and Case C-216/87 *Jaderow Ltd* [1989] ECR 4509). *Becker* was decided in 1982, when direct effect was well established.

¹¹³ Examples of such subsequent acceptance of the Court's authority to frame the fundamental doctrines of EU law, apart from direct effect, primacy, and human rights protection as general principles of EU law, include the principle of liability of the Member States for the breaches of Community law, or the principle of institutional balance (standing of the European Parliament). While some were accepted tacitly, others were explicitly written into the Treaties or Declarations (the status of the European Parliament as a privileged applicant was formalised in the Maastricht Treaty, in what is now Article 263 TFEU, and the protection of human rights culminated in the Charter). Declaration number 17 (Declaration concerning primacy) to the Treaties, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon ([2012] OJ C 326/47) explicitly refers to "the settled case law of the Court of Justice".

¹¹⁴ H L A Hart, *The Concept of Law* (3rd edn, OUP 2012), 153.

¹¹⁵ Helfer and Slaughter (n 1) 114.

¹¹⁶ Burley and Mattli (n 4) 69.

principles,¹¹⁷ or by reiterating formulas which could shift the level of discussion away from the facts and the consequences of concrete cases and decisions to the long term common goals and interests of integration.¹¹⁸

The present analysis provides empirical support for the existence of this rationale of step by step decision making by courts, also referred to as incrementalism. In addition, it adds to this discussion by making it explicit *how* the Court employs legal tools to balance the entrenchment of the authority of law with the interests of individual Member States.¹¹⁹ This study shows how courts, aware of broader societal concerns and interests, construct and extend principles and doctrines in individual cases; and it begins the process of measuring and assessing the long term consequences of this practice.

In individual cases, the relevant court will use its judicial situational sense (or judicial “horse sense”),¹²⁰ All decisions that disrupt the status quo will need to renegotiate the authority of the court by renegotiating and reconfirming the authority of the law. Thus, when deciding potentially controversial cases a court will counter-balance the proclamation of its authority: (1) in the court’s rhetoric/language, and/or (2) in effect, by not applying the principle that it established in the same case, qualifying the principle that it established in the same case, or not disclosing its full potential. This study’s scrutiny of incremental decision making reveals that its most common manifestations include decoupling the principle from the remedy, temporal delays of the effects of judgments, and repeated appeals to fundamental (and common) goals in the form of prefabricated formulas and locutions. In the long run, this practice implies that courts will develop legal doctrines over time in a series of decisions which exhibit an uneven, varying degree of vigour.

This analysis constitutes an improved picture of how courts assert power or retreat from power both on the level of outcome and on the level of

¹¹⁷ “[I]n the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.” Hartley (n 11) 74.

¹¹⁸ Burley and Mattli (n 4) 68.

¹¹⁹ For a more recent contribution concerning the incremental decision making of the ECtHR see Shai Dothan, *Reputation and Judicial Tactics : A Theory of National and International Courts* (CUP 2015). For WTO and UN see Venzke (n 16). For a recent survey of empirical quantitative studies on how the Court considers the interests of the Member States in its decision making see Clifford Carrubba and Matthew Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (CUP 2014), 66.

¹²⁰ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Co. 1960).

judicial language in potentially contentious cases. We have been able to delve more precisely into how these two levels are intertwined in individual judgments and in the building of doctrines, and examine how they sustain the authority of the Court in the long run.¹²¹

¹²¹ Incrementalism will work in the face of limited disapproval: the struggle for authority is won in debates about legitimacy and in the process of critique and defence.