The principle of effectiveness of EU law: a difficult concept in legal scholarship

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Abstract

Effectiveness is a principle frequently used by the Court of Justice of the European Union to secure the authority of EU law over national law. This study analysis the scholarly treatment of the concept in most relevant selected academic literature and draws some conclusions, mostly that difficulties remain surrounding the conceptualization of the principle. The Court uses it in a variety of ways and judicial outcomes are linked to the context of every case at hand. On one hand, we find effectiveness as a stand-alone principle or expression of general "effet utile"; but, on the other hand, we see the use of the term strongly connected to the effective judicial protection of individual rights and/ or as limit to national procedural autonomy. The concept is furthermore embedded in a complex matrix of various other principles of EU law, namely primacy, direct effect, indirect effect or the obligation of consistent interpretation, and Member State liability for breaches of EU law. The results of the study lead to question whether there is really one single concept of effectiveness in EU law and lead to further research in order to explore whether a comprehensive and coherent theory is necessary, feasible and/or desirable.

Keywords: *effectiveness; EU law; principle; academic literature; meanings and conceptualization.*

JEL Classification: K10, K33

1. Introduction

A decade ago, a doctrinal study on the European principle of effectiveness was published, comparing the legal orders of the European Union and the European Economic Area (EEA) and assessing in parallel the impact of the case-law of the Court of Justice of the European Union (ECJ[2]) and the Court of the European Free Trade Association (EFTA Court) on the national legal orders with a special focus on Iceland. At that time, it was argued that a silent revolution had taken place in the European legal order since that judicial made legal principle had become its pivotal cornerstone for the protection of individual rights not only within the EU but also in the EFTA-EEA countries (Iceland, Norway, Liechtenstein).[3]

The doctrine of effectiveness, it was concluded at the time (on the basis of historic case-law from the European courts and from relevant literature) was a legal

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[2] Reference is primarily made to the Court of Justice of the EU dealing with requests for preliminary rulings from national courts, the General Court. Therefore, the use of ECJ and not CJEU.

[3] M. Elvira Méndez-Pinedo, *EC and EEA law: A Comparative Study of the Effectiveness of European Law* (Groningen: Europa Law Publishing, 2009).

principle created by the ECJ that mostly dealt with the effects of EU law in national law and before domestic courts. Grounded on the "effet utile" of international treaties and the unique supranational nature of EU law, the Luxembourg court developed this concept through judicial interpretation (some would rather refer to a sort of creative law-making). On the basis of this principle the Court articulated a framework (without theoretical explanations) using it in combination with other principles such as the primacy of EU law over national law, its direct effect for private individuals/economic operators with some conditions (limited in the case of Directives and horizontal situations), its indirect effect or the obligation of consistent interpretation and, most importantly, the Member State liability for breaches of this supranational law [4].

As stated above, the term "effectiveness" originated in classic international law (*effet utile* of international treaties) and can be assimilated to the old constitutional concept of the rule of law and its enforcement through to judicial review; so, we must know acknowledge that the novel revolution was relative when seen in a wider perspective. However, it is clear that the use of effectiveness has reached a potential, development and level of sophistication in EU law never seen in comparative constitutional law or in public international law.[5] Today, together with these fundamental general principles of European constitutional law laid out in seminal rulings, the principle is still claimed by the ECJ and widely accepted by most national courts.[6] In fact, it is a dynamic principle since we have come to witness in the last decade other references connecting effectiveness to the horizontal and direct effect of general principles of EU law, to the provisions of the EU Charter of Fundamental Rights as well as an expansion of the Member State´s liability for damages due to judicial breaches.

In a parallel way, since effectiveness is strongly linked to the authority and primacy of EU law over all national law – not only of procedural nature and not only of infra-constitutional status; the use of this principle has received some recent strong criticism from academia and, albeit indirectly, from some constitutional courts (i.e. Denmark in case *Ajos* refusing to acknowledge judicial made general principles of EU law)[7]. Criticism to this judicial sort of activism is not new nor surprising either but it has to be taken seriously[8].

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[4] Effectiveness was also used as a tool for interpretation. The Court used a classic teleological approach to construe new rules, focusing of the functioning and purpose of a given pre-existing rule. Méndez-Pinedo, *EC and EEA law, 3*.

[5] Méndez-Pinedo,M. Elvira and Abat I Ninet, Antoni, 'Effectiveness', *The Max Planck Encyclopedia of Comparative Constitutional Law* (December 2017) <http://oxcon.ouplaw.com/page/mpeccol-articles> accessed 20 October 2020.

[6] Craig, Paul and De Burca, Grainne, *EU law: Texts, cases and materials*, 6th edn, (Oxford: Oxford University Press, 2015) 250-251. See also 7th edition, from 2020.

[7] In a judicial dialogue the Supreme Court of Denmark essentially fails to acknowledge judicial made general principles of EU law. See Case C-441/14 *Dansk Industri (DI) v. Estate of Karsten Eigil Rasmussen (Ajos)* ECLI:EU:C:2016:278 and Danish Supreme Court Case no. 15/2014 *Dansk Industri acting on behalf of Ajos A/S v The estate left by A*, available at <http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Documents/15-2014.pdf> accessed 24 September 2020.

[8] On the authority of EU law and current challenges to it see Chalmers, Damian, Davies, Gareth and Monti, Georgio, *European Union Law*, 4th edition, (Cambridge: Cambridge University Press, 2019), Chapter 5, 202-248.

It is time to take new developments in scholarship and critique into study. Time has come to re-evaluate whether the conclusions reached at the time on the principle of effectiveness still hold, what is the position of academic scholarship regarding the concept and, last but not least, whether new relevant cases from the ECJ confirm and/or redefine the scope and relevance of the judicial principle. Due to constraints imposed by this format and size of publication, the main focus of the current study is to do a critical survey of EU literature on the principle (and only indirectly of most important court cases referred to by doctrine); while the review and analysis of the most recent and relevant cases of the ECJ in the period 2010-2020 is left for another occasion. The same applies to the parallel development and review of the concept of effectiveness in the EEA legal order which has been partially covered in another study[9].

The research questions are therefore the following: what does effectiveness mean as a principle in our field of EU law? What does a survey of relevant scholarship reveal on the matter? The results of the study are important since they lead to question whether there is really one single concept of effectiveness in EU law and whether a comprehensive or at least more coherent theory is necessary, feasible and even desirable.

The structure of the study is the following. In order to revise, update and do a critical assessment of these questions we need in the first place to define the principle. The difficulty starts when we try to define and conceptualize what do we understand by "effectiveness" in our field. This is not an easy task since there are different strands of literature and ECJ case-law that use the concept meaning different things. As it will be seen in section 2, some extra questions concerning the concept appear. Do we limit effectiveness to general effet utile and focus on substantial issues or do we also take on board its fundamental role in European procedural law as a limit to procedural autonomy? From this section we learn that the use and understanding of the principle of effectiveness is very broad and connected to other fundamental principles such as the primacy of EU law, direct effect, indirect/consistent interpretation and State liability for breaches of European law. In section 3 the study moves to reflect the criticism to the concept that has been raised in parallel to most EU legal scholarship/textbooks. This selection of literature review and critique questions the assumptions that shape our understanding of effectiveness in EU law, in the sense that it becomes questionable whether a single, all-encompassing holistic theory and framework of effectiveness in EU law is needed and feasible (section 4). The concept, both in the case-law of the ECJ and in legal scholarship, reflects a variety of principles, doctrines and rules all connected under a generic multi-faceted or "umbrella" term. The conclusions show that, at least for the time being, the effectiveness of EU law and the relationship between Union

[9] Christian, Franklin (ed), *The Effectiveness and Application of EU and EEA Law in National Courts - Principles of Consistent Interpretation* (Cambridge: Intersentia, 2018). Franklin looks at effectiveness of European law through the prism of indirect effect or principle of consistent interpretation following the sequence/order indicated by the ECJ in case C-282/10 *Dominguez* EU:C:2012:33. His book only focuses on the indirect effect of EEA law in national legal orders without commenting on the theory, principle or doctrine of effectiveness (as *effet utile*).

law and national (constitutional) law is a question explored since the beginning of European integration but still under construction and left always open for interpretation.

In the second place, it is necessary to refer to the methodology followed in this contribution. It is based on doctrinal approach to European law. The study of the law (in this case a judicial made concept or doctrine) is based not directly on primary empirical sources (relevant case-law from the ECJ) but mostly on secondary theoretical sources (general textbooks, academic monographies and journal articles focusing directly or indirectly on the effectiveness of EU law and commenting case-law). The nature of the contribution is not only descriptive but also analytical. It aims to assess the most recent academic debates in a neutral and critical way and to offer a different perspective of looking at the "concept of effectiveness".

The scope of research is limited to EU law in this contribution, but it is important to note that the principle of effectiveness is a classic concept in public international law[10]; is also present in other fields of European law such as the EEA legal order[11] and the European Convention of Human Rights[12] and has made a recent

[10] Some important studies have already covered the effectiveness in international law, focusing on international courts and international agreements. See, in chronological order: Ryngaert, Cedric, *The Effectiveness of International Criminal Justice* (Antwerp: Intersentia, 2009); Shany, Yubal *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014); Romano, Cesare P.R., Alter, Karen J. and Shany, Yuval (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014); Carrubba, Clifford J. and Gabel, Matthew J., *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (Cambridge: Cambridge University Press, 2014); and Couvreur, Philippe, *The International Court of Justice and the Effectiveness of International Law* (Leiden/Boston: Brill/Nijhoff , 2016).

[11] Méndez-Pinedo, *EC and EEA law*, 2009 and Christian, *The Effectiveness and Application of EU and EEA law*, 2018.

[12] The concept of effectiveness has been also been studied in the field of European Human Rights Law and the European Convention of Human Rights (ECHR, Rome 1950). See Rietiker, Daniel, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis', *Nordic Journal of International Law* 79 (2010), 245-277. For Rietiker the Strasbourg Court has developed a set of specific methods of interpretation with the aim of rendering the rights enshrined in the ECHR effective. He distinguishes between four dimensions of the principle of "effectiveness". The first dimension has a narrow sense meaning interpretation of a treaty according to the *effet utile* of a norm. Rietiker notes in the first place that, although the principle has not been incorporated by the drafters of the Vienna Convention on the Law of the Treaties (VCLT signed in 1969 and entered into force on 1980), this is somehow a principle underlying paragraph 1 of Article 31 VCLT. "The rule of interpretation implies that the drafters of a treaty have adopted a norm in order to be applied and, thus, the judge has to choose, among different possibilities, that interpretation which is most likely to guarantee the effectiveness of the treaty *(ut res magis valeat quam pereat)*" (Rietiker, 256). As such, he traces the principle back to the practice of the International Court of Justice as well as to the jurisprudence of the Inter-American Court of Human Rights. However, in the second place, he adds that it is in the framework of the ECHR that the principle of "effectiveness" has taken a very prominent place becoming a fundamental cornerstone for the protection of rights and freedoms. In this legal order it means that the ECHR is supposed to be interpreted in a manner that seeks to ensure that those rights and freedoms are applied in ways that are of *" practical and effective"* use to complainants (Rietiker, 257).

and timid appearance in the area of comparative constitutional law in Europe[13]. In these other constellations of European law (in a broad sense) we find similar ideas of effectiveness, connected with the rule of law and judicial enforcement, also developed by European courts with exclusive jurisdiction over constitutional matters (EFTA Court in Luxembourg, European Court of Human Rights, highest constitutional courts in some European countries); and studied/criticised by scholarship. For these reasons, the scope of this study is limited to EU law and mostly to those relevant authors who study effectiveness as a general principle in a broad sense; either understood as *effet utile* and/or as a mayor theme connected to justiciability or effective judicial protection of individual rights. It does not cover extensively those scholars who treat it exclusively as a requirement upon national procedural law (in combination with principle of equivalence).

2. On effectiveness: a key principle of the EU (+EEA) constitutional legal orders

2.1 General observations and preliminary questions

The respect for the rule of law in the supranational legal order of the European Union is of paramount importance. Article 2 of the Treaty on the European Union (TEU) refers to the rule of law as one of the values on which the EU is founded

[13] The first study on the concept of effectiveness in the field of European comparative constitutional law is the one done by Kokott and Kaspar who use the term "efficacy" meaning practical effect. There we find a similar understanding of the core issue of effectiveness and an overview of different approaches in constitutional regimes across Europe. Although they note that the concept of "efficacy" has no clear and general definition in the field, they understand "efficacy" in a general way as a reference to all requirements for a constitution to work well once it has been set in place. In their view, "constitutional efficacy relates to the difference between the 'written' constitution and constitutional reality: the smaller this difference, the higher the degree of efficacy" (Kokott and Kaspar, 795). In their study they analyse several key instruments to ensure that a constitution's rights and rules are being respected and guaranteed effectively in practice. Those can be classified under the diverse but complementary approaches of 1) judicial review by constitutional courts versus, 2) rule of law or parliamentary sovereignty, and 3) constitutional veto by Head of State (sanction of legislation). They note that the classical approach followed by many European countries is constitutional judicial review, that is to say, to create a constitutional court as 'guardian of the constitution', a court whose main task is to control that all state authorities comply with constitutional provisions. See Kokott,, Juliane and Kaspar, Martin. "Ensuring Constitutional Efficacy", in Rosenfeld, Michel and Sajó András (eds.) *The Oxford Handbook of Comparative Constitutional law* (Oxford: Oxford University Press, 2012), 795–815. Another study was done on the concept of effectiveness in the field of constitutional comparative law by Méndez-Pinedo, M. Elvira and Abat I Ninet, Antoni (University of Copenhagen) and published by the Max Planck Encyclopedia of Comparative Constitutional law/Oxford Constitutional Law. There a double conclusion was reached. On one hand, the concept deals with the aspirational principles that all modern constitutions accommodate explicitly or implicitly as well as interrelated issues such as rule of law, separation of powers and enforcement/judicial review of rights (Art. 16 of the Declaration of the Rights of Man and of the Citizen of 1789 is paramount in this sense). On the other hand, for the time being there is no such an independent and established doctrine of effectiveness (understood as *effet utile*) in national constitutional orders. This interesting gap could lead to a further research project exploring in depth the scope, nature and limits of the concept of effectiveness – as understood in EU and EEA constitutional law – in the field of constitutional comparative law and studies. Méndez-Pinedo and Abat i Ninet, *Effectiveness*, 2017.

and Article of the same treaty provides for a special mechanism in case of breach of these fundamental values[14]. Apart from these general rules, the EU counts on a number of additional tools and instruments to identify and address concerns about the rule of law in its 27 Member States (Brexit completed). One of them is the concept of effectiveness, a principle developed by the ECJ during a long process of creating and providing authority and coherence to this unique supranational system.

But this concept is elusive. Most commonly, effectiveness is understood in EU law as effective judicial protection of individual rights. As a "community of law", the European Union is of course based on the respect of fundamental rights upheld not only by the ECJ but also by national courts acting as European courts. Article 47 of the EU's Charter of Fundamental rights[15] specifies that anyone whose rights under EU law are violated has the right to an effective remedy before an independent tribunal and a fair trial. Article 19 (1) TFEU, brought by the Treaty of Lisbon reads "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law". Judicial collaboration is the norm in this legal order since national courts cooperate closely with the court of Justice through a system of preliminary rulings where the ECJ has the final and exclusive authority on the interpretation of EU law. The European Commission has a specific role: as guardian of the Treaties, it is empowered to initiate infringement proceedings against Member states in case of breaches of EU law. This notion of effectiveness must respect, at the same time, the boundaries and autonomy of national procedural laws.

But the concept of effectiveness also has a different meaning in the EU sui generis legal order. Being of supranational character, European Union law has some fundamental aspects that make it different from classic public international law. In addition to the notion of effective judicial protection mentioned above, there is however a unique relationship between EU law and national laws constructed around the concept of "effet utile".

In fact, since 1957, the ECJ has used keywords such as 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[16]. This doctrine of effectiveness (understood as *effet utile*) is, however, much more sophisticated and it is now encapsulated in a framework provided by other legal principles and interpretative methods created by the ECJ with limited legal basis in the EU Treaties (most importantly primacy of EU law and State liability/damages for breaches, see section 2.3).

Last but not least, effectiveness has been classified and commented by the doctrine upon in several way: as a doctrine, a principle or a rule of interpretation in

[14] Consolidated version of the Treaty on European Union. Official Journal C 326, 26.10.2012, pp. 13-390.

[15] Charter of Fundamental Rights of the European Union**.** Official Journal C 326, 26.10.2012, pp. 391-407.

[16] Mayr, Stefan, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v. Effet Utile as a Meta-Rule', *European Journal of Legal Studies* 5, no. 2 (2012) 8-21, 8.

the hands of the ECJ[17]. No matter its nature, it was concluded in 2009 that it is a very important principle in the EU legal order and, by extension, in the EEA legal order.[18] From a theoretical point of view, it was argued that the ECJ had developed this important jurisprudence, using it as a foundation of the EU legal system, stretching the notion to its outer limits and thus taking this idea of effectiveness to new legal frontiers[19]. In a similar way, it was also noted that the concept had been incorporated into the European Economic Area via the parallel case-law of the EFTA Court, a development also studied in detail that was described as a silent revolution. These findings led to conclude that, in spite of the different nature of EU and EEA law, effectiveness had become a common legal principle that served to protect the rights of all European citizens in a very sui generis legal order constructed on two pillars and guaranteed by two European courts. The main conclusion at the time was the discovery that a key principle of the EU constitutional legal order had now become also essential in the EEA legal order.[20]

2.2 What does effectiveness mean in European law? Justiciability, *effet utile* and other related concepts and principles

In general, it is now commonly agreed within the field of EU constitutional law that effectiveness has become a well-established judicial principle and, at least for some authors, there is no way back[21]. In the first place, for the ECJ, the effectiveness of (EU) law works primarily as functional interpretation based on *effet utile*[22] and means that its role and purpose would be weakened if the nationals of the EU Member States could not invoke it in the courts and the national courts could not take that law into consideration. All in all, the most important jurisprudence of the Court on the principle can be summarized and understood in general as justiciability, practical effect and/or enforceability of clear, precise and unconditional European rights for European citizens who may invoke those rights before the courts.

Effectiveness may be seen, on the one hand, as a simple idea. Justiciability is an old theme strongly related to theories of access to justice and protection of individual rights in constitutional orders that need to secure the rule of law through a proper system of remedies when rights are predetermined as enforceable.

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[17] Sadl, Urska '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 European Union', (2015) 8 *European Journal of Legal Studies* 18, 23.

[18] Méndez Pinedo, *EC and EEA law*, 8.

[19] Méndez Pinedo, *EC and EEA law*, 3-10.

[20] Méndez Pinedo, *EC and EEA law*, 300.

[21] Sadl, „The role of Effet Utile", 23.

[22] Lenaerts, Koen and Gutiérrez-Fons, José A. „To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice". Academy of European Law Distinguished Lectures of the Academy. *EUI Working Paper* AEL 2013/9, 25. See also on interpretation techniques Bengoetxea, Joxerramon., *The Legal Reasoning of the European Court of Justice* (London: Clarendon Press, 1993).

As former ECJ judge Pescatore pointed out, the very purpose of the law is to be effective, to be operative and to deploy ordinary effects in the legal word. This classic author summarized the legal philosophy of the Court in the following clear way[23].

"This philosophy is very simple indeed. It means that legal rules, by their very nature, have a practical purpose. Any legal rule is devised so as to operate effectively… If it is not operative, it is not a rule of law… […] "

"Effectiveness is the very soul of legal rules and therefore […] it is not excessive to say that any legal rule must be at first sight presumed to be operative in view of its object and purpose."

Same opinion is shared in principle by Mayr who agrees on the ultimate simplicity of the doctrine[24].

While effectiveness or effet utile considerations can be traced back to Roman law and have been explicitly codified in numerous modern legal orders, it has been traditionally covered by the European doctrine as a legal principle in connection with the interpretation of the EU Treaties[25]. In general, scholarship agrees that the aim of the Court is to provide the maximum efficacy to EU Treaties and EU secondary law. Relying on this general meaning of *effet utile* and rule of interpretation to secure justiciability, we find very interesting contributions[26].

We will see in next sessions how effectiveness has transcended its classic meaning of practical effect (*effet utile*) used in treaty interpretation and even its dimension as effective judicial protection. It has become a real tangible though unwritten general constitutional principle of EU law meaning diverse things, used in different contexts and producing several outcomes in practice. We will go deeper into the difficulties of conceptualization of effectiveness in section 2.4 since no academic classification has managed to fully comprehend and explain at the same time the simplicity of the term and the complexity of a matrix of different legal principles lying behind it and interacting with each other.

2.3 Brief historical summary – effectiveness key ECJ´s cases and lack of legal basis in the Treaties

The EU Treaties have established a supranational system where European rights are applied and enforced mostly by national procedural laws and remedies. This implies a duty of loyal cooperation on both sides. The ECJ´s evolving response

[23] Pescatore, Pierre, 'The Doctrine of Direct Effect: An Infant Disease of Community Law', *European Law Review* 8 (1983), 155- 157, 155.

[24] Mayr, "Putting a Leash on the Court of Justice?", 8.

[25] Tridimas, Takis, *The General Principles of EU Law*, 2nd ed. (Oxford: Oxford University Press, 2007) 419 and Sadl, "The role of Effet Utile", 23.

[26] Sadl, "The role of Effet Utile", 2015. Most classic and recent literature focuses on "effectiveness" in its first meaning, as a legal principle and/or a tool of interpretation of EU treaties in order to provide *effet utile* to norms. The most critical study done by Sadl in 2015 focuses exclusively on *effet utile* and approaches the concept from a different framework in a triple dimension: as legal principle, as a facade for creative jurisprudence and, finally and, as a rhetorical instrument.

to the problems of application and enforcement of EU law for which Member States have been entrusted has shown the importance of the principle of effectiveness (*effet utile* as the French prefer to use) in EU law. Since there is no legal basis in the Treaties for the concept, some authors point that effectiveness stems from the loyalty clause (*pacta sunt servanda*) as a fundamental general principle of European law[27]. But effectiveness is also strongly related to the authority and primacy/supremacy of EU law over national law, a general principle which has been also constitutionalized in the EU Treaties[28]. Traditionally, loyalty, primacy and effectiveness have formed a trio in the jurisprudence of the ECJ although the most recent case-law refers to another trio: primacy, effectiveness and unity of EU law[29].

While there is general agreement that law should be effective, the question is how to assure effectiveness of EU law in practice. This has been done in two ways since effectiveness is nowhere mentioned in the EU Treaties (no positive legal basis). On one hand, EU law has created new substantive rules, rights and obligations for States, citizens and companies in 27 countries (after Brexit). But the jurisprudence of the ECJ has also added to this *corpus iuris* a set of fundamental principles that regulate the relationship between European law and the national legal orders that must apply and enforce those European rights. These principles or doctrines are fundamental for the European legal framework and can be qualified as the 'cornerstone' of the EU legal order. In fact, these classic doctrines are the pillars that provide effectiveness to the whole system. In short, the doctrine of effectiveness in EU law is not only a constitutional theory but also a reality in practice since it offers an arsenal of legal arguments ("weapons") that citizens and companies can use to claim and enforce their rights at both national and eventually European judicial levels.

The saga of the effectiveness doctrine is well known. The principle of *effet utile* appears in 1961 in the case *Steenkolenmijnen Limburg*[30], and is used in connection with the so-called Member States retained powers formula. The Court stressed that the Community could affect questions of national sovereignty (French direct translation: permit the incursions of Community competence) only in order to

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[27] Temple Lang, John, 'Article 10 EC – The Most Important 'General Principle' of Community Law', in: Ulf Bernitz, Joakim Nergelius & Cecilia Cardner (ed.), *General Principles of EC Law in a Process of Development, Reports from a conference in Stockholm*, 23-24 March 2007, organised by the Swedish Network for European Legal Studies (Alphen an den Rijn: Kluwer Law International, 2008), 75-113, 75. The duty of loyalty or rule corresponding to former Article 10 EC is now found in Article 4 (3) TEU.

[28] The primacy of EU law over national law is now secured thanks Declaration 17 added in the Lisbon Treaty (signed in 2007 and entered into force 2009). This declaration does not clarify, however, whether primacy of EU law rules extend over core national constitutional provisions, as the case-law of the ECJ has established in its jurisprudence.

[29] See, for instance, in relation to Article 53 of the Charter, Case C399/11 *Melloni*, judgment of 26 February 2013. ECLI:EU:C:2013:107, paras 60 and 61(where the ECJ ruled that 'Member States are 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 [ECJ], and the primacy, unity and effectiveness of EU law are not thereby compromised').

[30] ECJ, Case 30/59 *De Gezamenlijke S teenkolenmijnen in Limburg v High Authority* [1961] ECR 1.

ensure that the *effet utile* of the Treaty was not considerably weakened and its aims and purposes were not seriously compromised.

Later on, during more than 50 years, it may be argued that effectiveness has become the key concept which lies behind all fundamental doctrines of primacy, direct effect, direct applicability, duty of consistent interpretation and State liability for breaches of EU law. The ECJ justified its jurisprudence during decades on the necessary authority and full effect (*effet utile*) of European law which constrains the fundamental national procedural autonomy in the application and enforcement of EU law originally agreed in the EU treaties. During a long line of jurisprudence, the ECJ gradually 'hardened' the duty of Community loyalty expressed (Article 4(3) TFEU) creating European constitutional doctrines enforceable in/against EU Member States. This trend was accompanied by the gradual importance of fundamental rights in EU law as well as in what is now referred as general principles of European law. All along the way, a broad notion effectiveness (referred with different names) became part of the nature of EU law.

We must refer to the statement of the ECJ in the case *Van Gend en Loos*[31] when it declared that it has to be interpreted as producing direct effects and creating individual rights which national courts must protect, a doctrine now referred to as direct effect: „States have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals […] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."

But the ECJ did not stop there and created other four doctrines related to the effectiveness of European law that had no explicit formal basis in the EU Treaties (former European (Economic) Community/now European Union Treaties). Together with direct effect, we must also refer to these other legal doctrines:

- Primacy (ECJ *Costa v ENEL*[32]) or precedence of EU law over conflicting national law.
- Direct applicability (ECJ *Simenthal*[33]) or immediate incorporation of EU law into the national legal order without need for further national measures as well as obligation to disapply or set aside national conflicting law.
- Indirect effect (cases *Von Colson*[34]*/Marleasing*[35]) or obligation of national courts to interpret domestic law consistently and as far as

[31] ECJ, Case 26/62 *N. V. Algemene Transport- en Expeditie Onderneming van Gend & Loos/Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)*, [1963] ECR 1.
[32] ECJ, Case 6/64 *Flaminio Costa v ENEL*, ECR [1964] ECR 585.
[33] ECJ, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.
[34] ECJ, Case 14/83 *Von Colson and Kaman* [1984] ECR 1891.
[35] ECJ, Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

possible in conformity with EU law.

- Member State liability for infringements/breach of EU law (under some conditions) (ECJ *Francovich*[36], *Brasserie du Pêcheur/Factortame*[37]); principle of full compensation (ECJ *Marshall II*[38]) and more recently State liability for judicial breaches of EU law (ECJ *Köbler*[39] and *Cartesio*[40]).

As Sadl points out[41], while the Court did not use any reference to effet utile in seminal cases like *Van Gend en Loos* and *Costa v. ENEL* it nevertheless used this idea of effectiveness referring to the executive force of Community law (*Costa v. ENEL*), the effectiveness of public enforcement procedures (*Van Gend en Loos*), and to the protection of the individuals whose rights were at stake to effectively enforce European law (*Van Gend en Loos*).

As for the last decade, references to the principle of effectiveness by the Court are often closely interrelated and sometimes even overlapping in a series of waves slowly but firmly constructed without too many clarifications or theoretical explanations. We find effectiveness linked to general primacy of supranational law over conflicting national laws (also over national constitutions) as well as the direct effect of some EU law (*Melloni*[42]). Effectiveness is also important as regards the obligation to interpret national law in the light of EU law and *Simmenthal* mandate to set aside all conflicting national law) (consistent interpretation (*Dominguez*[43]). It is essential when assessing the State liability for all national breaches of EU law, inclusive of judicial breaches (cases *Köbler*[44] 2003, *Tomasova* [45]2016 and *Hochtief Solutions*[46]). And the term is also mentioned when the Court clarifies the rights and obligations of (highest) national courts under Article 267.3 TFEU (obligation to refer for a preliminary ruling on the interpretation of EU law (case *Commission vs. France*[47]). At the same time, this construction of effectiveness as a constitutional doctrine finds several constraints. Important limits are set by other fundamental right in criminal law and other general principles of European law (ie. legal certainty and

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[36] ECJ, Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991**]** ECR I-5357.

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

[38] ECJ, Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority* ["*Marshall II*"] [1993] ECR I-4400.

[39] ECJ, Case C-224/01 *Gerhard Köbler v Republik Österreich* ECR [2003] I-10239.

[40] ECJ, Case C210/06 *Cartesio* [2008] *ECR* I9641.

[41] Sadl, The Role of Effet Utile, 34.

[42] ECJ, Case C399/11 *Melloni*, judgment of 26 February 2013 ECLI:EU:C:2013:107.

[43] ECJ, Case C–282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* ECLI:EU:C:2012:33.

[44] ECJ, Case C–224/01 *Köbler* [2003] ECR I-10239. ECLI:EU:C:2003:513.

[45] ECJ, Case 168/15 *Milena Tomášová v. Slovenská republika - Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.* ECLI: EU:C:2016:602

[46] ECJ, Case 620/17 *Hochtief Solutions* ECLI:EU:C:2019:630.

[47] Case C-416/17 *Commission v France* ECLI:EU:C:2018:811. In this case the Court finds that a breach of obligation to refer to the ECJ a preliminary question on interpretation of EU law qualifies as violation of EU law and may lead to an infringement case started by Commission in relation with the doctrine CILFIT on *acte clair.*

security, *res iudicata*, etc).[48] No doctrinal study has yet dealt with effectiveness in relation with these more recent cases in a systematic way.

2.4 The concept of effectiveness in the EU law literature: from silence to acceptance

Although it took a long time to be acknowledged by mainstream EU law textbooks that ignored this key development, some current EU law scholarship refers now to effectiveness as any other general principle of European law.[49] Most scholars and textbook authors have noted the use of the term but, although we are witnessing now a new stage of complexity and sophistication of the use of the principle, few authors have tried to conceptualize the concept compared to the vast literature dedicated to other related subjects such as the general principles of European law.[50] A notable exception was Von Bogdandy who referred to effectiveness it as a fundamental keystone pillar of EU law in 2009 describing it as: "a source from which virtually all judicial concepts (e.g. direct effect, primacy, effective and uniform application and State liability for breach of EU law) are derived, a source that constitutes the very nature of EU law and the public authority of the European Union itself"[51].

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[48] ECJ, case C-399/11 *Stefano Melloni v. Ministerio Fiscal* ECLI:EU:C:2013:107 and Opinion AG Bot delivered on 2 October 2012 ECLI: EU:C:2012:600; case C-105/14 *Taricco and Others*, case Judgment of 8 September 2015, EU:C:2015:555; case C-42/17 *Criminal proceedings against M.A.S., M.B.* (*Taricco II*) [2017] ECLI: EU:C:2017:564; case C-234/17. *XC and Others v Generalprokuratur.* Judgment of the Court (Grand Chamber) of 24 October 2018. ECLI:EU:C:2018:853; case C-620/17. *Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék.* Judgment of the Court (Fourth Chamber) of 29 July 2019. ECLI:EU:C:2019:630; and case C-676/17. *Oana Mădălina Călin v. Direcţia Regională a Finanţelor Publice Ploieşti.* Judgment of the Court (Fourth Chamber) of 11 September 2019. ECLI:EU:C:2019:700.

[49] Craig and De Burca, *EU law*, 2015, refer to effectiveness as a principle of EU law, 250-251. In the 7th edition of the book, however, effectiveness is treated several times without such a key pivotal importance: 1) in connection to access to justice and individual standing at the ECJ (555-559, 561, 567); 2) in connection with the equivalence principle and national procedural autonomy principle; 3) as a requirement relating to the State liability for breaches of EU law (298); and 4) in relation to supremacy principle (311-314). All these dimensions contextualize "effectiveness" as effective judicial protection of a fundamental right and duties of national courts (derived from loyalty principle). Craig, Paul and De Burca, Gráinne, EU Law. Text, cases and materials, 7th edition, (Oxford: Oxford University Press, 2020).

[50] The other important relevant textbook on EU law from Chalmers, Davies and Morty, does not treat effectiveness as a general principle although it refers to the term in Chapter 7. *Rights and Remedies in Domestic Courts*, 289-327. See Chalmers, Davies, and Monti, *European Union Law*, 2019. In an earlier textbook from 2014, Bobek refers to effectiveness as effective judicial protection with a shift or rethoric due to the Treaty of Lisbon (new Article 19 (1) TFEU) and the EU Charter of Fundamental Rights (article 47). Bobek, Michal. "Chapter 6. The effects of EU law in the national legal systems" in Barnard, Catherine and Peers, Steve (eds), *European Union Law* (Oxford: Oxford University Press, 2014), 140-173, 167.

[51] Von Bogdandy, Armin and Bast, Jürgen (eds), *Principles of European Constitutional Law* (2nd ed.) (Cambridge: Hart/Beck 2011), 29.

Originally categorized as a legal principle[52], effectiveness is often associated by most doctrine with the liberal statutory interpretation of the EU Treaties done by the ECJ, either as a sub-category of its dynamic and creative judicial interpretation ("the most usual functional criterion"[53]) and/or as an independent method[54].

From Mayr´s perspective, the Court uses the concept in a double way: 1) as a guideline to choose between two, at least, different interpretations; and 2) as a sort of interpretative leitmotiv and a meta-rule of interpretation in EU constitutional law.[55]

As a rule of choice between tentative interpretive results, effectiveness presupposes a variety of arguable norm-hypotheses[56]. And, in practice, this means that: „In a situation where the Court has to choose from alternative arguable norm-hypotheses, *effet utile* emphasises or even prioritises the teleological aspects. Among alternative meanings, it favours those furthering the effectiveness of EU law, putting a twofold emphasis on teleological aspects (with a view to the provision but also EU law in its entirety)"[57].

Other authors broaden the legal context linking it to the principle of loyalty between Member States and the EU[58]. Defined in such a way, effectiveness/*effet utile* is acknowledged to be a fundamental constitutional principle[59] and one of the most important tools in the process of constructing the most important doctrines of EU constitutional law that define its specific unique nature[60]. As a legal principle, the key concept of effectiveness and its framework deploy wide legal effects reaching also to the European Economic Area and its EFTA Court[61].

While some relevant literature has followed the doctrine of the ECJ, few scholars have tried to construct a legal theory or criticize the doctrine along the way. One exception to this regard is the most recent research on one dimension of effectiveness (*effet utile*) by Urska Sadl. This is an excellent empirical study that covers the period 1958-2013 (data of *acquis communautaire* to be translated by new EU Member States up to the case *Melloni*[62]). In her study, Sadl offers the best recent survey of literature and lines of convergence and divergence among EU scholarship as well as a good summary of historic and recent *effet utile* cases viewed from a critical perspective[63].

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[52] Tridimas, *The General Principles of EU Law*, 419.
[53] Bengoetxea, *The Legal Reasoning of the European Court of Justice*, 254.
[54] Seyr, Sybille, *Der Effet Utile in Der Rechtsprechung Des Eugh* (Berlin: Duncker & Humblot, 2008) 367.
[55] Mayr, „Putting a Leash on the Court of Justice?", 8, 21.
[56] Ibid.
[57] Mayr, „Putting a Leash on the Court of Justice?", 17.
[58] Klamert, Marcus, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014), 255.
[59] Ross, Malcom, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?', *European Law Review* 31, no. 4. (2006), 474- 496, 476.
[60] Craig and De Burca, EU Law, 2015, 400. See also 7th edition from 2020.
[61] Méndez-Pinedo, *EC and EEA law*, 8.
[62] Case C399/11 *Melloni*, judgment of 26 February 2013. ECLI:EU:C:2013:107.
[63] Sadl, Urska '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 European Union', *European Journal of Legal Studies* 8, vol. 18 (2005), 18-45, 23-24.

The growing importance of the principle of effectiveness in practice and in scholarship reflects a story of acceptance and somehow relative success. While there is general agreement in the literature reviewed that effectiveness is a fundamental concept grounding the most important cases of EU legal history as the historic *effet utile* cases empirically produced by the ECJ already prove[64]; the rather semantic parallel meanings and use of the term are confusing in EU legal scholarship.

2.5 Conceptualizing effectiveness: a difficult task

Effectiveness is an elusive concept difficult to conceptualize and contextualize for one important reason: while the Court refers to it explicitly in many cases, it uses the term in different strands of jurisprudence meaning diverse things. Furthermore, the ECJ does not always use similar arguments or legal reasoning and, even so, sometimes cases even end with a broken connection between the claim of effectiveness and the outcome of the case[65].

While some seminal studies have collected empirical data (most important rulings from the ECJ) and proved the emergence of this doctrine; a fundamental question still remains today: how do we construct effectiveness in European constitutional law from a theoretical point of view? Here opinions differ and a variety of explanations, both classic and contemporary, is offered according to the different constitutional importance to the concept. Mousmouti even adds another dimension, making a distinction between effectiveness *ex-ante* (as good legislation drafting technique) and *ex-post* (as a more open-ended concept generally linked to enforcement but not always)[66].

For Tridimas[67], „the starting point of the Courts´ approach to effectiveness remains the universality of remedies. Effective judicial protection, based on the maxim: where there is a right, there must be a remedy *(ubi jus ibi remedium)*". Effectiveness for Tridimas is above all a legal principle that means, at the end, that substantive rights must be complemented by procedural rights, otherwise they do not become real or effective. The exercise of European rights in the daily life of citizens is closely linked to the proper existence of judicial redress mechanisms at national level. National courts must provide a remedy for the protection of European rights and even more, offer individuals the opportunity to vindicate or assert these rights.

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[64] Sadl „The Role of Effet Utile", 8.

[65] A preliminary finding deriving from the jurisprudence of the Court already noted by Sadl is that there is no consistent legal theory by the ECJ. Sadl, "The Role of Effet Utile", 2015.

[66] Mousmouti, Maria 'Introduction to the Symposium on Effective Law and Regulation', *European Journal of Risk Regulation* no. 9 (2018): 387–390. As an example of a different understanding and context, Mousmouti refers who Majone who defines effectiveness as satisfactory level of economic growth in the EU. See Majone, Giandomenico, 'Legitimacy and effectiveness: a response to Professor Michael Dougan's review article on Dilemmas of European Integration', *European Law Review* no. 32 (2007) 70–82, 70.

[67] Tridimas, *The General Principles of EU law*, 466.

Moving beyond legal theoretical principles, some authors have referred to a legal revolution for European citizens regarding access to justice and effective judicial protection, a revolution brought by the ECJ and marked by the following stages[68]:

1) in the first place, a transition from rights secured through the doctrines of supremacy and direct effect to … remedies required to achieve a full effective judicial protection;

2) in the second place, a move from the principle of non-application of conflicting national laws to... the uniform application of Community law through selective harmonization of national legal remedies and

3) last but not least, a departure from comparing legal systems to…the forging a common law, a new '*ius commune*' in Europe.

For Van Gerven[69] this legal revolution was established through the limits set on the national procedural autonomy that EU Member States enjoy: the requirement of 'homogeneity' and equivalence of legal remedies at national level for EU rights and the final need to secure the 'effectiveness' of EU law (both justified on Article 4 (3) TEU, former Article 10 of the EC Treaty).

In short, the doctrine has tried to conceptualize the use of the docrine by the ECJ looking to construct a more general theory during the last decade. For Lenaerts, this principle of EU law may be examined from three different, albeit constantly related and sometimes overlapping, perspectives[70]:

- First, it is strongly related to the right to effective judicial protection as a general principle. Thus, this aspect of effectiveness focuses on access to the courts, effective judicial review and the need for judicial supervision in order to secure individual rights.
- Second, it may be examined as a means of upholding the primacy and authority of EU law vis-à-vis conflicting national (procedural) laws.
- Third, it is constructed as a judicial doctrine to ensure the most effective application of EU law (*strictu senso*).

This classification is shared by other authors[71] (Prechal and Widdershoven) who also refer to these three strands in the case-law of the ECJ.

As stated above, important literature exists on the first and second strands, that is to say on the enforcement aspects of effectiveness and the tension between so-called national procedural autonomy and the effective protection of individual rights. In fact, for many authors the principle of effectiveness in EU law has been assimilated into the 'effective judicial protection'[72]. However, the third strand was

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[68] Van Gerven, Walter, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies', *Common Market Law Review* 32 (1995) 679-702, 679, 699.

[69] Van Gerven, "Bridging the Gap", 679-702.

[70] Lenaerts, Koen, "Effective judicial protection in the EU", lecture at the *Assisses de la Justice –what role for Justice in the European Union?* Brussels, 21-22 November 2013, 3. See also Lenaerts and Gutiérrez-Fons, "To Say What the Law of the EU Is", 25.

[71] Prechal, Sacha and Widdershoven, Rob, 'Redefining the relationship between "Rewe-effectiveness" and effective judicial protection', *Review of European Administrative Law* 4, vol. 2 (2011) 31-50, 31.

[72] Ross, "Effectiveness", 479.

maybe the most neglected one by general scholars. And this was strange since effectiveness has a very important meaning which refers to the idea of 'effective compliance' encapsulating the idea of obedience, sanction and enforcement[73].

The importance of the last strand is paramount in our view. Some authors concluded long ago that the principle of effectiveness has become an essential reference in law as the ECJ´s jurisprudence is conceptualising its role as a guarantee for the functioning and coherence of the Community legal order[74]. In this sense, 'effectiveness is a governing principle which is informed by and mediates between the Community and national legal orders and is crucial for the legal authority of Community law' (now EU law)[75]. More recently, other authors have covered the last strand of effectiveness as *effet utile* from a critical perspective and/or with other quantitative empirical methods of enquiry that cast a new light into a jurisprudence stretching over more than 50 years.

More recently, Sadl and Olsen[76] have used their empirical research on the use of the effectiveness term by the ECJ as an example where quantitative and empirical methods can complement doctrinal legal studies. This time effectiveness is not only limited to *effet utile* (meaning practical or full effect of EU law). Their interesting conclusions also confirm that the current theory and typology of effectiveness is imprecise both in the doctrine and in the case-law of the ECJ and should open to accommodate new categories and subcategories different from the ones traditionally covered by the doctrine: 1) effectiveness as a principle of interpretation in the context of protection of individual rights and the corresponding duties of national courts and 2) effectiveness as a limit to the principle of procedural autonomy of Member States (alone or in combination with the principle of equivalence).

Nevertheless, conceptualizing effectiveness proves to be a difficult task even for the most qualified scholars dedicated to its study. In spite of the brilliant methodology and findings of Sadl and Olsen, their empirical method and resulting article does not refer to the strong connexion between effectiveness and primacy of EU law and to the interaction of these two judicial doctrines (implicitly or explicitly) in seminal cases that predate the publication of the study such as *Melloni*[77] (2013),

[73] Nebbia, Paolisa, 'The Double Life of Effectiveness', *Cambridge Yearbook of European Legal Studies* 10 (2008), 287-302, 287, 288.

[74] Accetto, Matej and Zleptning, Stefan, 'The Principle of Effectiveness: Rethinking its Role in Community Law'. *European Public Law* 11, no. 3 (2005): 375-473. See also Snyder, Francis, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' *Modern Law Review* 56 (1993) 19-54, 19.

[75] Accetto and Zleptinig, The Principle of Effectiveness, 375.

[76] Sadl, Urska and Palmer Olsen, Henrik, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts', *Leiden Journal of International Law* 30, no. 2 (2017) 327-349, 327, 335-344.

[77] ECJ, Opinion of Mr. Advocate General Bot delivered on 2 October 2012 case C-399/11 *Stefano Melloni v Ministerio Fiscal* or ECLI: EU:C:2012:600.

Taricco I[78] (2015), *Ajos*[79] (2016) and *Taricco II*[80] (2017). This proves that classical doctrinal legal study on a personal selection of cases (using keywords in titles of judgements and/or in texts) and other quantitative and empirical methods (ie. massive selection of judgement through citation networks and corpus linguistic analysis) are necessary and mutually complementary. Both methodologies are essential for the study of European law if we also want go guarantee unity and coherence.

For all the above reasons we agree with Mousmouti that we might refer to 'effectiveness-in-context' for several reasons, "the most pertinent being that, although it is possible to contextualise effectiveness in many different ways, reality presents a 'neutral', relative, and fluid principle, but 'empty' in terms of substantive (value laden) content"[81]. Let this preliminary conclusion about the open-ended character of the term remain in the background.

3. The critique of effectiveness in parallel EU law literature

One of the most interesting questions that the EU faces these days is the resistance to the authority of EU law. Academic criticism, judicial resistance and/or political waves of nationalism and fragmentation of EU law provide different views from national perspectives. Current debates focus on the levels of disparity in compliance across Member States, the understanding of national courts (including constitutional courts) in the context of a new context where future development of the EU must not be taken for granted[82].

Whatever its nature, legal principle, tool of interpretation or simple empty formulation; effectiveness is regularly subject to academic criticism. For this reason, the history of silence and acceptance by scholarship (and national courts) must be complemented by a parallel story of criticism. One of the first voices to criticize the was Danish author Rasmussen[83] who, from a critical socio-legal angle, dared to qualify *effet utile* as a facade to hide real policymaking under the guise of interpretation. According to late reviewers, he had argued that the Court of Justice was an activistic court that constructed EC/EU law (and principles such as *effet utile*) beyond the limits and competences transferred in reality by the democratically elected governments of the Member States[84].

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[78] ECJ, case C-105/14 *Taricco and Others*, case Judgment of 8 September 2015, ECLI:EU:C:2015:555.

[79] ECJ, Case Case 441/14 *Dansk Industri v. Rasmussen or Ajos* [2016] Judgment of 19 April 2016 ECLI:EU:C:2016:278.

[80] Case C-42/17 *Criminal proceedings against M.A.S., M.B.* (*Taricco II*) ECLI: EU:C:2017:564

[81] Mousmouti, 'Introduction to the Symposium on Effective Law and Regulation', 387.

[82] Chalmers, Davies and Monti, *European Union Law*, 2019, Chapter 5 „The Authority of EU law", 202-248.

[83] Rasmussen, Hjalte, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Leiden: Martinus Nijhoff Publishers, 1986), 438; and Rasmussen, Hjalte, *The European Court of Justice* (Copenhagen: Gadjura, 1998) 438 and seq.

[84] Von Quitzow, Carl Michael, 'Hjalte Rasmussens Legacy', *Lund Student EU law Review* 3 (2016) 104-119, 105.

As a legal and judicial made principle (some might say legisprudence?), effectiveness was also later criticized in 2006, when Ross argued that it had become a rationale for an unjustified creative line of jurisprudence[85], a criticism well-grounded that deserves further comment.

Ross was one of the few scholars who dared to do a more critical analysis of the doctrine developed for decades by the ECJ and previously challenged by Rasmussen. As a starting point, Ross noted that, although the notion of effectiveness had been used in a variety of ways, the most important factor was that it had become a constitutional principle, 'patrolling borders between EC law and other legal norms and setting standards for national courts in meeting their EC law obligations' (now EU)[86].

What was most interesting for this author was that, in the absence of a compelling Treaty base in the Treaty of Lisbon, 'the principle of effectiveness is emerging as the driver of constitutional evolution' through the case law of the Court in spite of not being endowed yet with Treaty blessing[87].

Ross´s central thesis is constructed referring to the case *Francovich* as a pivotal example of the doctrine[88]: „… [the Court] invoked effectiveness as a rationale for the invention of [a] new EC law principle…. Here the effectiveness of the Treaty as a whole was presented as a justification for a novel principle that patently had no textual anchor in the Treaty. The demands of effectiveness transmuted an absent requirement into an inherent one."

According to Ross, effectiveness was attributed to be such a fundamental value by the ECJ that it could legitimize solutions to competing choices of interpretation in EU law becoming the self-referential and tautological basis for creative jurisprudence. This claim was highly problematic and contested but, in his view, the technique presented a self-legitimizing character as it 'camouflages the novelty of the development which it is invoked to justify'[89]. Ross wondered whether those who defended the novelty of the principle could be somehow ingenious or naive. Following earlier Pescatore´s line of thinking, Ross confronted all of us with a fundamental question: 'who, after all, would advocate rules, methods or systems that proclaimed themselves to be ineffective?'[90]

His critique of effectiveness as a self-justifying rationale for judicial interpretation is worth reading in full[91]: „effectiveness is overtly surfacing as a dominant leitmotif in judicial reasoning. At the very least, appreciation of the effectiveness factor may help in understanding or predicting which of the Court´s protective principles in relation to enforcing EC rights and obligations is likely to be applied in given situations. In this sense, effectiveness is revealed as possessing yet another characteristic: a determinant between competing analytical tools or, put it more crudely, a handy device for best result instrumentalism."

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[85] Ross, "Effectiveness", 481
[86] Idem, 476.
[87] Idem, 477, 480-481.
[88] Idem, 476.
[89] Idem, 481.
[90] Ibid.
[91] Ross, "Effectiveness", 486.

Ross already concluded a decade ago that the principle had been relied upon by the ECJ as a tool of interpretation with the goal of attaining systemic coherence. In his view, 'it is a mechanism that explores the dynamics between and national and European law', pursuing 'reviewability of national provisions which constitute obstacles to enjoyment of Treaty provisions' and assessing acceptable diversity in securing compliance with Treaty goals[92]. The problem for Ross, was, that enhanced reliance on effectiveness tests in one sense only moved the conflict of interpretation to a different arena, so Ross did not necessarily endorse the ECJ´s approach to turning towards the principle of effectiveness as a new constitutional principle. All in all, Ross criticized that the ECJ was moving from a functionalist approach to an instrumentalist one[93].

Ross is not alone in the critique of the judicial construction of the concept in current European constitutional law. As stated above, a critical strand of EU scholarship has been lifting the veil of the traditional theories that considered creative jurisprudence on effectiveness as a positive legal development in the context of European integration and referring to instrumentalism and judicial law-making. Ten years later, the novelty of the construction and the doctrine of effectiveness has somehow faded away for some qualified part of the doctrine as well[94].

Other authors such as Bossuyt and Verrijdt[95] prefer to address the question of effectiveness as a question of fundamental rights, rather than a theory of effectiveness of EU law. For them, the focus should be on what is actually at stake: the effectiveness, not of EU law, but of human rights protection. In their view, the EU effectiveness principle should be placed in a framework which also takes into account newer principles of EU law, such as the principles of constitutional identity, procedural autonomy and subsidiarity.

One of the most brilliant and updated study on effectiveness of EU law by Sadl[96] also points to the need to revise from other perspectives the doctrine of effectiveness (understood as effet utile) and doing so in a more critical way[97]. In her study she makes a more recent survey of literature classifying doctrine into different schools. The classical school considers effectiveness/*effet utile* as a legal principle and tends to be quite positive towards it. Other scholars adopt instead a broader socio-legal and critical angle. Although they do not fully acknowledge it as a legal principle, they all agree on their criticism towards this judicial line of reasoning[98].

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[92] Idem, 495-496

[93] Idem, 497-498.

[94] Chalmers, Davies and Monti, *European Union Law*, 2019, Chapter 5 „The Authority of EU law", 202-248.

[95] Bossuyt, Marc and Verrijdt, Willem, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki'. *European Constitutional Law Review* 7 no. 3 (211) 355-391, 355.

[96] See Sadl´s study on effet utile on the basis of EU pre-accession empirical data (cases selected for translation by the European Commission Legal Service). Sadl, "The Role of Effet Utile", 2015.

[97] Ibid, 18.

[98] Lasser, Mitchel de S.-O.-l'E, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2009) 236 and Conway, Gerard, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), 117.

From their somehow opposite perspective focusing on judicial interpretation, justification and argumentation, *effet utile* looks "like 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"[99]. At the end of the day, this second line of research also culminates in the conceptualization of *effet utile* as a mere facade for potential/real judicial policymaking labelled or disguised as "interpretation" and encroaching onto the democratic legitimacy of national legislators, a line of argumentation already signaled by Ross[100] and earlier on by Rasmussen[101] who offered a general critique of the ECJ but did not, however, develop a general normative theory on interpretation of EU law.

The findings of Sadl represent an important recent critique to EU law. For this scholar, the main function of *effet utile* is to mitigate the entrenchment and extension of fundamental doctrines of EU law (primacy, direct effect and human rights) into national legal orders. In fact, in her view, *effet utile* is primarily a judicial technique of interpretation (or a tool/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[102].

„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"[103]

Confronted to define effectiveness/*effet utile* as a legal principle, a tool of interpretation or a simple linguistic formula; she concludes by defining *effet utile* an "incantation [who's aim is to] trigger national compliance".

However, although the framework developed by Sadl is certainly the most recent, relevant and the most interesting due to its new methodology (combining quantitative and qualitative methods, empirical data with doctrinal analysis and theory) and findings; the truth remains that her study from 2015 is limited to the first dimension of effectiveness (*effet utile*). In this sense, it is argued here that we cannot limit effectiveness to *effet utile* and focus only on substantial issues, we must also take on board the fundamental role of effectiveness in other EU law (ie. primacy, European procedural law as a limit to national procedural autonomy, State liability). Regarding procedural law, two dimensions of the principle are needed since procedural and substantive rights are simply two sides of the same coin. Rather than

[99] Sadl, "The Role of Effet Utile", 24.
[100] Ross, "Effectiveness", 486
[101] Rasmussen, *On Law and Policy*, 1986 and Rasmussen, *The European Court of Justice*, 1998.
[102] Sadl, "The Role of Effet Utile", 18.
[103] Idem, 5.

qualifying the effectiveness principle as either procedural or substantive, an argument is made here in favour of a combined approach by suggesting that the theory constructed by the ECJ has a *doublé dimensión* and consequences for both the procedural side (remedies) and for the substantive side (rights). We must therefore make a better effort to understand the different meanings of the concept, an effort that Sadl and Olsen take in their latest contribution to the theory[104].

4. Do we need a comprehensive theory of effectiveness in EU law?

It can be concluded that the concept of effectiveness is both elusive and difficult for EU law scholarship. There is no general agreement on a single meaning and scope. Various doctrinal studies have made clear contributions to the development and construction of the principle/doctrine/theory of effectiveness EU law. While undoubtedly the idea of effectiveness of EU law as a positive principle and development has been the prevailing tone, other scholars have expressed strong and well-grounded criticism towards this trend. The due protection of individual rights, the need to guarantee the legitimacy of a system of European governance and the parallel respect for our democratic values must be also overriding interests for the Court of Justice. In spite of a somehow unclear meaning, the constitutionalisation of the principle of effectiveness must not be immune to study, analysis, criticism and critical review.

It is clear therefore that we need a better understanding of an apparent simple but in fact more sophisticated concept. What remains to be studied in legal theory is a clarification on the definition, scope, use and limits, circumstances and contextual outcomes of the principle of effectiveness constructed by the ECJ as well as its critique. This theory may take long time to come. In spite of the different arguments and theories developed, most attempts to conceptualize the principle of effectiveness (including the latest attempt done by Sadl and by Olsen) have not succeeded since they do not reflect completely the whole framework constructed by the ECJ in its case-law and all the differents meanings and strands of jurisprudence.

For all these reasons, it can be argued that there is a need for a new legal theory and empirical approach in European constitutional law that combines all the perspectives and build a more sophisticated and better integrated theory of effectiveness relying on current doctrine and case-law. On the other hand, it can also be pointed out that such a theory, if feasible, might have to be kept rather vague in order to be able to incorporate all strands of effectiveness in the ECJ´s jurisprudence. That leads to the ultimate question whether it is necessary and desirable.

This author is convinced of the necessity simply because effectiveness, as it is being used now both by the doctrine and the Court, has become quite messy principle and difficult to understand for general readers and practitioners (and even for undergraduate students of EU law). This study, however, does not aim to construct such a new theory in a short contribution but only to cast light on the topic,

[104] Sadl and Olsen, "Can Quantitative Methods?", 2017.

to offer a framework for discussion and analysis and to encourage researchers specialised in legal theory and/in empirical data analysis to follow that path.

5. Conclusions

The effectiveness of EU law and the relationship between Union law and national (constitutional) law is a question explored since the beginning of European integration but still under construction and left always open for interpretation. The main reasons are two: 1) the lack of a proper definition of the concept (neutral and fluid but 'empty' in terms of substantive (value laden) content); and 2) a judicial technique of self-referential justification and partial legal clarification/reasoning/argumentation in the case-law of the Court of Justice. All this of course affects the quality of doctrinal work that focuses on a principle used in different context and with different meanings (as *effet utile*/practical effect, as a twin claim to primacy of EU law leading to State liability for damages or as a limit on the national procedural autonomy).

Almost since its origin, the ECJ and most European scholarship have constructed a classic narrative of the precedence and necessary parallel effectiveness of Union law over conflicting national law. According to the traditional understanding, Union law must prevail and deploy full effect in all circumstances over national law, including constitutional law. However, this classical narrative and meaning of effectiveness has been deconstructed by a different wave of critical legal scholarship (Rasmussen in 1986 and 1998, Ross in 2006 and Sadl in 2015).

With reference to the most recent doctrinal studies, the never-ending expansion of the ECJ´s doctrine and its legal reasoning have been criticized with good arguments on the basis of gigantic empirical data extracted and analyzed with new quantitave/qualitative methods (that go beyond standard consultation of *Eur-lex* database and intuition to select most relevant cases). The new approaches and methodologies are very much welcomed and represent a big step in the potential of legal research combined with other disciplines. But the main focus should not be missed since the purpose is to understand and comprehend effectiveness in all its dimensions.

A selective survey and analysis of literature revealed that the conceptualization of the principle of effectiveness is difficult for EU scholarship. There is not a single comprehensive legal theory of effectiveness but multiple studies. This led to the questions: do we still believe in this principle? Is it necessary to study, clarify and contextualize its nature, meaning, and role in the European legal order? This study argues that this concept, as it stands in 2020, is essential and still offers a unique perspective to explain the authority of EU law vis-à-vis national law and the effective protection of individual rights in their daily ordinary life.

We are in a situation where we face more than one reality or truth regarding effectiveness. The Court of Justice uses the term in different contexts and diverse meanings. The doctrinal works do the same. If the question is whether effectiveness is X, Z or Y… the answer in reality might be yes to all of them. For this reason, here

is argued that we need to examine effectiveness from many perspectives at a time:

1) from a substantive/material point of view and from a formal/procedural point of view (twined with the equivalence principle regarding autonomy of national procedural laws);

2) as a tool of interpretation grounded in legal reasoning and functionalism in EU law but also as an incantation or fiction ungrounded in the EU Treaties (Rasmussen, Ross and Sadl´s criticism);

3) as a legal principle fully independent in its meaning and scope but also as a principle integrated and limited by other fundamental principles of European law (i.e. primacy, protection of fundamental rights, classic principles of European/national criminal legal orders, legal certainty, and State liability for breaches of EU law among others).

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