Common Market Law Review **58**: 1761–1788, 2021.
© 2021 *Kluwer Law International. Printed in the United Kingdom.*

OLD IS NEW: THE TRANSFORMATIVE EFFECT OF REFERENCES TO SETTLED CASE LAW IN THE DECISIONS OF THE EUROPEAN COURT OF JUSTICE

URŠKA ŠADL*

Abstract

References to settled case law permeate the decisions of the European Court of Justice. Legal literature commonly deems them elements of stability and constraint. By contrast, this article highlights their transformative effect. That effect occurs in the process of repetition, conceptualized as a process that permits alteration. The article identifies and explores three types of alteration, or three mechanisms of instability: (1) the substitution of cited cases in citation strings; (2) the alternation between expressions found in settled case law and alternative expressions; and (3) the un-anchoring or detachment of legal statements from cases in which they initially appeared. The analysis illustrates how substitution leads to diverging interpretive outcomes, how alternation unsettles the normative force and the relevance of the acquis, and how un-anchoring results in a loss of knowledge. From this perspective, references to settled cases result in complex changes to the law – changes which are multi-directional and lack a clear progression. The article contributes to a better understanding of legal change, and it illuminates the role of past cases in the Court's decision making.

1. Introduction

The Court of Justice of the European Union (the Court) routinely refers to *settled case law* in its judgments (also including its Orders and Opinions under Art. 218 TFEU). The Court produces a legal statement about the meaning of a legal source, affirming that the meaning is stable, frequently citing past judgments in support. References tend to assume the sort of standardized form shown here:

* European University Institute, Florence. I am thankful to the participants of the seminars and workshops in Copenhagen, Florence, Berlin, Oxford, Konstanz, and Vienna for engaging with the argument presented in this article. Special thanks to the anonymous reviewers for critical comments and suggestions that proved essential to completing it.

> "According to settled case law, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; *Francovich and Others*, cited above, paragraph 42, and Case C-312/93 *Peterbroeck* [1995] ECRI-4599, paragraph 12)."[1]

Nominally, references in this form seem analogous to de facto precedents, creating an expectation that *settled case law* should constrain and legitimize judicial law making, stabilize adopted interpretations, and secure legal certainty.[2] As such, scholarship has mostly described and evaluated the normative force of settled case law, or taken issue with the Court's technique of applying precedent, notably in cases where it distinguishes or overrules.[3] Even in legal literature where the precedent analogy is softened, the same criteria persist and the normative-comparative analytical framework is retained.[4] In this framework, repetition, which is the most distinct feature of references to settled case law, is envisaged and assessed only in its capacity to justify an outcome or an adopted interpretation – its capacity to strengthen or weaken the legal argument.

This article views the references to settled case law through a different prism. It focuses on the destabilizing or transformative potential of repetition, showing how the Court changes the law while referring to it as settled. The argument is presented in three steps. The first step defines the concept of references to settled case law and the decision-making context in which they occur and persist. It distinguishes between complete and incomplete structures. The former are characterized by three elements: a reference to

1. Case C-224/01, *Köbler*, EU:C:2003:513, para 46.
2. E.g. Schauer, "Precedent", 39 *Stanford Law Review* (1987), 571.
3. Lasser, "Judicial (self-) portraits: Judicial discourse in the French legal system", 104 *Yale Law Journal* (1995), 1325; Arnull, "Owning up to fallibility: Precedent and the Court of Justice", 30 CML Rev. (1993), 247; Tridimas, "Precedent and the Court of Justice" in Dickson and Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law* (OUP, 2013); Barcelo, "Precedent in European Community law" in MacCormick, Summers and Goodhart (Eds.), *Interpreting Precedents: A Comparative Study* (Routledge, 2016); McAuliffe "Precedent at the Court of Justice of the European Union: The linguistic aspect", 15 *Law and Language: Current Legal Issues* (2013), 483; Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press, 2014). The classic comparative study is MacCormick, Summers and Goodhart (Eds.), *Interpreting Precedents: A Comparative Study* (Routledge, 2016), first published in 1997.
4. Komárek, "Reasoning with previous decisions: Beyond the doctrine of precedent", 61 AJCL (2013), 149.

settled case law; a legal statement; and case citations. In incomplete structures, the Court may speak of case law as settled without mentioning any judgments by name; or it may invoke past cases without specifying that the case law was settled. The second step in the argument conceptualizes repetition as alteration (which opens the possibility of transformation) and thereafter identifies three types of alteration. These correspond to three mechanisms of instability: substitution; alternation; and un-anchoring. Substitution means that the Court adds or omits cases from citation strings and changes the meaning of the legal statement which those cases support. Alternation means that the Court connects a reference to settled case law or an alternative expression with the same legal statement (or with the same case), thereby inflating or deflating their normative force and legal relevance. Un-anchoring means that the original cases and phrases get "lost" in the process of repetition. The third step in the argument examines the mechanisms, illustrating their effect on selected examples from the Court's judgments. It shows that the mechanisms contribute to a loss of knowledge, relax normative constraint, and underpin divergent interpretations of the same legal source. The effect of instability is alteration and ultimately transformation, which is complex, multi-directional, and intermittent rather than progressive, linear, and cumulative.

This analysis is not the first to suggest that the Court does not practise the stability that it preaches. Nor is it novel to observe that the Court's referencing style is erratic. Yet by exploring the mechanics of transformation, the article engages with a vexing legal puzzle applicable to judicial institutions everywhere: it demonstrates how courts make new law by following old law.[5]

This article has seven sections. Section 2 defines and categorizes the references to settled case law. Section 3 outlines the Court's practice of decision making and decision writing, explaining why repetition occurs and persists. Section 4 conceptualizes repetition as alteration and scrutinizes the criteria of stability. Section 5 demonstrates alteration and its effects on the law. Section 6 elaborates on the type of change that repetition produces. The seventh and final section summarizes the argument and suggests avenues for future research.

2. References to settled case law: Concept and typology

The Court's practice of invoking settled case law is as diverse as it is pervasive. In a bid to identify the tipping points more systematically, this analysis distinguishes between complete and incomplete references. A

5. Sharpest in Shapiro, "Judges as liars", 17 *Harvard Journal of Law and Public Policy* (1994), 155.

complete reference has three parts: a reference to settled case law in a narrow sense; a legal statement, which the reference deems settled; and a citation of one or more past cases, as seen below:

> "According to settled case law of the Court, that autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. . . . (Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 33 and the case law cited)."[6]

The phrase beginning with "that autonomy" is a legal statement. Legal statements typically appear as formulas, or sequences of words, stored and retrieved from memory as whole units at the time of use.[7] Literature has analysed selected formulas as devices which the Court can use to extend the reach of European Union competence,[8] or as textual precedents.[9]

Incomplete structures are bipartite. They include the legal statement, but omit either case citations or a reference to settled case law. In the former case, the Court can allude to an unspecified body of case law, as it did in *Potato Starch*:

> "as the Court has repeatedly held in its decided cases it should be stressed that, as far as concerns general acts, especially regulations, the requirements of Article 190 of the Treaty are satisfied if the statement of reasons given explains in essence the measures taken by the institutions and that a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measures as a whole".[10]

Alternatively, the Court can omit the reference to settled case law or an alternative expression, but indicate consistency by the use of case citations. The reference to settled case law is implied. In *Dorsch Consult*, the Court held:

> "In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question

6. Case C-621/18, *Wightman*, EU:C:2018:999, para 27.

7. Some formulas are immutable and tight, such as "clear and present danger". Others are flexible, such as "The referring court essentially asks from the Court of Justice's case law".

8. Azoulai, "The retained powers' formula in the case law of the European Court of Justice: EU law as total law", 4 *European Journal of Legal Studies* (2011), 178.

9. Komárek, op. cit. *supra* note 4.

10. Case 166/78, *Italy* v. *Council* (*Potato starch*), EU:C:1979:195, para 8.

> governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, the judgments in Case 61/65 *Vaassen* (*neé Göbbels*) [1966] ECR 261; Case 14/86 *Pretore di Salò* v *Persons unknown* [1987] ECR 2545, paragraph 7; Case 109/88 *Danfoss* [1989] ECR 3199, paragraphs 7 and 8; Case C-393/92 *Almelo and Others* [1994] ECR I-1477; and Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9)".[11]

The Court sends the message that it is applying well-established law in all examples. Yet only when using the complete tripartite structure, such as the example above (Case C-621/18, *Wightman*), does the Court support the legal statement with case citations and a reference to its past practice as settled case law. In *Dorsch Consult*, the cited cases imply that the criteria for a court or a tribunal under Article 267 TFEU (ex 177 EC) have not changed between 1996, when the Court decided the first cited case (*Vaassen*), and 1997, when the Court decided *Dorsch Consult*. In *Potato Starch*, the Court reminds observers that it is repeating what it has said (and/or decided) previously, but without providing proof.

Structure is meaningful. Complete structures signal the Court committing more firmly to the past and they set out most transparently which aspects of EU law the Court considers settled and which aspects are instances of a relatively consistent practice that the Court follows for pragmatic rather than normative reasons. A reference to settled case law is also likely to indicate that the cited case is foundational to the legal statement. This is probably where the analogy to precedent is most compelling. Incomplete structures signal a looser commitment to the past. An incomplete structure without an explicit reference, even when unintentional, entails an additional loss of information and increases the likelihood of diverse outcomes. These distinctions seem qualitative even if we do not subscribe to the analogy between precedent and settled case law.

3. The process of text production and the institutional context

The drafting process and the institutional context enabling it explain the origin and the pervasiveness of references to settled case law. They permit, promote, and possibly merit repetition.

11. Case C-54/96, *Dorsch Consult*, EU:C:1997:413, para 23.

Producing the text of a judgment begins with a draft, in French, typically authored by a clerk in the cabinet of the reporting judge.[12] The reporting judge approves the text and shares it with the cabinets of all sitting judges. Post deliberation in chambers of three or five judges, in the Grand Chamber (up to fifteen judges) or rarely in the Full Court, the draft returns to the clerk with precise instructions about the outcome of the case and the main line of justification.

Once all sitting judges agree to the final draft, the corrector, a native French speaker with a legal background, edits the text stylistically and suggests subtle changes to the language and the reasoning. This process is additional to the stylistic guidelines that clerks follow in the drafting phase. The role of language editing is to bootstrap the legal argument and organize the text into the recognizable structure of argumentation, thereby speeding up translation. Finally, lawyer-linguists in the Court's translation division translate the judgment from French to all official languages. The text is then ready for publication.

The working method of the Court is embedded in a complex institutional setting, characterized by diverse but often overlapping factors. In relation to judicial style and the form of judgments, the factors most often discussed include: civil law origins and legacies; collegiate decision making which encourages consensus and prohibits separate opinions; absolute secrecy of deliberations; multilingualism; delegation to clerks. One could add the indirect effect of enlargements, whereby the Court's membership has nearly doubled since 2004. Another factor is Treaty reforms, which widened the already broad jurisdiction, necessitating procedural reforms and institutional reorganization. Yet most pertinent of all to the continuity and consistency of the Court's case law would be the revised chamber system with Presidents of Chambers, the rotating membership of the judges in the Grand Chamber, and the non-permanent composition of smaller chambers.[13]

Rapid institutional expansion and overflowing dockets have probably led to a further streamlining of routines and procedural practices. They may also have reinforced the role of the administrative services, such as the Research and Documentation department which assists with the collection of relevant legal sources, including case law. Moreover, renewable mandates,

12. For the effect of the working method on the text, see McAuliffe, "Behind the scenes at the Court of Justice. Drafting EU law stories" in Nicola and Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press, 2017). On multilingualism and translation, see also Pingel, "Le Multilinguisme à La Cour de Justice de l'Union Européenne: Questions Choisies", 32 *International Journal for the Semiotics of Law* (2019), 449.

13. Rules of Procedure of the Court of Justice, O.J. 2012, L 265, last amended in 2019, O.J. 2019, L 316, Arts. 11 and 27–35 (chambers and formation).

appointment procedures that are largely left to the Member States,[14] and non-permanent chambers, might render the sitting judges, especially the inexperienced incoming judges, disproportionately dependent on long-serving career clerks moving between the cabinets.[15] While clerks typically receive relatively detailed instructions from the judges, they are often *the* experts in European Union law and seasoned drafters, hence the logical repository of relevant knowledge and an important source of institutional memory. Time constraints minimize discussion between judges and clerks, perhaps keeping judges in a collegiate setting focused on the outcome rather than on argumentation.[16] Multilingualism, a unique feature of the Court, means that, in theory, the Court could work in 24 official languages. In practice, the Court works in French and employs over 1000 translators. Translation demands escalate the use of approved formulations.[17]

The defining aspect of the Court's method and style might be the dynamic produced by delegation and multilingualism. The former arguably depersonalizes the written judgment. Combined with the latter, often implying drafting in a non-native language,[18] it increases the reliance on form and internal stylistic guidelines.

Unsurprisingly, the standardized process of text production leads to a standardized text with string references to several (most often three) past decisions[19] and ultimately to a "jurisprudence of prefabricated phrases".[20] Repetition comes across primarily as a time-saving device serving a clear

14. Hermansen and Naurin, "Will do? Selecting judges on the basis of policy preferences or performance indicators", Working Paper, on file with the author.

15. Vauchez, "Keeping the dream alive: The European Court of Justice and the transnational fabric of integrationist jurisprudence", 4 *European Political Science Review* (2012), 51.

16. Posner asserts that delegation absolves the judge from confronting the consequences of the decision. Posner, "Judges' writing styles (and do they matter)", 62 *University of Chicago Law Review* (1995), 1421, 1448.

17. McAuliffe, op. cit. *supra* note 3, 483, refers to "Court French". Linguists have shown how the exigencies of procedural economy reduced the already trimmed-down set of linguistic devices. Trklja and McAuliffe, "Formulaic metadiscursive signaling devices in judgments of the Court of Justice of the European Union: A new corpus-based model for studying discourse relations of texts", 26 *International Journal of Speech, Language and the Law* (2019), 21.

18. Few members of the Court (less than half of clerks, and even fewer legally trained staff at the Court) are native French speakers. Zhang, "The faceless court", 38 *University of Pennsylvania Journal of International Law* (2016), 71. The question of the working language is raised *inter alia* in Arnull, "The many ages of the Court of Justice of the European Union" in Kilpatrick and Scott (Eds.), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (OUP, 2020).

19. Jacob, op. cit. *supra* note 3, p. 90.

20. Azoulai, "La Fabrication de La Jurisprudence Communautaire" in Mbongo and Vauchez (Eds.), *Dans la Fabrique du Droit Européen: Scènes, Acteurs et Publics de la Cour de Justice des Communautés Européennes* (Bruylant, 2009). The process has also been described

goal: to deliver a final judgment without undue delay and minimal loss in translation.[21] The Court's struggle with the caseload and intense focus on the yearly output lend further support to this evaluation.

4. Repetition as alteration

Repetition is the most distinguishing feature of references to settled case law,[22] projecting its outward consistency and stability. To explore its mechanics and effects, the next subsection conceptualizes repetition as a process that allows alteration. The second subsection scrutinizes the criteria of stability, and on that basis differentiates three mechanisms of instability.

4.1. *Conceptualizing repetition*

The Court's practice of referring to settled case law is extensively explored in recent scholarship. Most studies capture the transformative potential of repetition only imperfectly because they are built on the premise that settled case law is (or should be) a mechanism of stability, analogous to precedent in common law.[23] Through this prism, instability is envisaged as a conscious reworking, a deliberate manipulation, or insensitive omission, sustained and enabled by the indeterminacy of language and by decision-making practices. Manipulation would include inadequate methodology, especially the use of purposive interpretation, integrationist bias, strategic citations, and so on. Omissions would mean negligent copy-pasting, superficial searches through the internal database,[24] or other unfortunate errors committed by drafters, language correctors, and translators.[25] This mode of thinking

as law making via phrase building in Brown and Jacobs, *The Court of Justice of the European Communities*, 2nd ed. (Sweet and Maxwell, 1983), p. 46.

21. For example, the Foreword of the President of the Court of Justice to the Annual Report, available on <curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf> (last visited 4 Sept. 2021).

22. This is most visible in highly homogeneous and formulaic French versions of the judgments. For a discussion of formulaicity see Trklja, "A corpus investigation of formulaicity and hybridity in legal language: A case of EU case law texts" in Goźdź-Roszkowski and Pontrandolfo (Eds.), *Phraseology in Legal and Institutional Settings. A Corpus-based Perspective* (Routledge, 2017).

23. For instance, an early comparative study considers differences as differences "on the margins". MacCormick, Summers and Goodhart, op. cit. *supra* note 3.

24. Pingel, op. cit. *supra* note 12.

25. At times, scholars uncover instances in which the Court cites cases to support the opposite of what they establish, and attribute the errors to the Court's methodology. Arnull, op. cit. *supra* note 3; Jacob, op. cit. *supra* note 3.

culminates in a logic maintaining that "if only the Court did it properly", settled case law could not be misused for law-making and repetition would be controllable and stabilizing. However, such parameters establish false visions of control: while the Court's working method does contribute to repetition, it is not an exclusive source of transformation.

Pure repetition, Derrida observes, carries with it an unlimited power of perversion and subversion.[26] This thinking is less mystical than it appears.[27] The point of departure is the idea of iterability. Iterability is a property of signs, which must be repeated to communicate, but which lose individuality in the process. In other words, the speaker must use signs because the receiver can only recognize the signs. However, a compilation of signs is not identical to their meaning. The speaker or the author of a written text cannot control how her statements will be received, interpreted, and repeated (i.e. what they will mean). Thus, she cannot impose individuality on them.[28] The meaning, which she conveys with signs, is deferred and altered with every repetition.

In its most radical form, the assumption implies that the Court can alter the meaning of the law even when repeating legal statements in different contexts in identical terms. This is, obviously, not the default scenario – it would be absurd to claim that repetition renders law unpredictable and unable to uphold legitimate expectations. Nonetheless, conceptualizing repetition as alteration has thought-provoking implications for the study of legal change and judicial decision making. Conceptually, it offers a basis on which to rethink references to settled case law as a mechanism of transformation.[29] Methodologically, it posits a challenge: calling for a framework that might identify the tipping points and differentiate legally meaningful change from alteration. In this setting, it calls for a set of criteria allowing us to investigate the stability and instability of structures.

4.2. *Criteria of stability*

Illustrating how courts change the law by referring to it as settled entails a detailed unpacking of the process of repetition, capturing the ways that it alters the meaning of legal statements and cited cases. The most logical starting point in the European legal context is the complete structure of a

26. Derrida, *Writing and Difference* (University of Chicago Press, 1978), p. 296.

27. For a relatively straightforward application of Derrida's thought to legal analysis, see Balkin, "Deconstructive practice and legal theory", 96 *Yale Law Journal* (1986), 743.

28. Derrida, *Limited Inc* (Northwestern University Press, 1988), p. 9.

29. Conceptually, repetition alters the law irrespective of whether the judges believe that the cited cases compel the conclusion of the citing case; or of the grounds on which they choose the cases to cite; or of whether the practice changes over time; or of who (the judges or other Court personnel) selects and inserts the reference and at what stage of the drafting process.

reference: (1) the phrase “settled case law”; (2) the legal statement; and (3) case citations. This is because the three parts are co-dependent – one part makes other parts meaningful and provides the immediate context that determines the meaning of the text (the legal statement or the cited case or the reference).[30] When one part changes or is missing, it affects other parts.

The Court cannot prevent alteration but it can seek to contain it, keeping the references stable. To contain alteration, repetition of references to settled case law would need to observe certain criteria of stability. Ideally, the reference in the narrow sense (part 1) would appear with a legal statement once the Court settled the law (or the interpretation of a legal source). The Court would not alternate between complete and incomplete structures. Equally, when the Court considered a single case as foundational (or precedential), it would regularly associate it with the law that it settled or contributed to settling; namely, it would treat it as a landmark or a primary reference point. Hence, a limited set of citations or a limited number of permutations in citation strings would accompany legal statements.

To minimize alteration, the Court could additionally bootstrap the stylistic features of references. It could use citation prefixes consistently when referring to past cases, such as “in particular”, or “see, to that effect”, or “see, inter alia”, or omit prefixes. It could differentiate between sources that it interprets, such as a Treaty provision or previous case law. Part (1) of the complete structure would be immune to translation (e.g. from French to English). The length of citation strings would not vary greatly.

The observation that the Court’s judgments rarely meet these criteria is trite. The context in which the judgments are produced, described in section 3, renders expectations of complete stability hopeless. Moreover, one could argue that substance ought to take precedence over style. That said, the strict reliance of the Court on form and the high level of standardization (formulaicity) of the Court’s texts compared to national supreme courts, as well as citation guidelines and the institutional writing manual used by clerks (Vade mecum), make the argument less compelling.[31] The practice of decision making and the process of text production explain repetition but do not unpack the mechanism of transformation and its implications. The

30. Literature has typically examined the parts of references separately and often statically, as either legal concepts, linguistic devices, judicial method, or theoretical constructs. The view that context codetermines the meaning of concepts is not controversial. See Kjaer, “Nonsense: The *CILFIT* criteria revisited: From the perspective of legal linguistics” in Koch, Haltern and Weiler (Eds.), *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (DJØF, 2010).

31. On the use and importance of Pescatore’s Vade mecum in the drafting stage, see Vauchez, op. cit. *supra* note 15.

important task of picturing how repetition of references changes the law remains.

5. Mechanisms of instability

An analysis of alteration that arises when employing the criteria of stability identifies three interacting mechanisms, associated with three effects: (1) Un-anchoring, leading to a loss of knowledge; (2) alternation, relaxing normative constraint; and (3) substitution, producing divergent interpretive outcomes. These mechanisms and effects, explored in this section, result in a particular type of legal change explored in section 6 below.

5.1. *An overview*

Table 1 below provides an overview of the mechanisms and their transformative effects. The columns present the mechanisms of instability and their characteristics (from left to right). The rows (from top to bottom) include the label of the mechanism (un-anchoring, alternation, and substitution), a condensed explanation of the process that describes the mechanism (and repetition), the main alteration in the references according to the criteria of stability, which the analysis of structures observes systematically. In addition, the rows contain the part of the reference that is the focus of the analysis, and other (stylistic) alterations that the analysis observes in relation to individual structures. While the main alteration has a significant bearing on the effect, stylistic alteration typically amplifies the main effect. Finally, the bottom row of the table labels the main observed effect of the mechanism.

Divergent interpretive outcomes is the most destabilizing alteration, associated with the substitution of cited cases in citation strings and unstable citation strings generally. New cases supporting interpretations of the legal statement that diverge from the existing cases are added to citation strings or replace the cited cases. Those cases may be more recent than the cases which they supplant, but less recent cases are also possible. The legal statement, which was interpreted as meaning *a*, could bear interpretation *–a,* or an interpretation previously unassociated with the legal statement. When the repetition of the legal statement or past cases is central to the Court's argument, the alteration changes the outcome of the dispute. By analogy to precedent, the alteration would qualify as an "implicit reversal" of settled case law or tacit overruling.

Table 1: Mechanisms of instability, identified based on alteration of the criteria of stability.

The three mechanisms are listed in three separate columns (2–4). The main observed effect is listed in the second row, the observed stylistic alteration in the third, and the main effect in the bottom row.

Mechanism	**Un-anchoring**	**Alternation**	**Substitution**
Process / repetition	Dissociation from the “foundational” case / original legal statement	Alternation between complete and incomplete structures / Fragmentation	Cases with opposite outcomes are added to citation strings / Omitted from citation strings
Main observed alteration (Criteria of stability)	Dissociation from the foundational case	Omission / addition / of reference to settled case law	Variation in composition of citation strings / case citations
Part of reference in focus	Legal statement	Reference in the narrow sense	Cited case law
Stylistic alteration (Criteria of stability)	Varying number of cited cases / Modifying prefix to cited cases	Inconsistent translation (from French to English) / Varying number of cited cases / Modifying prefix to cited cases	Varying number of cited cases / Modifying prefix to cited cases
(Main) Effect	**Loss of knowledge**	**Relaxed normative constraint**	**Divergent interpretive outcomes**

The second effect involving relaxed normative constraint arises especially from the alternation between complete and incomplete structures. A reference to settled case law indicates that the legal statement is more than a habit, and that the cited case is qualitatively different from a mere illustration of past practice. Replacing it with an alternative expression, such as stipulating that “it must be stated as a preliminary point ...”, deflates (even if unintentionally) the status of the cited case and the legal statement, especially when repeated without proof (citation of past cases). Conversely, alteration can have the

opposite – inflationary – effect. When a single case is associated with more than one legal statement, and the legal statements are repeated in complete and incomplete structures, the authority of the case fragments. In all instances, the normative commitment is relaxed.

Un-anchoring refers to the situation where the foundational case, or a case from which the legal phrase originated, is omitted in the process of repetition (and over time forgotten as the original case). The loss of knowledge occurs primarily because citation strings are unstable and because individual cases are not tied to a given legal statement. Rather, they appear with various legal statements, some typically less characteristic of a case's contribution to the acquis. Similarly, un-anchoring can concern the dissociation of a legal statement and cases from the original legal statement. The meaning of the original legal statement is lost.

The following sections explain and illustrate the working of these mechanisms in more detail, relying on examples from the Court's case law. The examples include legal statements coined in landmark judgments or repeated in numerous run-of-the-mill cases across policy areas and types of procedure, politically contentious and politically anonymous judgments, older and newer decisions, doctrinally controversial and uncontroversial judgments. The aim of such untargeted selection is to illustrate universality of the mechanisms, and their relative independence from external considerations or considerations tied to the legal questions and problems raised by the individual disputes. Yet this need not exclude the importance of contextual factors (such as political sensitivity or grave financial repercussions attending a decision). Nor does it exclude the relevance of circumstances (such as the urgency of the matter in asylum cases). These factors remain helpful in making sense of the content of the legal change, as well as the mechanisms that support it.

5.2. *Substitution and opposing interpretive outcomes*

The Court has repeated countless times that:

> "The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes."

This legal statement is a staple element in infringement cases, and typically embedded in a complete structure.[32] The content of cases and the number of

32. Case C-168/03, *Commission* v. *Spain*, EU:C:2004:525; Case C-152/05, *Commission* v. *Germany*, EU:C:2008:17, and Case C-323/01, *Commission* v. *Italy*, EU:C:2002:320, use settled

cited cases vary: the Court alternates the citation prefix[33] and the translation,[34] but rarely omits the reference in the narrow sense.

Despite outward stability, repetition can lead to divergent interpretive outcomes. In *Commission* v. *Portugal*,[35] which dealt with the failure to comply with Directive 91/271/EEC (Urban waste-water treatment),[36] the Court repeated the legal statement[37] to argue that it could not take into consideration the fact that "works on the treatment plants were under way or scheduled in order to comply with the obligations". It found that various Portuguese agglomerates did not comply with the Directive because they did not have operational waste-water treatment plants at the end of the period set by the reasoned opinion.[38] The attempts to comply with the Directive, and the ongoing work on the plants after the expiry of the period laid down in the reasoned opinion, were irrelevant.

The Court relied on *Portugal* v. *Commission* in a subsequent judgment, *Commission* v. *Luxembourg,*[39] concerning the failure of Luxembourg to bring its legislation into conformity with Directive 2006/112 on Value Added Tax.[40] It repeated the legal statement to reject the defence put forward by Luxembourg that it had amended its legislation after the period laid down in the reasoned opinion expired. The amendment was irrelevant to the establishment of the failure to fulfil obligations.[41] The Court made it clear that it would not consider any actions after the expiry of the period laid down in the reasoned opinion. The rationale about what would be deemed irrelevant

case law while in Case C-103/00, *Commission* v. *Greece*, EU:C:2002:60, the Court omits the phrase "settled case law" and uses the phrase "it should be observed in this regard that the Court has consistently held".

33. In Case C-168/03, *Commission* v. *Spain*, Case C-23/05, *Commission* v. *Luxemburg*, EU:C:2005:660, Case C-147/00, *Commission* v. *France*, EU:C:2001:175, the Court uses "see, in particular", while Case C-433/03, *Commission* v. *Germany*, EU:C:2005:462, and Case C-103/00, *Commission* v. *Greece*, use "see, *inter alia*". The prefix is unrelated to the number of cited cases.

34. The expression "selon une jurisprudence constante" translates as "according to settled case law" (Case C-168/03, *Commission* v. *Spain*) and "the Court has consistently held" (Case C-103/00, *Commission* v. *Greece*).

35. Case C-398/14, *Commission* v. *Portugal*, EU:C:2016:61.

36. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, O.J. 1991, L 135/40–52.

37. Citing Case C-440/06, *Commission* v. *Greece*, EU:C:2007:642, para 16, and Case C-395/13, *Commission* v. *Belgium*, EU:C:2014:2347, para 39.

38. Case C-398/14, *Commission* v. *Portugal*, paras. 49–51.

39. Case C-274/15, *Commission* v. *Luxembourg*, EU:C:2017:333.

40. Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. 2006, L 347/1–118.

41. Case C-274/15, *Commission* v. *Luxembourg*, para 48.

actions/conduct extended to legislative action and construction work.[42] The key substitution, however, occurred in two subsequent cases.

In the first case, *Commission* v. *Germany*,[43] the Court repeated the legal statement, citing *Commission* v. *Luxembourg.* The case was somewhat unusual. The Commission brought an infringement action against Germany for its failure to comply with Council Decision 2014/699/EU.[44] The alleged infringement arose from Germany's actions at the 25th session of the Intergovernmental Organization for International Carriage by Rail Revision Committee. Germany voted against the Union's position on the amendments to the Convention concerning International Carriage by Rail, agreed and enacted in the Decision, and voiced its opposition to it. Germany argued that the action of the Commission was inadmissible because it could no longer remedy the breach, and no breach existed in the period laid down in the reasoned opinion.

The Court concluded that the action was admissible,[45] based on the principle of sincere cooperation (Art. 4(3) TEU). From this perspective, while the conduct of Germany had ceased, the effects of that conduct on the unity and consistency of the European Union's international action persisted after the expiry date of the time limit set in the reasoned opinion. These effects were relevant in establishing the breach. By repeating the legal statement and substituting previous case law with *Commission* v. *Luxembourg*, paragraph 47,[46] which referred to a different factual situation, the Court altered the meaning of the legal statement. The conduct/action of Germany, which constituted the breach in the citing case, ceased before the period laid down in the reasoned opinion expired, as opposed to the situation in the cited case.

In the second case, *Commission* v. *Poland and others*, the Court repeated the legal statement and cited both cases, *Commission* v. *Germany* (explicitly) and *Commission* v. *Luxembourg* (indirectly, as "the case law cited"): "According to the settled case law of the Court, the question whether a Member State has failed to fulfil its obligations must consequently be determined by reference to the situation prevailing in the Member State at the end of that period (judgment of 27 March 2019, *Commission* v *Germany*, C-620/16,

42. Lamond argues that law changes even when a court follows a precedent, because it adds further facts to the list of those that cannot "defeat" the reason provided by the ratio of the precedent. Lamond, "Do precedents create rules", 11 *Legal Theory* (2005,) 1.

43. Case C-620/16, *Commission* v. *Germany*, EU:C:2019:256.

44. Council Decision of 24 June 2014 (2014/699/EU) establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to the Appendices thereto, O.J. 2014, L 293/26–33.

45. Case C-620/16, *Commission* v. *Germany,* para 60.

46. Ibid., para 39.

EU:C:2019:256, paragraph 39 and the case law cited)."[47] The joined cases concerned the failure of Poland, Hungary, and the Czech Republic to relocate migrants according to Decisions (EU) 2015/1523 and (EU) 2015/1601 from Italy and Greece to other Member States during the migration crisis. They were provisional measures, adopted after the sudden influx of third-country nationals into Italy and Greece. They were no longer in force by the time the Court heard the cases (but were still in force at the time of the expiry of the time set in the reasoned opinion). The defendant Member States raised the objection of admissibility in a similar vein to the objection that Germany raised in the first example. The Court found that the actions were admissible. The cases that the Court cited supported divergent interpretations of the legal statement regarding the point in time when the situation constituting the breach existed or would have to exist for the action to be admissible.

Dozens of judgments not cited by the Court in *Commission* v. *Germany* and *Commission* v. *Poland and others* would have led to the outcome that the actions were inadmissible. *Commission* v. *Italy*[48] is only one, rather clear, example. In that case, the Court held that the Commission's action was inadmissible, because the awarded public contracts exhausted their effects before the Commission brought the infringement actions. The effects of the contract notices were exhausted before the reasoned opinion was issued, and the contract notices, published after the action was brought, were not contrary to EU law.[49] The Court's position seemed categorical and the case law seemingly "settled".

The example shows how substitution underpins alteration and transformation, and that the transformation can only occur in the process of repetition. The Court consistently repeated the legal statement in a complete structure. However, because of substitution of cited cases in the citation strings, it was able to reach opposing interpretive outcomes of Article 258 TFEU. In the examples, the question of admissibility was decisive for the outcome of the dispute.

The cases raise interesting doctrinal discussions about the extended effects of breaches of EU law,[50] about the Court's methodology, and also the persuasiveness of the Court's reasoning and the impact of non-legal factors on judicial decision making. In principle, the Court's argument of extended effects in *Commission* v. *Germany* or its argument of sincere cooperation in *Commission* v. *Poland and others* could lead to a coherent doctrinal

47. Joined Cases C-715, 718 & 719/17, *Commission* v. *Poland and others*, EU:C:2020:257, para 54.

48. E.g. Case C-362/90, *Commission* v. *Italy*, EU:C:1992:158.

49. Ibid., para 11.

50. Prete and Smulders, "The age of maturity of infringement proceedings", 59 CML Rev. (2021), 285.

construction of the case law. These questions and debates are consequential, but ultimately different from the present analysis of how law transforms with the substitution of cited cases.

5.3. *Alternation and relaxed normative constraint*

The second mechanism of instability is the alternation between complete and incomplete structures. It means that the Court omits or replaces the reference to settled case law with an alternative expression (e.g. "the Court has previously held"; "it must be observed") in subsequent cases and then reverts (or does not) to the reference to settled case law. A reference to settled case law elevates the normative force of a cited judgment (or a part of a judgment, or a legal statement) above mere practice/habit. Omission deflates its normative force. Inconsistent translation from French, variation of prefixes and the number of cases added in a citation string, amplify the effect. The following comparison between references to *Francovich*[51] and *Dassonville*[52] is illustrative.

The Court decided *Dassonville* in 1974. Famously, it coined the formula that all trading rules enacted by Member States, "capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (and thus in principle prohibited by the Treaty).[53] When then Court first associated the legal statement (or the formula) with a reference to the settled case law in 1981,[54] it had previously repeated it only once, in a case decided in 1979.[55] The Court has consistently used a complete structure, and has typically associated the legal statement with *Dassonville*. It has rarely referred to *Dassonville* in a legally dissimilar context, i.e. outside the area of quantitative restrictions and free movement of goods.[56] Thus, the repetition of *Dassonville* has altered the law, with repetitions in new legal contexts and relating to similar facts, but it has not fragmented its doctrinal contribution to the acquis. It has also maintained its place in the European canon. Remarkably, however, the Court continues to use the complete structure, even though it has

51. Joined Cases C-6 & 9/90, *Francovich & others*, EU:C:1991:428.
52. Case 8/74, *Dassonville*, EU:C:1974:82.
53. Ibid., para 5.
54. Case 113/80, *Commission* v. *Ireland*, EU:C:1981:139, para 9.
55. Case 2/78, *Commission* v. *Belgium*, EU:C:1979:128, paras. 35–36.
56. For instance, *Denkavit* repeats para 11 of *Dassonville*, but in relation to the same subject matter of import declarations: "As a result, and in accordance with the consistent case law of the Court (see, in particular, the judgments in Case 8/74 *Dassonville* [1974] ECR 837 and in Case 120/78 *Rewe-Zentrale* [1979] ECR 649), the requirement of a semi-open declaration comes within the prohibition laid down in Article 30 of the Treaty." Case C-39/90, *Denkavit*, EU:C:1991:267, para 17.

explicitly narrowed the scope of *Dassonville* in *Keck*.[57] It occasionally repeats the formula co-citing both cases[58] thereby inflating the meaning (the range of application) of *Dassonville.*

In contrast to *Dassonville,* the Court associates *Francovich*, decided in 1991, with at least two doctrinally relevant aspects. In *Francovich*, paragraph 35, the Court delivered the so-called *Francovich* formula, i.e. that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State could be held responsible was inherent in the system of the Treaty.[59] The Court has since alternated between complete[60] and incomplete structures[61] when repeating the legal statement, using alternative expressions, such as "the Court has repeatedly held" or "it should be recalled", as a preliminary phrase.[62] While there appears to be a shift from incomplete to complete structures over time, indicating that the law became settled, a more recent turn to the incomplete structure contradicts such a conclusion.[63]

In addition, the Court often refers to *Francovich* (alternating between structures but to a lesser extent) in relation to the principles of effectiveness and equivalence, known as the *Rewe*/*Comet* case law.[64] Those cases typically

57. Joined Cases C-267 & 268/91, *Keck & Mithouard*, EU:C:1993:905.

58. Case C-217/99, *Commission* v. *Belgium*, EU:C:2000:638, para 16.

59. Joined Cases C-6 & 9/90, *Francovich & others*, para 35.

60. Joined Cases C-46 & 48/93, *Brasserie du Pêcheur & Factortame*, EU:C:1996:79 ("The Court held in *Francovich"*); Case C-392/93, *British Telecommunications*, EU:C:1996:131 ("It should be recalled, as a preliminary point"); Joined Cases C-94 & 95/95, *Bonifaci & others Berto & others*, EU:C:1997:348 ("In that connection, the Court has repeatedly held"); Case C-127/95, *Norbrook*, EU:C:1998:151 ("It must be remembered, first, that, as the Court has held repeatedly"); Case C-261/95, *Palmisani*, EU:C:1997:351 ("In that connection, the Court has repeatedly held that"); Case C-424/97, *Haim*, EU:C:2000:357 ("First of all, it should be recalled that"); Case C-118/00, *Larsy*, EU:C:2001:368 ("First of all, it should be recalled that"); Case C-63/01, *Evans*, EU:C:2003:650 ("First, as the Court has repeatedly held"); and Case C-224/01, *Köbler* ("First, as the Court has repeatedly held").

61. Case C-445/06, *Danske Slagterier*, EU:C:2009:178 ("It is to be recalled first of all that, in accordance with settled case law"); Case C-118/08, *Transportes Urbanos*, EU:C:2010:39 (It is to be recalled at the outset that, in accordance with settled case law); Case C-429/09, *Fuß*, EU:C:2010:717 ("It must however be pointed out that, in accordance with settled case law"); Joined Cases C-501 to 506, 540 & 541/12, *Specht & others*, EU:C:2014:2005 ("It should be borne in mind that, according to settled case law").

62. The Court cites *Francovich* in cases which share the same legal statement and have different outcomes, e.g. Case C-224/01, *Köbler*.

63. Case C-244/13, *Ogieriakhi*, EU:C:2014:2068, para 49 ("First, it should be borne in mind").

64. *Francovich* is sometimes cited in a string with *Rewe and Comet* case law (Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG*, EU:C:1976:188, and Case 45/76, *Comet BV*, EU:C:1976:191); e.g. in Case C-224/01, *Köbler*, (complete reference) or Case C-312/93, *Peterbroeck*, EU:C:1995:437, and Joined Cases C-430 & 431/93, *van Schijndel*, EU:C:1995:441 (incomplete reference).

stand for the principle of procedural autonomy.[65] The latter means that the Member States must ensure the enforcement of EU law rights effectively and equivalently in accordance with their national procedural arrangements. *Francovich* might not have enriched that line of case law at all (and is even deemed an interference in the national system of remedies and procedures).

That said, the Court does not control the complexity of a dispute and should not be held accountable for resolving more than one legally significant issue in one case. Therefore, it is also important to observe and tease out the effect of alternation in complex cases without evaluating the practice.

On a more general level, alternation suggests that a reference to settled case law is independent of the volume of repetitions, of cases that support the legal statement, and of legal content. For instance, the volume of repetitions necessary for the Court to conclude that the law is settled or unsettled varies greatly between judgments like *Francovich* and *Dassonville*. Undoubtedly, much of this difference stems from the disparities between policy areas, the patterns of litigation, and the nature of legal questions that individual judgments address. Not all judgments contribute equally to the acquis, and not all judgments reverberate across policy areas.[66] So, while it would be unfair to overemphasize the latter point, the observation and the exploration is useful to the analysis of the dynamics of change and tipping points in the development of legal doctrine.

To summarize, on the one hand, alternation deflates the normative constraint of the original contribution of the case – the *Francovich* formula – to the acquis/doctrine. On the other hand, it inflates its less original contribution to the principle of effectiveness and equivalence. Importantly, the effect extends to the normative force and the relevance of the principle of State liability. The result is a relaxed normative constraint and a foreshortened use of the past for current and future decision making. The effect is amplified because the Court occasionally substitutes *Francovich* with newer cases in citation strings and varies the number of co-cited cases (the length of citation strings). For example, it co-cites *Francovich*, paragraph 35, in a string with one, two, five, and seven cases from 1991 to 2003, four in 2006, and three in 2008, until in 2009 no references to cases appear immediately after it. Moreover, the Court does not embed references to a more contentious aspect of a case like *Francovich*, in more complete structures to signal greater constraint.

65. Some authors have suggested that procedural competence might better describe the division between rights, remedies and procedures for their enforcement. Van Gerven, "Of rights, remedies and procedures", 37 CML Rev. (2000), 501, 502.

66. On the versatility of cases, and their relevance for different parts of the case law, see Šadl and Tarissan, "The relevance of the network approach to European case law: Reflection and evidence" in Kilpatrick and Scott, op. cit. *supra* note 18.

5.4. *Un-anchoring and the loss of knowledge*

One need not delve very deeply into the case law to come across the legal statement that:

> "[t]he Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 32)."[67]

This section examines the mechanism whereby a legal statement is un-anchored amid the Court's effort to provide a useful answer. Un-anchoring occurs because the legal statement is separated from the foundational case and its origins are lost in the process or repetition. The present analysis traces the origins of the useful answer, the context, and the tipping points in the process of repetition. It does not scrutinize the justification of the Court's decision and the persuasiveness of its argumentation.

The illustration begins with *Wightman*, paragraph 27, from which the above citation is taken. In that case, the Court had to deal, as a preliminary point, with the admissibility of the questions of the Scottish court in the wake of the United Kingdom's withdrawal from the European Union pursuant to Article 50 TFEU. The referring court inquired whether the United Kingdom could revoke the withdrawal before the expiry of the two-year period laid down in Article 50 TFEU, whether it could do so unilaterally, and whether the revocation would mean that the United Kingdom remained in the European Union. The British government raised the objection of admissibility because it considered the question hypothetical. No national act had been adopted "or even contemplated" and hence the purpose of the reference was not to solve a genuine dispute but to obtain an advisory opinion on a constitutional issue.[68]

The Court recalled, in a complete structure, that references should not solicit advisory opinions on general or hypothetical questions. It nevertheless considered that the reference sought an interpretation of a provision of European law (Art. 50 TFEU), which had a bearing on the main dispute, and

67. Case C-621/18, *Wightman*, para 27.

68. The Commission supported the UK's position that the question was hypothetical, but held that there was a dispute.

was hence admissible.[69] The decision hinged on the question of whether the Court would be able to provide the referring court with a useful answer.

In that context, in *Wightman*, paragraph 27, the Court repeated the legal statement and cited *Gauweiler*[70] and *American Express*.[71] Both those cases raised admissibility questions and repeated the legal statement, with *Gauweiler* ascribing it to *Melloni*, paragraph 28,[72] and the case law cited, and *American Express* looping back to *Gauweiler*, paragraph 25. The second reference is uninformative as to the origin. Yet the first reference to *Melloni*, paragraph 28, refers further to *Paint Graphos*, paragraph 30,[73] and the case law cited. If we follow the chain of repetition of mostly incomplete structures through explicit references to past cases[74] and several dead ends, the sequence finally points to *Meilicke*, decided in 1992.[75]

The preliminary reference in *Meilicke* concerned the interpretation of the Second Company Law Directive regarding capital requirements.[76] The Opinion of the Advocate General reveals that the applicant, who was also an academic lawyer, might have "orchestrated"[77] the dispute in order to contest and debate the decisions of the German courts on that matter. In particular, Mr Meilicke debated the stricter rules governing cash contributions to increase a company's capital and engaged in a dispute he was bound to lose. The case predictably raised the issue of artificial disputes, as well as the question of hypothetical and general opinions, which the Court had dealt with previously in *Foglia* v. *Novello*.[78] In that case, decided eleven years earlier, the Court for the first time refused to engage in such disputes.

Prior to *Meilicke*, the Member States had invoked *Foglia* only to challenge the jurisdiction of the Court in genuine disputes.[79] The situation in *Meilicke* was different, and closer to the facts of *Foglia* on the point of the genuine

69. Case C-621/18, *Wightman*, para 28, citing Case C-72/15, *Rosneft*, EU:C:2017:236, para 194 and the case law cited, Case 244/80, *Foglia*, EU:C:1981:302, para 18; Case C-458/06, *Gourmet Classic*, EU:C:2008:338, para 6.

70. C-62/14, *Gauweiler & others*, EU:C:2015:400, para 25.

71. C-304/16, *American Express*, EU:C:2018:66, para 32.

72. Case C 399/11, *Melloni*, EU:C:2013:107.

73. Joined Cases C-78-80/08, *Paint Graphos*, EU:C:2011:550.

74. *Paint Graphos* refers to Joined Cases C-222-225/05, *Van der Weerd & others*, EU:C:2007:318, Joined Cases C-188 & 189/10, *Melki & Abdeli*, EU:C:2010:363, and Joined Cases C-395 & 396/08, *Bruno & others*, EU:C:2010:329, whereby only *Van de Weerd* further refers to Case C-379/98, *PreussenElektra*, EU:C:2001:160, which cites Case C-415/93, *Bosman*, EU:C:1995:463, which further refers to Case C-83/91, *Meilicke*, EU:C:1992:332.

75. Case C-83/91, *Meilicke*.

76. Directive 77/91/EEC of 13 Dec. 1976 on coordination of safeguards, O.J. 1977, L 26/1.

77. Opinion of A.G. Tesauro in Case C-83/91, *Meilicke*, EU:C:1992:178.

78. Case 244/80, *Foglia*, para 21.

79. Case 180/83, *Moser*, EU:C:1984:233; Joined Cases 98, 162 & 258/85, *Bertini*, EU:C:1986:246.

nature of the dispute. The Court summarized several paragraphs of *Foglia*, to which it referred as a precedential case[80] and as an exception from the settled case law that the assessment of necessity of interpretation lay with the referring court.[81] Interestingly, the Court also thought it necessary to refer to its previous judgments in *Benedetti*, *Deutsche Milchkontor*, and *Irish Creamery*.[82] In those judgments, the Court did not deal with artificial disputes or hypothetical questions but discussed the need to define the legal context of the dispute, establish the facts of the case, and settle the question of purely national law at the time of the reference. It had used the phrasing "an interpretation of Community law which will be of use to the national court", that amounts to the expression "useful interpretation".

The Court concluded in *Meilicke* that it was "being asked to give a ruling on a hypothetical problem, without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it".[83] Thereby, it fashioned a new criterion of admissibility – "useful answer" – integrating the legal statement "interpretation that will be of use"[84] into the case law on hypothetical questions, repeating previous case law. Something salient was not revealed in this process: in contrast to *Foglia*, where the Court dealt with "an artificial dispute" and refused to reply to the questions, in *Benedetti* and *Deutsche Milchkontor* the Court dealt with genuine disputes, but ruled that clumsily drafted references were still admissible. This context of useful interpretation was dissociated from previous case law, and its meaning was altered through repetition.

The un-anchoring of the expression "useful answer" from *Meilicke*, which the Court repeated in *Wightman*, has occurred over successive alterations and a number of tipping points. The first important tipping point seems to be two judgments: *PreussenElektra*[85] and *Melloni*. Those cases are apparently the

80. Case C-83/91, *Meilicke*, para 25.

81. Ibid., para 23: "It is also settled law (see, in the first place, Case 83/78 *Pigs Marketing Board* v. *Redmond* [1978] ECR 2347, para 25, and, most recently, Case C-186/90 *Durighello* v. *INPS* [1991] ECR I-5773, para 8), that, in the context of such cooperation, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment."

82. Case 52/76, *Benedetti*, EU:C:1977:16, paras. 20, 21 and 22, and Joined Cases 205-215/82, *Deutsche Milchkontor*, EU:C:1983:233, para 36. The phrasing in *Irish Creamery* (Joined Cases 36 & 71/80, *Irish Creamery*, EU:C:1981:62, para 6), however, is taken from a previous case to which *Irish Creamery* refers, viz. Case 244/78, *Union laitière normande*, EU:C:1979:198. There the Court spoke of the "interpretation utile du droit Communautaire" (translated as "helpful interpretation").

83. Case C-83/91, *Meilicke*, para 32.

84. In French, "interpretation . . . qui soit utile pour le juge national" (Joined Cases 36 & 71/80, *Irish Creamery*).

85. Case C-379/98, *PreussenElektra*, EU:C:2001:160.

starting point of two separate chains of repetition. In *PreussenElektra*, the Court referred to settled case law to the effect that it was in principle bound to give a ruling, citing *Bosman*[86] as the original case. In *Bosman,* paragraph 61, the Court did cite *Meilicke*, but paraphrased and added to the legal statement. It held that it did not have *jurisdiction* in cases where the problem was hypothetical and it did not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[87] In *PreussenElektra*, the Court referred to *Bosman*, summarizing the criteria without references to *Foglia*, *Meilicke*, or the judgments on useful interpretation.[88] The chain of repetition leading to *Melloni* follows a similar pattern but is more complex, disorderly, and more difficult to reconstruct.

This example shows the gradual "excision" of the origin of the "useful answer" – an excision of the context in which the Court developed its stance on the admissibility of preliminary references and the limits of its jurisdiction. The effect of the separation of the legal statement from the foundational case and especially from the circumstances that gave rise to the legal statement (interpretation, argument, or conclusion), is a loss of knowledge. While legal statements retain a recognizable structure, repetition underpins the transformation of the procedural duty of national courts to give the Court enough information to establish jurisdiction, into a duty to convince the Court that it could meaningfully (i.e. in substance) contribute to the resolution of the dispute in the main proceedings (i.e. provide a useful answer). This transformation is possible because the process of repetition continuously recontextualizes the legal statements and dissolves their links to the original judgments.

It is generally complicated to identify and distinguish between the original judgments (where the Court first created a legal statement), the judgment which is the main vessel – the super-spreader – of the phrase or an expression, and the judgment which is legally closest to the statement.

The example might artificially inflate the effect of repetition because it draws on voluminous and diverse legal material. The broad applicability of the legal statement necessitates repetition and accelerates alteration, significantly increasing the likelihood of loss. The same characteristics could have the

86. Case C-415/93, *Bosman*, EU:C:1995:463.

87. Ibid., para 61, combines the expression "useful answer" from Case C-83/91, *Meilicke*, para 32, with the expression that it has "no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose (see, *inter alia*, Case C-143/94 *Furlanis* v *ANAS* . . . paragraph 12) …."

88. Case C-379/98, *PreussenElektra*, para 39, refers to Case C-415/93, *Bosman*, para 61; Case C-36/99, *Idéal Tourisme*, EU:C:2000:405, para 20; and Case C-322/98, *Kachelmann*, EU:C:2000:495, para 17.

opposite effect. The volume of repetitions might just as well lead to greater standardization, considering the similarity of the challenges to the Court's jurisdiction, the high degree of automation in the process, and its rigidity.

6. The "special effect" of repetition

Analysing these mechanisms of instability and their impact sheds light on judge-made legal change. The special effect of repetition is incremental legal change which is multi-directional, flows back and forth, and lacks a clear progression. The case law, the legal knowledge, and the interpretations are not stable in their accumulation. They are subject to alteration, muddling (in the case of opposing interpretative outcomes), multiplication, and elimination. Alternation between structures continuously revises the status of past cases and interpretations. Substitution results in opposing, and even divergent, interpretive outcomes. Un-anchoring dissolves the ties to the past. Alteration, like entropy, increases exponentially as the repository of the Court grows.

From this perspective, past cases acquire novel meaning as they age; while new precedents, better suited to solving the problems of the present day, do not replace older and outdated precedents. The meaning of cases is subverted, lost, and fragmented. The legal solutions that past cases contribute to the doctrine, are decontextualized. Their scope continuously narrows or expands, and their normative force strengthens or weakens. In this sense, repetition of references to settled case law resettles the law, rather than progressively extending the limits of a court's jurisdiction. In the European Union context, the process does not necessarily lead to the expansion of the European Union's competence or the totalization of the integration process.[89]

This image complements the existing conceptualizations of legal change, such as the most common presentations of change as legal evolution or development.[90]

89. Azoulai suggests that the Court's language constructs or formulas (such as the formula of the existence and the exercise of competence) "totalize" the integration process. "Totalization" refers to the extension of the European Union's jurisdiction beyond the limits set by the Treaties. Totalization, however, does not work via pre-emption of Member States' action, absorption of their competence and powers, or colonization of their reserved sphere. It affects their action, and compels them to think in European terms, reorganize their legal systems, and adapt their regulations regardless of the formal division of competences. Azoulai, op. cit. *supra* note 8. See especially 199–201.

90. In the context of EU law, this line of thinking is represented in Craig and De Búrca (Eds.), *The Evolution of EU Law, 3rd ed.,* (OUP, 2021), also in the earlier editions of that work.

Nevertheless, the conceptualization presented here also differs from the evolutionary model which explains how the legal system develops through interaction with other autonomous systems and translates new knowledge into its own legal universe.[91] The evolutionary conceptualization does also consider change largely separate from the actors, but it ascribes change to exogenous factors and law's internal capacity of translation and adaptation, rather than to repetition as a near automatic process endogenous to the system.

Such change in a body of law occurs irrespective of the motivation of the actors. It is not exclusively determined by whether judges strive for coherence or instead manipulate past cases to make policy and promote individual agendas, hiding behind the purpose of the Treaty provisions. Repetition can legitimize any endeavour – even negligence – because it preserves the outward appearance of continuity and supports a coherent construction of the past and present.

7. Conclusion

This article engaged with the repetition of references to settled case law. It explored how the process of repetition underwrites legal transformation. The analysis outlined the concept of references to settled case law, distinguishing between complete (tripartite) and incomplete (bipartite) structures. Seeking a clearer picture of repetition and its transformative effects, the analysis conceptualized repetition as alteration: namely, as a process which endorses change. This categorization and methodology enabled the article to view references to settled case law through a new prism, and to identify and examine three mechanisms of instability: substitution, alternation, and un-anchoring.

The analysis then closely scrutinized the working of each mechanism and its transformative effect. It demonstrated that the substitution of cited cases (continuously replacing or reshuffling older and newer cases, and co-citing cases with opposing outcomes) could lead to contrasting interpretations of the provisions of EU law and potentially divergent outcomes of disputes. Alternation between complete and incomplete structures could lead to a new settlement of the normative force of past cases and the relevance of legal statements. Finally, un-anchoring of individual judgments from legal statements and the context in which they were elaborated was linked to a loss of legal knowledge.

91. Teubner, *Law as an Autopoietic System* (Blackwell Publishers, 1993).

The result was a more nuanced picture of repetition. On the one hand, law very evidently changes due to deliberate action: notably interpretation, manipulation of precedents, linguistic indeterminacy, and the practices of decision writing which promote repetition. On the other hand, repetition of settled case law remains the mechanism that supports, enables, signals, or legitimizes this action. The findings are valid for the Court of Justice but have a broader validity and appeal: courts make new law by relying on the established law. Seen in this light, this analysis contributed to scholarship by outlining these mechanisms and their effects, independently but in the context of the Court's practice and working method.

The criticism might be raised that such practices are not particular to the Court of Justice, and that, indeed, such methods are universal. Moreover, one may wonder whether the Court doesn't simply do what it can, bound by its constraints and its own procedures. This is true. The article shows the effect of the Court's methods, even if it cannot (or because it cannot) change.

The findings in this analysis do not challenge the notion that repetition is primarily a shortcut for otherwise lengthy, painstaking, deep, and detailed engagement with legal sources. Nor do they clash with assertions that engagement with legal sources has become increasingly haphazard owing to the growing number and diversity of past cases. Equally, the article's conclusions are not at odds with claims that the increasing formulaicity of texts, the internal contradiction in the references to settled case law, and the working methods of the Court are problematic. Such practices reduce the readability of judgments and the persuasiveness of the argument, and potentially erode institutional legitimacy.

While it was not the primary motivation of this article to enter the conceptual debate on precedent and other interpretive techniques, the results suggest that analogies which view settled case law as precedent – as a mechanism of stability and constraint, legitimizing judicial law making – are not entirely accurate. References to settled case law are not merely mechanisms of stability and continuity, anchoring existing interpretations in past cases, offering a ready-made upper premise to the syllogism. Rather, they can alter an established interpretation and destabilize the authority of past judgments.

The article did not delve into the external factors and conditions under which particular concepts, phrases, or cases may be elevated to become settled case law. Nor did it pursue the question of whether, and to what extent, the legal community shaped this process. Instead, it supplied comprehensive conceptual and methodological foundations for such inquiries.

Analysing procedural referencing opens up new vistas on the institutional role of references to settled case law. Through references to settled case law,

the Court can easily reshape the relationship with its key interlocutors: the Commission, the General Court, and the national courts. Future research should clarify the extent to which the Court responds to this coordinating potential, and whether it has tangible effects in the Court's decisions.