EFFET UTILE REASONING BY THE COURT OF JUSTICE OF THE EUROPEAN UNION IS MOSTLY INDIRECT: EVIDENCE AND CONSEQUENCES

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Legal reasoning cannot merely be categorized by the content of the arguments used, such as reference to specific rules, principles or policies. Arguments can also be distinguished in terms of whether they are used directly (i.e. ostensively) to defend a certain position or interpretation or indirectly (i.e. apagogically) to contest it. Empirical analysis of the Court of Justice of the European Union judgments in the 'important pre-accession case law' demonstrates that effet utile *arguments are mostly used indirectly: the Court points out how a certain interpretation of European Union law would undermine its effectiveness and concludes that the opposite interpretation should be followed. This empirical analysis therefore appears to counter the claim that the Court uses* effet utile *reasoning in a maximalist manner. Nevertheless, apagogic reasoning is not an innocent way of reasoning, since it can lead to fallacies and provides greater opportunities to hide the reasons for decisions.*

Keywords: Court of Justice of the European Union; legal reasoning; *effet utile*; apagogic reasoning

TABLE OF CONTENTS

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I. INTRODUCTION

Effet utile is widely recognized as an important principle or interpretative tool used by the Court of Justice of the European Union (CJEU, 'the Court') and has been the subject of a large body of scholarship. It has been said to play a 'particularly prominent role' in the CJEU's case law[1] and has been termed an 'indispensable tool' for the creation of the central tenets of European law.[2] At the same time, it is 'one of the most contested terms in

[1] Stefan Mayr, 'Putting a Leash on the Court of Justice – Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule' (2012) 5(2) European Journal of Legal Studies 3, 7.

[2] José Luis da Cruz Vilaça, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour' in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser 2012) 279.

European case law',[3] including because it is often perceived as a tool for judicial activism.[4] This paper provides a new perspective on how the CJEU uses *effet utile* reasoning and how this affects its potential for judicial activism.

Section II will clarify the difference between direct (ostensive) and indirect (apagogic) ways of using arguments: in the case of direct reasoning, arguments are used to defend a certain position or interpretation; in indirect reasoning, arguments are used to contest a position or interpretation that one aims to reject. Section III will then demonstrate that the Court sometimes uses *effet utile* arguments in an ostensive manner and sometimes in an apagogic manner. In instances of the first type, the Court argues that a certain interpretation would enhance the effectiveness of European law. In instances of the second type, the Court argues that a certain interpretation would undermine or reduce the effectiveness of European law. The central argument of this article is that the Court actually uses *effet utile* reasoning mostly in the second manner, i.e. indirectly. This will be demonstrated through an empirical analysis of the judgments of the CJEU in the so-called 'important pre-accession case law'.[5] As will be discussed in more detail in Section III, in a large majority of the instances in which the CJEU uses *effet*

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3 Urška Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8(1) European Journal of Legal Studies 18.

4 Michael Potacs, 'Effet utile als Auslegungsgrundsatz' (2009) 44 Europarecht 465, 465. See also Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 European Law Review 199, 199. On teleological interpretation more generally, see Henri de Waele, *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom 2009) 107; Koen Lenaerts and Jose A Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 Columbia Journal of European Law 3, 34-37.

5 'Judgments from the Historic Case-Law in the Languages of the 2004, 2007 and 2013 Accession Countries' (CJEU) <https://curia.europa.eu/jcms/jcms/Jo2_14955/en/> accessed 14 April 2020.

utile reasoning in these judgments, it in fact does so in an apagogic rather than an ostensive manner.

Subsequently, Section IV of the article discusses certain risks presented by indirect arguments. First, in the absence of a clear prior choice between two alternative interpretations, apagogic reasoning can lead to logical fallacies. Second, indirect reasoning allows a court to venture into new interpretations of the law without much need for explanation. Contrary to claims that *effet utile* reasoning tends to lead to a maximalist interpretation of the law, it is rather these characteristics of the apagogic use of *effet utile* reasoning that give such reasoning a potential for the judicial activism of which the CJEU is sometimes accused.

II. DIRECT VERSUS INDIRECT REASONING

There are various typologies of legal reasoning and judicial interpretation. Friedrich Carl von Savigny, for example, distinguished between (i) grammatical, (ii) logical, (iii) historical and (iv) systematic tools of interpretation.[6] In the second half of the 20th century, Ronald Dworkin's distinction of arguments based on (i) rules, (ii) principles and (iii) policies became very influential.[7] In European legal scholarship the distinction developed by Neil MacCormick between arguments from (i) consistency, (ii) coherence and (iii) consequence has been the basis of other categorisations.[8] These different typologies naturally overlap to a large extent. For example, despite MacCormick's disagreements with Dworkin, the similarities between the three types of reasoning that each refers to are

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6 Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol 1 (Veit und Comp 1840) 213-14.

7 Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, 22ff. See also Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 14, 22ff.

8 See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978).

apparent if one compares Dworkin's description of principles and policies[9] with MacCormick's description of arguments from coherence and consequence.[10]

However, these typologies are limited to distinguishing *what* elements can be used to reason or to interpret; they do not differentiate as to *how* these elements are used.[11] What I mean to say is that all of the above-listed elements (such as the wording of a legal text, its history, the system in which it is located and so on) can be used either to support a certain interpretation or to contest it.[12]

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9 'I just spoke of "principles, policies and other sorts of standards." Most often I shall use the term "principle" generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish between principles and policies. (…) I call a "policy" that kind of standards that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (…). I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.' Dworkin, 'The Model of Rules' (n 7) 22-23.

10 'Because consequentialist argument is intrinsically evaluative, and because coherence as explained above involves reflection on the values of the system, the two interact and overlap as will appear; but they are not identical.' MacCormick (n 8) 107.

11 There are nevertheless some scholars that have highlighted the difference between the content and use of an argument. Manuel Atienza, for example, regrets that legal argumentation theory does not distinguish between arguments for and arguments against. Manuel Atienza, *Las razones del derecho: Teorías de la argumentación jurídica* (Universidad Nacional Autónoma de México 2005) 208. See also Douglas Walton, Giovanni Sartor and Fabrizio Macagno, 'Statutory Interpretation as Argumentation' in Giorgio Bongiovanni and others (eds), *Handbook of Legal Reasoning and Argumentation* (Springer 2018) 519, 525.

12 Henrike Jansen seems to express this by stating that the *reductio ad absurdum* 'cannot be characterised by a specific content, but must instead be characterised as an argument *form*'. Henrike Jansen, 'Refuting a Standpoint by Appealing to its Outcomes: *Reductio Ad Absurdum vs.* Arguments from Consequences' (2007) 27 Informal Logic 249, 249 (emphasis in original).

The most straightforward manner of reasoning is using an argument to support a certain interpretation (or position). This can be called direct or ostensive reasoning.[13] To demonstrate this, let us consider some of the examples that Ronald Dworkin uses to distinguish arguments based on rules, principles and policies.[14] A lawyer may refer directly to a rule that a will is invalid unless it is signed by three witnesses to argue that a particular will bearing only two signatures is not valid. Or a lawyer may directly invoke the principle that no one can profit from his own crime to argue that a murderer cannot inherit from the person he murdered. And, in either example, a lawyer who argues that sticking to the relevant rule or principle will induce parties to take due care when making a will or considering murder is using a direct argument from policy.

However, a lawyer can also support a party's position not by arguing for it directly, but rather by attacking the position the opposing party defends or might defend. In such indirect or apagogic[15] reasoning, the lawyer points out why the other party's position is contrary – in Dworkinian terms – to a specific legal rule, principle or policy. A lawyer may, for example, argue that preventing a murderer from inheriting from the person he murdered would be contrary to the principle that punishment should be limited to what the legislature has stipulated. Or the lawyer may argue that validating a will with only two signatures may risk causing parties to be less careful in the future when making a will. A special instance of this approach is when lawyers do not merely criticize the position of an opposing party, but themselves create a hypothetical counterargument to their own position. In those cases, rather

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13 This distinction is already present in the work of Immanuel Kant. Immanuel Kant, *Kritik der reinen Vernunft* (Johann Friedrich Hartknoch 1781) 789.

14 Dworkin, 'The Model of Rules' (n 7) 22ff. See also Dworkin, *Taking Rights Seriously* (n 7) 22ff.

15 From the Greek ἀπαγωγή (to lead away). This type of reasoning is already discussed by Aristotle. Aristotle, *Analytica Priora* (first published c 350 BC, Hugh Tredennick trs, Harvard University Press 1962) book I, 29.

than providing reasons to support a certain position, the lawyer points to a fictitious opposite position and demonstrates how absurd that position is.

While ostensive arguments are based on *modus ponens* reasoning, apagogic arguments depend on the *modus tollens*. In the case of *modus ponens*, the antecedent is confirmed and therefore the conclusion follows (formally $P \rightarrow Q, P \vdash Q$).[16] The classical example of this is: All humans are mortal; Socrates is a human; therefore, Socrates is mortal. In *modus tollens*, the consequent is denied and therefore the antecedent must be denied as well (formally $P \rightarrow Q, \neg Q \vdash \neg P$). [17] An example could be: All gods are immortal; Socrates is not immortal; therefore, Socrates is not a god. Both forms of reasoning are valid syllogisms.[18]

The fact that, in apagogic reasoning, the consequent is denied seems to have led some authors to assimilate reductions to the absurd to consequentialist or pragmatic arguments.[19] Other authors argue that it is an example of

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16 In other words: *P* implies *Q; P* is true; therefore, *Q* must also be true.

17 In other words: *P* implies *Q*; *Q* is false (not true); therefore, *P* must also be false (not true).

18 These are short versions of such argumentations. Ostensive reasoning based on *modus ponens* can involve various steps, for example: All animals are mortal; humans are animals; Socrates is a human; therefore, Socrates is mortal. The same is true for apagogic reasoning, which in that case can take the form of a slippery slope argument. See Candice Shelby, 'Reductio Ad Absurdum and Slippery Slope Arguments: Two Sides of the Same Coin?' (2010) 1 Annales Philosophici 77; Douglas Walton, 'The Basic Slippery Slope Argument' (2015) 35 Informal Logic 273, 291.

19 See Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 219; Frederik Peeraer, *Juridisch Argumenteren* (Gompel&Scavina 2019) 212. Joxerramon Bengoetxea also discusses apagogic reasoning under the heading of functional, teleological and consequentialist arguments, although he also sees it being used in systemic contexts. Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford University Press 1993). Similarly, Thomas Bustamante considers it to be a type of pragmatic argument, but admits links with systematic arguments, i.e. arguments from principles. Thomas Bustamante, 'On the Argumentum Ad Absurdum in Statutory Interpretation: Its Uses and

systematic argumentation, presumably because it uses a logic of inference.[20] I do not think either of these categorisations is correct. As pointed out above, the categories of consequentialist and systematic arguments only make sense if one looks at the content of the argumentation. The distinction between direct and indirect arguments cuts across any categorisation based on the content of an argument, since it looks at the way an argument is used. It may well be that certain types of arguments are more suitable for indirect reasoning than others. For example, all the examples of consequentialist arguments that MacCormick discusses are indirect forms of argument.[21] This may be because such arguments usually require balancing and therefore lend themselves more to indirect reasoning. But, as this article aims to show, that does not mean that the distinction between direct and indirect reasoning can simply be ignored. In the remaining sections, I will indeed point out how important indirect arguments are in legal reasoning and why this matters.

III. THE IMPORTANCE OF APAGOGIC REASONING: THE EXAMPLE OF *EFFET UTILE*

The importance of the distinction between ostensive and apagogic reasoning becomes apparent when looking at the use of the *effet utile* argumentation by the CJEU.

Normative Significance' in Christian Dahlman and Eveline Feteris (eds) *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer 2013) 21.

20 See Lenaerts and Gutierrez-Fons (n 4) 17. For a brief discussion of this categorisation, see also Harm Kloosterhuis, 'Ad Absurdum Arguments in Legal Decisions' in Josep Aguiló-Regla (ed), *Logic, Argumentation and Interpretation: Proceedings of the 22nd IVR World Congress Granada 2005*, vol 5 (Franz Steiner 2007) 68, 71. Ulrich Klug already pointed out that both systematic and teleological arguments can be used apagogically. *Juristische Logik* (Springer 1951) 142-43.

21 MacCormick (n 8). 129-51.

1. The concept of effet utile

The concept of *effet utile* needs little introduction to scholars of European Union (EU) law. The CJEU often uses the term '*effet utile*' explicitly in its judgments, but sometimes follows the same logic using other terms, such as 'effectiveness' ('*efficacité*' in the original French).[22] *Effet utile* reasoning is often viewed as a form of reasoning from policy (or pragmatic or teleological reasoning).[23] Other scholars, including the current president of the CJEU (writing in a personal capacity), have pointed out that *effet utile* reasoning can also be viewed as a form of systematic interpretation.[24] Regardless of how one wants to categorise it, however, *effet utile* reasoning can take both a direct and an indirect form.

An example of ostensive use of the *effet utile* argument can be identified in the judgment in *CIA Security*, where the CJEU ruled that, although directives cannot have horizontal direct effect, national courts must decline to apply a national technical regulation in a horizontal dispute if that regulation was not notified to the Commission as required by Directive 83/189.[25] To come to this conclusion, the Court held that:

> (…) it is undisputed that the aim of the directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify

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22 See e.g. Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 2, 13; C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* EU:C:1996:172, para 48. For a discussion of other terms, see Mayr (n 1) 8; Šadl (n 3) 26.

23 See Roger-Michel Chevallier, 'Methods and Reasoning of the European Court in its Interpretation of Community Law' (1965) 2 Common Market Law Review 21, 32; Tridimas (n 4) 208; Mariele Dederichs, *Die Methodik des EUGH* (Nomos 2003) 27; Potacs (n 4) 469; Mayr (n 1) 9; Lenaerts and Gutierrez-Fons (n 4) 32.

24 See Lenaerts and Gutierrez-Fons (n 4) 17.

25 *CIA Security* (n 22).

> constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.[26]

In other words: the Court's interpretation of the effect of the directive was aimed at *giving greater* effectiveness (or *effet utile*) to Community control, which was one of the objectives of the directive.

In many other cases, however, the formulation is apagogic. In those circumstances, the Court will reject a certain interpretation because it would do away with the *effet utile* of a norm of EU law. This is apparent, for example, in *van Duyn*, where the Court established the (vertical) direct effect of directives.[27] To do so, the Court reasoned:

> It would be incompatible with the binding effect attributed to a directive by Article 189 [of the EEC Treaty] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it in to consideration as an element of Community law.[28]

In other words: the Court's interpretation of the effect of the directives was aimed at *avoiding lower* effectiveness (or *effet utile*) of the obligations included in the directive. But the formulation can also be stronger, avoiding not merely *lower* effectiveness, but even a *complete lack* of effectiveness. This is indeed the approach famously used by the Court in *Van Gend en Loos*, when it established the principle of direct effect for the first time.[29] To do so, the Court argued:

> A restriction of the guarantees against an infringement of Article 12 [of the EEC Treaty] by Member States to the [infringement] procedures under

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26 Ibid para 48.

27 Case 41/74 *Yvonne van Duyn v Home Office* EU:C:1974:133.

28 Ibid para 12.

29 *Van Gend en Loos* (n 22).

> Article 169 and 170 [of the EEC Treaty] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty.[30]

Also in other cases, the Court used the specter of an ineffective European law to argue for a more effective interpretation of the EEC Treaty rules. In *Bosman*, for example, the Court established that professional footballers benefit from the free movement of workers and that football associations therefore could not restrict the number of players of a different EU nationality allowed to compete in their national leagues.[31] In its judgment, the Court explained that

> (…) the nationality clauses cannot be deemed to be in accordance with Article 48 of the [EEC] Treaty, otherwise that article would be deprived of its practical effect and the fundamental right of free access to employment which the [EEC] Treaty confers individually on each worker in the Community rendered nugatory (…).[32]

The above examples suggest that *effet utile* reasoning can be used in both a direct and an indirect manner. The next question, then, is whether the CJEU uses *effet utile* reasoning more often in an ostensive or an apagogic manner.

2. Empirical Analysis

To answer this question, one could review the case law of the CJEU since its inception in a systematic manner.[33] However, the volume of judgments and other decisions adopted by the CJEU since it was founded as the Court

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30 Ibid 13.

31 Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463.

32 Ibid para 129.

33 Dederichs has done so, but only for the year 1999. The four examples of *effet utile* reasoning she identified in the case law of the CJEU of that year are all apagogic. Dederichs (n 23) 81-82.

of Justice of the European Coal and Steel Communities in 1952 is very significant, running into the hundreds of thousands of pages. A systematic review of this case law could in practice only be undertaken in an automated manner. Such an approach is problematic for a variety of reasons. First, there are obstacles to making the case law of the Court machine-readable. In particular, older judgments are only available in print form (in the European Court Reports) or scanned copies uploaded to the website of the CJEU, which limits the quality and readability of the text. A striking example of this can be seen in the judgment in *Van Gend en Loos*: on page 25 of the French-language European Court Reports (*Receuil de la Jurisprudence de la Cour*) of 1963, the word '*inefficacité*' is split over two lines ('*ineffi-*' and '*cacité*') and therefore is not picked up by the search engine on the curia website.[34]

Second, as is apparent from the examples discussed in this article, there is not one single formula that the Court employs when referring to the effectiveness of EU law. Different words are used by the Court to express *effect utile* reasoning and it would be difficult to come up with an exhaustive list of trigger words to allow automatic identification of relevant judgments. Finally, this problem is even more acute in respect of ostensive and apagogic reasoning. Indeed, the distinction between direct and indirect reasoning does not depend on the use of certain words but rather on whether an argument is used to support a certain interpretation or to contest it. Again, this would be a difficult task to automate.

I have therefore opted to base my research on a sample of CJEU case law. This sample comprises the 47 CJEU judgments in the so-called 'important pre-accession case law' up to the year 2000.[35] This collection consists of EU judicial decisions selected by the European Commission and the CJEU for translation into the official languages of the countries who acceded to the

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[34] This probably explains why it was not included in the selection used by Šadl (n 3). For more on this, see n 44.

[35] 'Judgments from the Historic Case-Law in the Languages of the 2004, 2007 and 2013 Accession Countries' (n 5).

EU in 2004. The first batch that was translated consisted of 57 decisions from the period 1963–2000, 47 of which were judgments of the CJEU (the batch also included three opinions of the CJEU and seven judgments of the Court of First Instance). [36]

This selection of judgments is, of course, only a snapshot of the Court's jurisprudence. It spans case law from only four of the now almost seven decades of the Court's operation.[37] It is also not a 'neutral compilation' but rather an attempt by the CJEU 'to (self-)define its legal order.'[38] This also means that certain subject matters are overrepresented in the selection while others are underrepresented.[39] Furthermore, it is a selection that contains some of the foundational cases of EU law.[40] However, because of the importance of the *effet utile* figure in EU law, this also likely means that this figure is more present in these judgments than in the case law overall. The selection therefore is not random but purposive for the analysis of the use of *effet utile* reasoning by the Court.[41]

By reviewing each of these 47 CJEU judgments, I determined which ones contain *effet utile* reasoning. This assessment is based on the French language text, French being the working language of the Court and therefore the source of the translations available in other languages. I have only looked at

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36 An additional batch of 79 cases from the period 2001–04 was translated afterwards. These are not included in my analysis.

37 The first case in the 'important pre-accession case law' is *Van Gend en Loos* (n 22), while the most recent judgment in the first batch that I use here is Case C-376/98 *Germany v Parliament and Council* EU:C:2000:544.

38 Urška Šadl and Mikael Rask Madsen, 'A Selfie from Luxembourg: The Court of Justice's Self-Image and the Fabrication of Pre-Accession Case-Law Dossiers' (2016) 22 Columbia Journal of European Law 327, 328.

39 Ibid 337.

40 '[A] great majority of selected cases (eighty-seven percent) are among the top ten percent of most cited cases in the full network of 9,581 cases [as of 2013], and twenty-nine percent of selected cases are among the top one percent of most cited cases in the full network'. Ibid 339–40.

41 On purposive samples, see Robert M Lawless, Jennifer K Robbennolt and Thomas S Ulen, *Empirical Methods in Law* (Aspen 2010) 149.

the Court's own reasoning in the case and not the description of the arguments of the parties in the case.[42] While I have taken into account the use of certain keywords associated with *effet utile* reasoning (in particular '*effet utile*', '*utilité*', '*(pleine) efficacité*' and '*(plein) effet*'), I have also considered the context in which these words are used to determine whether they truly form part of the reasoning of the Court. I have therefore not counted instances where the word '*effet*', for example, is used in other contexts in these judgments.[43] This manual coding of the sample uncovered 21 judgments in which *effet utile* reasoning is used, which are listed in the Appendix together with a brief extract of the relevant wording in the judgment. This selection largely corresponds with the judgments identified by Urška Šadl in a 2015 article, which she categorized as 'historic *effet utile* cases'.[44]

Next, I determined in which of these instances *effet utile* is used in a direct manner and in which instances it is used in an indirect manner. This required an assessment of the relevant wording within the context of the broader reasoning. It is not easy to formulate strict rules in this respect. However,

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42 So in the older case law I ignored the part of the judgment which is entitled '*En fait*' in the French version and only considered the '*En droit*' part.

43 For example, in *Krombach*, the Court uses this word in the expression '*[a] cet effet, (…)*', which has nothing to do with *effet utile* reasoning. Case C-7/98 *Dieter Krombach v André Bamberski.* EU:C:2000:164 para 25.

44 See Šadl (n 3). I am grateful to Urška Šadl for discussing her methodology with me. My list differs from hers in two respects. First, I have not included the judgment in *Cassis de Dijon*, as the relevant reasoning there merely concerns the fact that Member States can restrict free movement 'in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision (…)', which does not seem to rely on *effet utile*. Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 para 8. Second, I included the judgment in *Van Gend en Loos* because it bases the principle of direct effect on 'the risk that recourse to [infringement proceedings] would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty'. *Van Gend en Loos* (n 22) 13. For the likely reason why this judgment was not included in Šadl's list, see n 39 and accompanying text.

apagogic reasoning will often involve the use of words with negative connotations, including explicit negations ('*in-efficacité*', '*in-compatible*', '*nier*', '*éviter*') and words that indicating weakening ('*affaibli*', '*amoindri*', '*porter atteinte*'). Ostensive reasoning, on the other hand, generally uses more positive wording ('*assurer*', '*renforcée*'). The last column of the table in the Appendix shows whether I considered an instance of *effet utile* reasoning to be ostensive or apagogic.

As is apparent from the Appendix, in virtually all instances where *effet utile* reasoning is used in the 'important pre-accession case law', it is used in an apagogic manner. This is undoubtedly the case for 17 out of the 21 judgments. There are only a few (possible) exceptions. The first are *Von Colson* and *Johnston*, which concern the issue that 'Member States must take measures which are sufficiently effective to achieve the aim of [a] directive'.[45] However, the key point in these cases was, of course, what this obligation entails. In *Johnston*, to answer this question, the Court reasoned apagogically: 'If every provision of Community law were held to be subject to a general proviso, regardless of the specific requirements laid down by the provision of the EEC Treaty, this might impair the binding nature of Community law and its uniform application.'[46] In *Von Colson*, on the other hand, the Court simply concluded that the wording of the directive in question did not prescribe a specific sanction.[47] The second possible exception is the *Chernobyl* judgment, in which the CJEU discusses the standing of the European Parliament before the Court. While it refers there to 'the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied',[48] it points out that there is a procedural gap in the treaties (an absurdity), which it overcomes by giving the Parliament

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45 Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para 17. See also Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, para 15, which contains similar wording.

46 *Johnston* (n 45) para 26.

47 *Von Colson* (n 45) para 18.

48 Case 70/88 *Parliament v Council* EU:C:1991:373, para 25.

standing. The last possible exception is the *CIA Security* judgment, already discussed above, which is, in my view, the only real ostensive use of the *effet utile* concept. Interestingly, this is a fairly controversial judgment, in which the CJEU introduced the theory of the incidental direct effect of directives in EU law.[49] The analysis of the 'important pre-accession case law' therefore indicates that the CJEU mostly uses *effet utile* in an apagogic manner.

3. Conclusion

Effet utile reasoning can be both direct (ostensive) and indirect (apagogic). To determine whether the CJEU uses *effet utile* more often directly or indirectly, it is worth considering the so-called 'important pre-accession case law', as it consists of some of the foundational cases of EU law and contains many instances of *effet utile* reasoning. An empirical analysis of the judgments in this selection of the case law shows that the Court, in almost all instances, used *effet utile* reasoning in an apagogic sense. Indeed, this is undoubtedly the case in 17 out of the 21 judgments. In only one instance is the Court's *effet utile* reasoning clearly ostensive, whereas in three other cases it could possibly be characterized as such. Based on this sample, it therefore seems that the CJEU uses *effet utile* reasoning mostly in an apagogic manner.

IV. THE RISKS OF APAGOGIC ARGUMENTS

Does it matter whether arguments are used in a direct or indirect way? I believe it does and, in the remainder of this paper, I will discuss some characteristics of apagogic arguments that may explain why *effet utile* is usually formulated in this negative manner and how this elucidates its role in the case law of the CJEU. In Section IV.1, I will point out that apagogic reasoning can lead to fallacies, in particular in the case of non-binary forms of reasoning such as legal argumentation. Section IV.2 will then point to the

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[49] See Anthony Arnull, 'Editorial: The Incidental Effect of Directives' (1999) 24 European Law Review 1. This theory has since been somewhat narrowed in the judgment. See Case C-122/17 *Smith v Meade and Others* EU:C:2018:631.

related issue that indirect reasoning reveals less about the logic behind an interpretation of the law than does direct reasoning. Section IV.3, finally, will link these conclusions to the debate about the alleged activism of the CJEU.

1. Apagogic Reasoning Can Lead to Fallacies

Apagogic argumentation can be a valid form of reasoning. Indeed, the reduction to the absurd has been used since antiquity to prove mathematical propositions. The most famous example is the proof of the irrationality of √2 (which is the same as the proof of the incommensurability of the side and the diagonal of a square), sometimes attributed to Euclid.[50] This proof starts from the assumption that √2 is a rational number (i.e. it can be expressed as a fraction of two integers) and shows that such an assumption leads to a contradiction. Therefore √2 must be an irrational number.[51]

However, such reasoning is only valid if the law of the excluded middle applies.[52] In other words, it applies to binary situations (i.e. when the falsity

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[50] It was in fact contained in early editions of Euclid's *Elements* as proposition 117 of book X, but is now considered an interpolation and therefore no longer present in modern editions. See Zoran Lučić, 'Irrationality of the Square Root of 2: The Early Pythagorean Proof, Theodorus's and Theaetetus's Generalizations' (2015) 37 The Mathematical Intelligencer 26, 27.

[51] In more detail: Assume that √2 is a rational number (i.e. it can be expressed as x/y, where x and y are integers with no common factors, since otherwise common factors can be eliminated). Following the theorem of Pythagoras, $x^2/y^2 = 2$, which can be rewritten as $x^2 = 2y^2$. This implies that x is even (only even integers have even squares) and hence a multiple of 2. In other words, x= 2z. If we insert this in the formula in step 2, we get $(2z)^2 = 2y^2$, which can be rewritten as $4z^2 = 2y^2$ or as $2z^2 = y^2$. This implies that y is even (only even integers have even squares) and hence a multiple of 2. x and y are therefore both multiples of 2 which contradicts the assumption that x and y do not have common factors.

[52] See Jean-Louis Gardies, *Le raisonnement par l'absurde* (Presses universitaires de France 1991) 183. See also Douglas Walton, *The New Dialectic: Conversational Contexts of Argument* (University of Toronto Press 1998) 160: 'Negative argumentation from consequences is very closely related to a form of argument well known in traditional logic – the dilemma'.

(absurdity) of the proposition implies that its negation (opposite) is true). On that condition, it is valid based on the *modus tollens* syllogism (formally: $P \rightarrow Q, \neg Q \vdash \neg P$).[53] This is why such reasoning works in mathematics. Since a number is either rational or irrational, the absurd conclusions drawn from the assumption that √2 is a rational number necessarily lead to the conclusion that √2 must be an irrational number.

However, in non-binary situations, the use of indirect reasoning is more problematic. If we can demonstrate that a certain interpretation of the law leads to absurd or unacceptable conclusions, that should not necessarily lead us to succumb to the opposite interpretation. A third (and possibly fourth, fifth, etc) interpretation may be available that is not excluded by the interpretation leading to the absurd or unacceptable conclusion. If such alternative interpretations have not first been rejected based on other arguments, then relying on apagogic reasoning risks amounting to the fallacy of the false dilemma (or false dichotomy).

An obvious example of this is *Van Gend en Loos*, the first judgment in the 'important pre-accession case law' and, also, the earliest example of *effet utile* reasoning in that selection of cases. The Court suggests that the only alternative to the direct effect of EU law is for the Commission or other Member States to bring infringement proceedings for breaches of EU law (which, according to the Court, would be 'ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the [EEC] Treaty').[54] In reality, however, several other alternatives are available.

Another solution could have been to let national law determine the effect of EU law. This is somewhat of an intermediate solution, as it would have resulted in a differential effect of EU law depending on the Member State. In Member States with a monistic tradition, national law would imply that

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53 See Kloosterhuis (n 20) 69; Peeraer (n 19) 213.

54 *Van Gend en Loos* (n 22) 13.

EEC Treaty articles could be directly applicable, whereas in countries with a dualistic tradition, this would not be the case (and resort to infringement proceedings would indeed be the only enforcement tool available). This possibility was discussed extensively by some of the intervening Member States (e.g. the Netherlands and Belgium)[55] and also by Advocate General Roemer in his opinion in this case.[56]

Another alternative could have been to give direct effect/applicability only to regulations (as foreseen in Article 189 of the EEC Treaty) and not to treaty articles or other legislation. In the instant case, this would have implied that no direct effect could be granted to Article 12 of the EEC Treaty, which barred Member States from increasing custom duties. But this interpretation would not result in the removal of 'all direct legal protection of the individual rights of [Member State] nationals', as the Court states.[57] Such rights could still exist, though they would be dependent on the promulgation of relevant regulations.

A fifth option, finally, could have been to interpret the standing requirements for individuals to bring cases to the CJEU more liberally, so that it would be easier for individuals to challenge national rules that were contrary to the EEC Treaty before the CJEU, rather than before national courts. This solution must have been contemplated by the Court at the time of the *Van Gend en Loos* judgment, although there is no trace of it in the judgment itself. Indeed, the *Plaumann* case, in which the Court ultimately decided to restrict standing for individuals to bring direct actions, was pending before the Court at the time of the *Van Gend en Loos* judgment. Though *Plaumann* was decided a year after *Van Gend en Loos*, the request for a preliminary ruling in *Plaumann* was actually sent to the Court before

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55 *Van Gend en Loos* (n 22) 6-8.

56 Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 16, Opinion of AG Roemer, 19-24.

57 *Van Gend en Loos* (n 22) 13.

the one for *Van Gend and Loos*.[58] Admittedly, *Plaumann* concerned direct actions against acts of the institutions, while *Van Gend and Loos* concerned non-compliance by Member States with EU law. Still, the question of the standing of individuals could have had an impact in both cases.

The above discussion shows that several other interpretations were available beyond the two extremes which the CJEU highlighted. If such alternatives had been considered, it would not have been possible to deduce from the limitations of infringement proceedings that direct effect needed to be granted to Treaty articles under the conditions mentioned in *Van Gend en Loos*.

In theory, the fallacy of the false dilemma can also arise in the case of ostensive reasoning. Indeed, all indirect arguments can be rewritten as direct arguments, just like *modus tollens* reasoning can be rewritten as *modus ponens* reasoning.[59] Instead of arguing that a certain interpretation of European law would result in the *ineffectiveness* of European law, the Court could argue that another interpretation would lead to the *effectiveness* of European law. Instead of arguing that a certain interpretation would weaken the effectiveness of European law, the Court could argue that another interpretation would increase the effectiveness of European law.

There is, however, a difference between the two formulations. When it is used in an ostensive manner, *effet utile* reasoning seems to allow the Court to add effectiveness to European law which it did not enjoy before. In the case of apagogic reasoning, on the other hand, the Court seems to merely avoid that European law becomes ineffective or less effective. The latter not only appears less intrusive, but it also appears to be the essential role of the

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58 Case 25/62 *Plaumann v Commission* [1963] ECR 197.

59 See Jansen (n 12) 257; Peeraer (n 19) 100.

Court, which is now enshrined as 'ensur[ing] that in the interpretation and application of the Treaties the law is observed.'[60]

One could say that, in the case of apagogic reasoning, the false dilemma can be combined with the straw man argument: rather than arguing for one interpretation of the rules, the Court argues against another interpretation of the rules that is wrongly believed to be (or presented as) the only alternative. In a discussion of the case law on the supremacy of EU law, CJEU Judge Mancini has referred to the specter that European law would be ineffective or less effective as the 'or else' argument: 'the alternative to the supremacy clause would have been a rapid erosion of the Community; and this was a possibility that nobody really envisaged, not even the most intransigent custodians of national sovereignty.'[61] Indirect arguments in some way turn a 'Manichaeistic worldview into a dogma'.[62] It is as if the Court states: 'either you are with us or your against us'; 'either you accept this conclusion or the sky will collapse'. This mechanism makes the use of apagogic reasoning all the more effective, but also all the more dangerous.

This is not to say that creating contrasting solutions may not be a useful tool in some circumstances to highlight certain aspects of the question that needs elucidation. This is indeed why apagogic reasoning is so attractive in mathematics. Furthermore, when it has first been established (based on other arguments) that there are only two possible interpretations available, there is obviously no *false* dilemma and indirect reasoning can be used to reject one of the two interpretations and to accept the other. However, when there is no clear dichotomy and, instead, multiple interpretations are possible,

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60 Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 19.

61 Giuseppe Federico Mancini, 'The Making of a Constitution for Europe' in Giuseppe Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart 2000) 1, 5.

62 de Waele (n 4) 168.

apagogic reasoning may come at the cost of nuance – something which may not be very relevant in mathematics, but is essential in legal reasoning.

2. Apagogic Reasoning Does Not Reveal the Reasons for Decisions

The risk that apagogic reasoning may lead to a false dilemma is further compounded by a peculiar characteristic of such reasoning that was noted by German philosopher Immanuel Kant. While Kant considered both ostensive and apagogic reasoning to be valid ways for 'pure reason' to reach a certain conclusion, he nevertheless considered the former superior to the latter. This superiority stems from the fact that ostensive reasoning provides insight into the sources of certainty, while apagogic reasoning does not.[63] This is apparent from the examples given earlier. In the example of the *modus tollens* (e.g. all gods are immortal; Socrates is not immortal; therefore, Socrates is not a god), we validly conclude that Socrates is not a god, but we know neither why he is not a god nor what other kind of being he may be. In the case of the *modus ponens* (e.g. all humans are mortal; Socrates is a human; therefore, Socrates is mortal), on the other hand, the reasoning also reveals what Socrates is (namely, a human) and, therefore, the explanation as to why he is mortal. In *modus ponens* reasoning, we come to a conclusion (Q) based on a fact (P), whereas, in *modus tollens* reasoning, the conclusion ($\neg P$) is based on a non-fact ($\neg Q$). The *modus tollens* gives us just as much certainty that the conclusion is true but does not contain facts which explain it.

From the Kantian perspective of pure reason, this feature of apagogic reasoning may be a disadvantage. But in the world of practical adjudication, the dissimulating aspect of apagogic reasoning may make it an attractive tool in some circumstances. One such circumstance was highlighted by the current president of the CJEU, writing in his personal capacity:

> [T]he ECJ operates under the principle of collegiality. In light of the latter principle, reaching an outcome based on consensus is of paramount

[63] See Kant (n 13) 789-91.

> importance for the daily inner workings of the ECJ. Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed. As consensus-building requires bringing on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential.[64]

Apagogic reasoning can be a tool to reduce reasoning to the very essential. *Van Gend en Loos* again provides an iconic example of this. Historical research suggests that this was a 4:3 ruling by the CJEU and that there was a tactical decision made by the Court not to discuss the doctrine of primacy in this judgment, even though it was closely related to the issue of direct effect.[65]

Of (perhaps less controversial) interest is the example which Koen Lenaerts himself gives of the approach discussed above: the case of *Ruiz Zambrano*, in which the CJEU ruled that, even in the absence of a cross-border element, EU citizenship precludes national measures that deprive EU citizens of the enjoyment of the substance of their citizenship rights.[66] Despite – or, in light of what is stated above, because of – the importance of the Court's ruling in this case, the reasoning in the judgment is very brief, covering only six paragraphs, concluding with a reduction to absurdity:

> It must be assumed that such a refusal [to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources

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64 Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart 2013) 13, 46. See also Tridimas (n 4) 210 and de Waele (n 4) 371-72.

65 See Morten Rasmussen, 'Revolutionizing European Law: A History of the Van Gend en Loos Judgment' (2014) 12 International Journal of Constitutional Law 136, 154.

66 Case C-34/09 *Ruiz Zambrano* EU:C:2011:124.

> to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.[67]

The use of this apagogic argument allowed the Court to stop there, without explaining in more detail the scope of EU citizenship – something which it needed to clarify in subsequent judgments. The Court could simply say "this will not stand" and leave it for another day to decide (or indeed agree *in camera*) what *will* stand. It was therefore only in subsequent judgments that further clarifications were provided as to what the notion of EU citizenship entails, following what Lenaerts calls a 'stone-by-stone approach'.[68]

3. The Relevance for the Debate on the Alleged Judicial Activism of the CJEU

The previous observations are relevant to the debate on the perceived activist attitude of the CJEU. To be clear, this paper does not purport to assess the merits of the claims that the CJEU is activist or not. I merely want to demonstrate how the fact that *effet utile* reasoning is used in an apagogic manner bears on the role this kind of reasoning can play for a court, including enabling more interventionist rulings.

A number of authors have claimed that the CJEU is an activist court or, at least, more activist than comparable courts. This debate was in many ways instigated by Hjalte Rasmussen's doctoral dissertation, which claimed that the case law of the CJEU in the 1960s and early 1970s was characterized by a 'broadened and intensified judicial incursion into Community policymaking' and that this had provoked a backlash amongst Member States.[69] Joseph Weiler has similarly argued that the CJEU only respects the boundary between law and politics to the extent that it itself 'draws the line

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67 Ibid para 44.

68 Lenaerts (n 64) 50.

69 Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff 1986) 377.

that divides "law" from "politics" [and then] does indeed stand firmly behind it'.[70]

On the other hand, other authors claim either that the CJEU is not activist or that any (perception of) activism is the consequence of the particular role the CJEU plays in the EU legal order. These authors point out, first of all, that the European treaties gave the court the authority to interpret the provisions of the European treaties, which were drafted in broad terms and therefore required more interpretation than is customary in national orders with established legal traditions.[71] These circumstances made the CJEU, from the beginning, a 'trustee court …, operat[ing] in an unusually permissive strategic environment'.[72] Furthermore, in the absence of preparatory texts, the general objectives set forth by the authors in the opening articles of the Treaty establishing the European Coal and Steel Community and the EEC Treaty seem to have taken the place usually taken up by historical interpretation in continental legal orders.[73] This approach was articulated in Pierre Pescatore's famous statement that teleological reasoning is a method of interpretation that is 'particularly suited to the characteristics of the treaties instituting the Communities'.[74] A purpose-

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70 Joseph Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges* (Hart 2013) 235, 246.

71 See Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 German Law Journal 537, 558; Mayr (n 1) 6; Lenaerts and Gutierrez-Fons (n 4) 31-32. For an earlier formulation of this argument, see also Bengoetxea (n 19) 99ff.

72 Alex Stone Sweet, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (OUP 2011) 121, 127.

73 See Chevallier (n 23) 30-32. See also Lionel Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell 2001) 330-334; Lenaerts and Gutierrez-Fons (n 4) 23.

74 '*[I]l s'agit d'une méthode particulièrement appropriée aux caractéristiques propres des traités instituant les Communautés*'. Pierre Pescatore, 'Les Objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice' in *Miscellanea WJ Ganshof van der Meersch:*

driven and necessarily dynamic interpretation was, in this reading, inherent in EU law.[75]

As already indicated, it is not my intention in this paper to take a position in this debate. However, regardless of whether one believes that the CJEU exercises sufficient judicial restraint, *effet utile* reasoning is often perceived as a tool for activism. It is then stated that, through the principle of *effet utile*, a court can give the *maximum* effect to legal provisions.[76] Conway makes this point succinctly, stating: 'It goes almost without saying that the EU as a legal and political system should be effective, but that does not mean that the ECJ can justifiably innovate whenever it considers an innovation would be more effective.'[77]

The same point is made by Michael Potacs, who has made a distinction between *effet utile* in the narrow sense, which aims at avoiding the lack of meaning of a legal provision, and *effet utile* in the broader sense, which aims at giving the widest possible effect to a provision.[78] This distinction is therefore quite similar to how I have distinguished between indirect and direct use of the *effet utile* argument. Potacs considers that only *effet utile* in the broader sense would result in a tool for activism. According to him, the CJEU uses *effet utile* mostly in this broader sense, thereby allowing it to develop the law in an activist manner. The limited empirical analysis above, on the contrary, suggests that the CJEU usually uses *effet utile* in an indirect manner. Therefore, it seems doubtful that the CJEU uses *effet utile* in the maximalist manner Potacs proposes. Even in the 'important pre-accession

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Studia ab discipulis amicisque in honorem egregii professoris edita, vol 2 (Établissements Emile Bruylant 1972) 325, 328 (emphasis in original).

75 See Tridimas (n 4) 205; Itzcovich (n 71) 558; Mayr (n 1) 6; Lenaerts and Gutierrez-Fons (n 4) 31-32.

76 Jolyon Maughan, 'Legislative Efficacy in the UK and EC' [1995] (4) Inter Alia: University of Durham Student Law Journal 8, 8.

77 Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 117.

78 See Potacs (n 4) 473.

case law', a snapshot 'highlighting [the CJEU's] own centrality in the formation of the EU legal order',[79] the CJEU often limits itself to an apagogic approach. If Potacs' views on *effet utile* in its narrow and broad senses are followed, the empirical analysis above would suggest that the CJEU is not activist at all.

However, I think such a conclusion would be premature. Indeed, the fact (discussed in the previous two sections) that apagogic reasoning leads to fallacies and does not reveal the reasons for decisions means that it gives the Court extra leeway to come up with its own interpretation of the law. This may allow the Court to come up with interpretations that go significantly beyond previous case law, potentially in an integrationist manner (which is often equated with judicial activism).

To what extent this potential is realized depends on a number of factors. For instance, it may depend on whether the indirect use of the *effet utile* argument is the principal, or indeed the only, basis for the Court's judgment or, on the contrary, whether it is merely an additional, or even supererogatory, argument. This is a question which is beyond the scope of this paper but could clearly be the subject of further research. While there is no easy way to determine the importance of a specific kind of argument in an individual judgment, such further research could at least establish whether apagogic *effet utile* arguments are the only arguments used by CJEU in specific rulings or whether they are used alongside other arguments. At the very least, this section of this paper constitutes a warning. Namely, if apagogic reasoning is the only basis for a court to support one interpretation of the law rather than another, then this should raise some suspicions. Indeed, by focusing only on the problems connected with a rejected interpretation of the law, the court may obscure the fact that it is venturing into uncharted territory by upholding its own alternative interpretation.

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[79] Šadl and Rask Madsen (n 38) 353–54.

V. Conclusion

This paper has aimed to show that legal reasoning cannot merely be distinguished by its content (e.g. whether it refers to a legal rule, a principle or a policy, to use the Dworkinian terminology), but also by its direct (ostensive) or indirect (apagogic) use of that content (i.e. whether it is used to defend or contest a position or interpretation). Indirect argumentation can even start from a hypothetical alternative rather than a position which a counterparty actually defends. An empirical analysis was conducted to determine whether *effet utile* reasoning by the CJEU is used mostly in a direct or indirect manner. An assessment of the 'important pre-accession case law' of the CJEU indicates that *effet utile* reasoning by the CJEU is mostly indirect: the Court points out how a certain interpretation of EU law would undermine or reduce its effectiveness and concludes that the opposite interpretation should be followed.

Such apagogic reasoning entails a potential for fallacy if one is not mindful of the risk of false dilemmas. The alternative interpretation that is rejected by the Court through indirect use of the *effet utile* argument may act as a straw man and create the (possibly false) impression that there are no alternatives to the interpretation ultimately supported by the Court. This potential for fallacious reasoning is compounded by the fact that apagogic reasoning creates greater opportunities to obscure the reasons on which conclusions are based.

That *effet utile* reasoning is mostly indirect may appear to counter the claim that the CJEU is using this type of reasoning in a maximalist and activist way. However, the opaqueness of apagogic reasoning and its potential for fallacies also create a potential for activism. This paper has not investigated the role that the indirect use of *effet utile* reasoning has played in the specific judgments considered or in the case law of the CJEU as a whole. It would therefore be inappropriate to conclude that such reasoning is always problematic or even activist. Rather, to assess the soundness of the Court's interpretation of EU law, it is important to determine what other arguments

the CJEU has used to support its interpretations and how central the (indirect) *effet utile* argument has been to the Court's reasoning.

APPENDIX: *EFFET UTILE* IN IMPORTANT PRE-ACCESSION CASE LAW

Case citation	Wording used (French version)	Reasoning
Case 26/62 Van Gend en Loos v Administratie der Belastingen EU:C:1963:1 [1963] ECR 7, 25.	'le recours à ces articles risquerait d'être frappé d'inefficacité'	Apagogic
Joined Cases 56 and 58/64 *Consten and Grundig v Commission of the EEC* EU:C:1966:41 [1966] ECR 433, 499-500	'cette interdiction serait sans effet'; 'pour mettre en échec l'efficacité du droit communautaire des ententes'	Apagogic
Case 2/74 *Reyners v Belgian State* EU:C:1974:68, para 50	'éviter que l'effet utile du traité ne soit déjoué'	Apagogic
Case 41/74 *Van Duyn v Home Office* EU:C:1974:133, para 9	'il serait incompatible avec l'effet contraignant'; 'l'effet utile d'un tel acte se trouverait affaibli'	Apagogic
Case 43/75 *Defrenne v SABENA* EU:C:1976:56, paras 27-37, 64	'contre l'effet direct'; 'l'efficacité de cette disposition ne saurait être affectée'	Apagogic
Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:59, paras 18-24	'nier ... le caractère effectif', 'l'effet utile de cette disposition serait amoindri'; 'obstacle à la pleine efficacité des normes',	Apagogic
Case 44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290, para 14	'qu'elle porterait atteinte à l'unité matérielle et à l'efficacité du droit communautaire'	Apagogic
Case 149/79 *Commission v Belgium* EU:V:1982:195, para 19	'aurait pour effet de porter atteinte à l'unité et à l'efficacité de ce droit'; 'éviter … que l'effet utile et la portée des dispositions du traité ... soient limités'	Apagogic
Case 8/81 *Becker* EU:C:1982:7, paras 23, 29	'incompatible avec le caractère contraignant'; 'l'effet utile d'un tel acte se trouverait affaibli'; 'obligation serait privée de toute efficacité'	Apagogic
Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, para 15	'toutes les mesures nécessaires en vue d'assurer le plein effet de la directive'	Ostensive?
Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, paras 17, 26	'prendre des mesures qui soient suffisamment efficaces pour atteindre l'objet de la directive'; 'risquerait de porter atteinte au caractère contraignant et à l'application uniforme du droit communautaire'	Ostensive? and Apagogic
Case 267/86 *Van Eycke v ASPA* EU:C:1988:427, para 16	'ne pas prendre ou maintenir en vigueur des mesures … susceptibles d'éliminer l'effet utile'	Apagogic

Case citation	Wording used (French version)	Reasoning
Joined Cases 46/87 and 227/88 *Hoechst v Commission* EU:C:1989:337, paras 27, 64	'serait dépourvu d'utilité'; 'incompatible avec l'obligation pour tous les sujets du droit communautaire de reconnaître la pleine efficacité'	Apagogic
Case C-70/88 *Parliament v Council* EU:C:1991:373 paras 20-27	'assurer la pleine application des dispositions des traités'	Ostensive?
Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame* EU:C:1990:257, paras 21-22	'la pleine efficacité du droit communautaire se trouverait … diminuée'; 'l'effet utile serait amoindri'	Apagogic
Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* EU:C:1991:65, para 31	'privé de tout effet utile'	Apagogic
Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* EU:C:1991:428, paras 33, 39	'la pleine efficacité des normes communautaires serait mise en cause'	Apagogic
Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463, para 129	'priver cette disposition de son effet utile'	Apagogic
Joined Cases C-46/93 and C-48/93 *Brasserie du pécheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* EU:C:1996:79, paras 20, 39, 52, 72.	'la pleine efficacité du droit communautaire serait mise en cause'	Apagogic
Case C-194/94 *CIA Security International v Signalson and Securitel* EU:C:1996:172, para 49	'L'efficacité de ce contrôle sera d'autant renforcée'	Ostensive
Case C-67/96 *Albany* EU:C:1999:430, paras 59-69.	'portent atteinte à l'effet utile'	Apagogic