SYSTEMIC INTERPRETATION IN EU PUBLIC PROCUREMENT LAW

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ABSTRACT

The evolution of EU public procurement law has been rapid and expansive. The European Court of Justice has been a central part in building the complex piece of legislation. The aim of the dissertation is to assess whether the jurisprudence of the Court has met the standards which secure the coherence and legal certainty and ultimately the acceptability of its rulings. The aim of the study is also to show how, by using systemic arguments, the Court could help to systematize this particular field of EU law and to improve legal certainty. First, the ontology of EU public procurement law is evaluated, because it is held that the theory of justification of judicial decisions is interlinked to the ontology of law. Here, the model by Wróblewski, dividing the validity of law into systemic, factual and axiological, is utilized. The sources of law of the EU public procurement legislation are also evaluated.

In the study, legal reasoning and interpretation are assessed in the context of the European Court of Justice and the EU public procurement legislation. Using the terminology of MacCormick and Siltala, the approach utilized in the study is based on the Three C’s in Legal Reasoning: from linguistic consistency to the pursuit of principled, analogy-aligned coherence among legal principles and, ultimately, to the value-laden social consequences of law. Going through the academic work on the legal reasoning of the ECJ, it is suggested that there may not be a need for additional directives of preference, affecting the use of different legal arguments. It is also suggested that that numerous approaches to the legal reasoning of the ECJ support the sequential directive of interpretation. Especially in the context of EU public procurement legislation, which is a complex field of procedural legislation with risks of getting mixed with other EU legislation concerning the relationship between public authorities and the market, it is suggested that the essential elements of consistency, coherence and the formal side of legal certainty are hampered if there is an excessive emphasis on teleological or consequential arguments.

The case law of the ECJ in cases concerning the scope of application of public procurement legislation and the requirement to tender out public contracts is evaluated through the normative viewpoint of sequential use of arguments. It is shown how the consistency and coherence of the Court’s reasoning and justification is improved through focusing on the concept of a public contract and its elements such as consideration. Same positive effects are drawn from the conceptual analysis of cooperation between contracting authorities. On the other hand, it is argued that the excessive use of teleological and consequential arguments has had negative effects on the coherence of both the normative field of EU public procurement legislation and the reasoning itself. The excessive use of teleological or consequential arguments has led to the expansion of tendering requirements concerning concession contracts, the use of the procurement legislation to achieving objectives of EU
competition law, the introduction of new objectives such as administrative efficiency, indeterminacy regarding the relationship and the division of tasks between free movement rules of the Treaty and the procurement directives, and the general uncertainty as to what types of arrangements of public authorities are covered by tendering rules.

Through systemic reasoning it is argued that better cooperation with these institutional actors could have been achieved. In addition, the use of systemic arguments has been and could have been even more efficiently used as an essential tool in preventing the useless duplication of reasons and mixing together pieces of legislation which may be loosely connected in terms of their objectives but not in terms of their tasks.
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This dissertation had its beginning in the frustration of an unseasoned lawyer facing tough questions on public procurement legislation. A large portion of the questions posed by people working in contracting authorities or economic operators participating in tendering procedures had ultimately more to do with why a certain rule was as a certain way than what the content of the rule was. The rules in national procurement legislation based on EU directives did not always seem to form a supportive structure or even be facing the same direction. In every new seminar or book or political discussion on procurement legislation there seemed to emerge new objectives to procurement rules: from fiscal frugality to anti-corruption to sustainable development to securing effective competition and free movement within the EU. In digging up what answers I could to these questions, a pattern started to appear: the European Court of Justice had had a part in forming a plethora of the rules applicable in the field of EU public procurement law. The Court had also, as it was revealed to me, been quite keen on referring to a great variety of different goals of public procurement law. I felt an urge to apply myself in studying this phenomenon.

What started as an undertaking of writing a couple of down to earth articles in Finnish legal periodicals on the scope of application of procurement rules, later became a somewhat more theory-oriented attempt to understand and assess how the European Court of Justice justifies its rulings and what consequences this type of justification might have on the coherence of EU public procurement law. This change from relatively short articles to a dissertation covering issues regarding, among others, the ontology of EU law has been surprising and not always easy. There have been many times when I have had a hard time bridging the gap between rules on in-house procurement and the theories of judicial decision-making of Jerzy Wróblewski. I dare to say, however, that the work has been advantageous to me, at least, both in terms of reflection and discovery. It is not often in the everyday work of a lawyer that one gets to really think about the methods of legal interpretation and to find in oneself an opinion or at least an approach to these issues.

Although I have not received any grants for my studies, this work would not have been finished without the indispensable and generous help of many people and institutions.

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1 INTRODUCTION

The legislation on public procurement in the European Union has become one of the most frequently applied within the internal market law. Thousands of public authorities and publicly-owned companies put up complex and time-consuming tendering procedures which are made public and scrutinized in great detail in courts, supervisory and auditing activities as well as in the media. Thousands of companies and other organizations look for information on these procedures, take part in them and wait anxiously at the outcome of these competitive exercises.

The evolution of EU public procurement law has been rapid and expansive. From a relatively short directive, restricted in terms of its scope of application, in 1971 to a vast package of procurement rules with hundreds of lengthy articles in 2014, few areas of EU law have seen as great enlargement as the procurement legislation.

One of the key driving actors in this evolution has been the European Court of Justice. With a large number of cases, the European Court of Justice (ECJ) has not only affected the interpretation and everyday application of the procurement legislation, but in many cases arguably created law which has then retrospectively been implemented in EU Statutes. This practice lends itself to the larger discussion on the role of the European Court of Justice in the development of EU law.

Through hundreds of hours of teaching procurement legislation, a recurrent characteristic of this field of law has emerged to me time and time again from the comments and other feedback from civil servants, lawyers and other administrative personnel faced with the obligation to take in all the information contained in this Behemoth of a law. These comments paint a picture of a vast jungle of rules with little or no directions of a way forward, with strange and indefinable vegetation, with little information as to when and where the vegetation changes into something else and with constant fear of the traveller lost in this jungle regarding the dire consequences of taking the wrong path.\(^1\) This fear is then increased tenfold by the fact that both public authorities and private tenderers are inside the jungle and try to navigate towards the distant voices of one another.

Time and time again the lesson for the teacher of procurement law has been the key importance of systematizing the law: of gaining knowledge on the similarities and differences between different types of fauna, of climbing to a higher ground in order to gain perspective, of the structures of the different paths across that jungle.

It is the understanding of this study that the key player in increasing the size of the jungle of rules has been the European Court of Justice. Through its

\(^1\) See Arrowsmith 2012a, 71-82.
jurisprudence on procurement law the ECJ has added blocks of jungle one after another, in the pursuit of building an ecosystem large and thick enough to contain the movement of the purchasing activities of the public authorities in the Member States. But the pursuit of demolishing obstacles to free movement in the internal market may have led to situation where public authorities do not know where to navigate anymore. The compass that this study is offering is the systemic interpretation of the procurement legislation.

The aim of this study is to look at the reasoning behind the judgments of the ECJ on some key public procurement cases and find out if the case law meets the standards which protect the coherence and legal certainty of the ruling as well as the procurement legislation in general. The focus here is on judgments on the scope of application of the procurement law, an issue which figures very prominently within ECJ case law on procurement as well as the practical application of procurement law in member states. The rules on scope of application are one of the objects of the most interesting changes in the new procurement directives. The issue of the scope of application of procurement law is relevant also because it acts as the interface between procurement legislation and other related areas of EU law such as competition law and state aid law. Rules on the scope of application act also as a revealing viewpoint to the question on how public authorities operate in different ways related to the market. Thus, the legal context (in terms of substantive law), plays a central role.

Sankari has presented some benefits from such a limitation in terms of the field of law:

“...here legal interpretation is analysed in the context of one distinct field of law, which enables a better understanding of the substantive evolution of the law and the Court of Justice’s role in it.”

This limitation would seem to run contrary to the view of some EU scholars interested in legal reasoning of the ECJ is that the fundamental features of legal interpretation are universalisable. According to Conway:

“They way in which a court approaches the identification of the rules and their application does not necessarily change according to the subject matter: otherwise, case law would be a wilderness of interpretative single instances, since it would be always possible to argue that a peculiarity of a case brought it into a category of its own. Such an approach would run counter to the core idea of the rule of law: of open, public rules, the meaning of which is share in essentials by, and predictable to, all reasonable participants in the legal interpretative community. Legal interpretation, as opposed to the content of the law, thus does not generally require a sector-specific process of initiation.”

\[\text{II Sankari. 2013. 84.}\]
\[\text{III Conway. 2012. 5.}\]
The fact that the fundamental features of legal interpretation are universalisable does not – in the view of this study – prevent the observer from taking into account the context of the case at hand. As I will suggest later in this study, the use of different arguments of justification is very much dependent on the context and the facts of each case. If legal interpretation was completely detached from the context of each case, there would be no need for the distinction between easy and hard cases, a key distinction among many academic writings on legal reasoning. On the other hand, the argument in this study is not that the method of legal interpretation is somehow completely unique in public procurement law compared to some other fields of EU law. The argument is, instead, that public procurement law offers a particularly good reference point to the evaluation of legal interpretation. This is because firstly, as Sankari has stated, the context of a particular developing field of law should be taken into consideration in evaluating how the Court of Justice has affected the law. IV Secondly, the context of procurement legislation shows how different models of legal justification operate within a field of law ridden with complexities both at the written level and on the level of the purpose of the law. Thirdly, there is a clear practical need for a closer look at the legal reasoning in procurement cases.

This study takes as its starting point the doctrinal study of law or legal dogmatics where the epistemological viewpoint is attached to that of the judiciary as an institutional reference. As Aarnio suggests, a scholar working in doctrinal study of law has an epistemologically internal point of view similar to a judge. V The sources of law as well as the argumentation models collectively utilized by the judiciary and other law-applying officials offer a point of reference to both descriptive-analytical inquiries using the method of rational reconstruction as well as more normative-critical attempts to systematize the EU public procurement law. VI

In this study, the aim is not only to find out if the ECJ case law on the scope of application of public procurement legislation meets the standards which secure the coherence and legal certainty of the rulings. The aim is also to show how, by using systemic arguments, the judicial decision-maker can both help to systematize the law and to improve legal certainty. Thus, the research interest here is critical-normative in a way that would hold predictive value over other cases than are handled in this study.

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2 ON EU PROCUREMENT LEGISLATION

EU public procurement legislation regulates the procedure through which public authorities and organizations close to them (contracting authorities and entities) procure goods, services and works from the market. Procurement legislation has been seen as a part of Internal Market Law of the European Union, laying its foundation in Articles 34 – 37 on free movement of goods, Article 49 on the freedom of establishment and Article 56 on free movement of services in the Treaty on the Functioning of the European Union (TFEU).\(^1\) The Treaty does not in itself include specific provisions on public procurement. The actual provisions on tendering procedures are included in three large Directives on public procurement procedures.\(^2\) The strong basis in internal market law can be seen in the recitals of the Directive on public procurement 2014/24:

“The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.”\(^3\)

As Arrowsmith has pointed out, the EU public procurement Directives are interesting pieces of Internal Market Law because they set up an active obligation to promote internal market goals (by publishing information concerning procurement procedures) whereas internal market rules in TFEU usually set up negative obligations:

“For a long time, it was assumed that the impact of the TFEU on public procurement was merely to prohibit negative measures restricting access to public markets, such as discriminatory qualification conditions...However, drawing inspiration from the approach in the procurement directives, the [Court of Justice] has now ruled that the free movement provisions also include, in the context of procurement (as well as certain other areas of EU law),

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\(^3\) Directive 2014/24/EU, recital 1.
an obligation of transparency. The purpose of this obligation is to make it possible to verify compliance with the principle of non-discrimination on grounds of nationality (and any principle of equal treatment) – just as the procurement directives seek to do with their own detailed transparency obligations.\(^4\)

EU public procurement legislation also covers directives on the remedies of the EU public procurement legislation as well as a directive on defense and security procurement.\(^5\) As these pieces of legislation have not prompted much case law on the issue of the scope of application of tendering requirements and because they have not recently been the subject of a large legislative reformation, they have been set outside the scope of this work.

Much has been written on the role of relationship between the internal market rules in the Treaty on Functioning of the EU and public procurement.\(^6\) From the beginning of 1970s public procurement procedures have been covered by EU directives. The first directives on public procurement were split into the so-called Liberalization Directives, which had the aim of eliminating restrictions and discrimination in public procurement, and the coordination Directives, which had the aim of harmonizing national legislation on procurement procedures.\(^7\) Latest versions of such Directives are from 2014 and, during those decades between the 1970s and the 2010s, the procurement legislation has been transformed from relatively small pieces of legislation to a large-scale mammoth. The Council Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts contained 34 articles whereas the Directive on public procurement from 2014 (2014/24/EU, only one of three procurement-related Directives) includes 94 articles. In the latest legislative package, a new directive on public concession contracts has been added, containing 55 new Articles.

The more legislation there is and the more detailed and complex the provisions contained therein become, the more questions start to emerge regarding the system it has built. Are the similar provisions or concepts in different procurement statutes to be interpreted similarly or not? When does one apply one statute on public procurement instead of another? If a certain statute or part thereof does not contain a provision which another statute or part contains, is this a conscious decision of the law-maker or an oversight which should be corrected in interpretation? What is the internal relationship between provisions, statutes, case law, principles and purposes of this legislation? What is the role of the judiciary in all of this? In the view of the

\(^4\) Arrowsmith. 2014. 264.


\(^7\) Directives 64/427, 64/428, 64/429, 70/32 (Liberalization Directives), 71/305 and 77/62 (coordination Directives).
present work, this patchwork quilt nature of EU public procurement law is one of the largest sources of legal and practical problems and uncertainty at the moment.\textsuperscript{8} Therefore it is of great importance to find out how this uncertainty could be removed or even decreased.

\textsuperscript{8} On the problems of the legislation, see Arrowsmith. 2012, 71-82.
3 ON EU LAW AND ITS ONTOLOGY

This study focuses on the interpretation, reasoning and justification of judicial decisions. According to Aarnio, the theory of justification is interlinked to the ontology of law, the epistemology of law (the nature of knowledge in legal dogmatics) as well as methodological questions (the methods of obtaining information). The ontology of law forms the basis of interpretation: one must take a position on what one assumes to be in existence for an interpretation to be at all possible. According to Raitio, to understand legal reasoning in a multi-disciplinary EU law one has to have an overall understanding of the ontology of law according to legal positivism, legal realism and empirism as well as natural law theories. Viewed larger as frames of legal analysis, different approaches such as an Isomorphic Theory of Law or Natural Law Philosophy, offer, as Siltala has stated, “philosophically defensible approaches to legal interpretation”.

A great starting point to the question on what EU law actually is can be obtained by Wroblewski’s theory on the ontology of law, where the existence of norm is a question of the validity of that norm. According to Wroblewski’s view on the legal normative model of judicial application of law, the court ought to justify its decisions by valid legal rules, which constitute the normative basis for the decision and determine the legal consequences of the proven facts of the case. He sees that validity can also “be deemed derivable from a metadecision as to the sources of law, determining the arguments which the court should or may use in justifying its decisions”.

The validity of a norm has three meanings which reflect all three approaches to the ontology of law. The three meanings are: a) systemic validity, b) factual validity and c) axiological validity. These different approaches to the validity of law are discussed below taking account their close relations with the theories of legal positivism, realism and natural law. All of these also have different relations vis-à-vis the different ideologies of the judicial application of law, suggested by Wroblewski.

The legal normative model suggested by Wroblewski was built around the concept of a nation state, whereas the legislation on public procurement is in many ways built on transnational law such as the Government Procurement
Agreement within the World Trade Organisation. Even though many of the scholars which have focused or influenced the issue of the validity of law have also delved into the territory of international law, the question of Wróblewskian validity of law outside the European Union and in the international sphere has been set outside of the scope of this work.

3.1 SYSTEMIC VALIDITY: KELSEN AND NORM SYSTEMS

According to Wróblewski, a norm is valid in the systemic sense if it has been accepted and promulgated in due course, the norm has not been repealed, it is not in contradiction with another norm in force in the same system and if there is an accepted rule for resolving conflicts in situations of contradiction. The concept of systemic validity is presupposed in the ideologies of bound judicial decision-making and of legal and rational judicial decision-making, because it corresponds with the legal normative model of the judicial application of law attached to these ideologies.  

The systemic validity of norms is clearly apparent in the work of Kelsen. According to Kelsen, legal order is a whole comprised of norms where these norms belong to the world of “Ought” (“Sollen”):

“By ‘norm’ we mean that something ought to be or ought to happen, especially that a human being ought to behave in a certain way. This is the meaning of certain human acts directed toward the behavior of others.”

Legal norms always receive their validity from other norms within the world of Sollen. Validity is not a property or a value of norms, but instead their specific form of existence which distinguishes them from facts. Legal validity is a function of the normative, ‘authorising’ interpretation of certain facts as norm-creating. The validity from one norm to another is transferred through means of authority and the material content of the superior norm. In this way the legal order becomes a hierarchy of norms (a system) with a chain of validity all the way to the existing constitution and even beyond: to a historically first constitution:

“if we ask for the reason of the validity of the historically first constitution, then the answer can only be (if we leave aside God or

16 Kelsen. 1952.
17 Wróblewski. 1992. 77-83. Systemic validity is often present in the academic work of legal positivists, whose thought has been heavily influenced by the Oxford school of linguistic philosophy. See Siltala. 2011. 113-143.
18 Kelsen. 2005. 4
19 van Roermund. 2013. 16-20.
‘nature’) that the validity of this constitution must be 
"presupposed."

According to Kelsen, the Constitution receives its presupposed validity from a fundamental norm (Grundnorm). The fundamental norm functions thus as the basis of the unity of a legal order, because the legal order is comprised of norms whose chains of validity share this common element. The Grundnorm is also the basis of the validity of the norms within the legal order. In addition, the Grundnorm "injects" normativity to the legal order: because of it, the norms belong to the world of Sollen. In the field of public procurement law the rule which gives a contracting authority an obligation to publish a procurement notice receives its validity and normative nature from the national law on public procurement. The national Act receives its validity from national Constitution and the Constitution from the Grundnorm. As Conklin has stated, the structure of norms comes first; the authorizing origin of the structure second. The structure presupposes its own existence.

In the context of the European Union and EU procurement legislation, the problem arises from the question on what kind of a role the EU Directives and Treaties have in the chains of validity and normativity. Kelsen’s ideas have been put to use in the study of EU law, especially in studies concerning the relationship between EU law and national law. According to Jääskinen, the search of a Kelsenian Grundnorm has been the starting point for those scholars looking to understand the EU law as a normative order in force in the Member States. Some, like Bindreiter, have argued that the basic norm that would apply to the European Union, would have to be conditional in a way that it is tied to the criterion “which in our times is reckoned uppermost among the criteria for ‘legal system’ – democracy”. According to Bindreiter, the principle of democracy would have to be observed on all levels of the Kelsenian norm system. Others, like Weyland, have argued that EU and national legal orders form a coherent order with a common basic norm, common criteria for determining content and common rules which eliminate actual or potential norm conflicts.

Kelsen’s Stufenbau, the hierarchical structure of norms, poses some questions to the relationship between national and transnational law: do they form a unified hierarchical structure and if so what is their hierarchical relationship? Kelsen, himself, has stated that it is the basic or fundamental norm of the international legal order which is the fundamental reason of

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27 Weyland. 32-35.
validity of the national legal orders.\textsuperscript{28} Thus, all national legal systems are subordinate to international law. For him, the principle of legal equality of states is only possible when the international legal order is seen as being superior to national legal order and that no subject-matter can be situated outside the legal order.\textsuperscript{29}

Eleftheriadis has classified different approaches to the relationship between EU law and national law. Nearest to Kelsen's own view of a singular order of norms is the monistic approach where the EU Treaties are seen to give validity to each Member State legal order. The monistic view receives its justification from the classic ECJ ruling in \textit{Costa v. ENEL}, which emphasized the autonomy of the EU legal order created by the Treaty. Monism has also been supported with arguments on the effectiveness and the cohesion of EU law (for instance, in the judgment of the ECJ in \textit{Simmenthal}-case).\textsuperscript{30}

In the dualistic approach, the tension between national and EU law is resolved through means of international law. Dualism recognizes the existence of two legal orders: national law sets obligations to its citizens whereas foreign citizens and states are subject to their own set of obligations based mainly on international law. The points of convergence are formed through states joining international Treaties and through private international law. Dualism is largely a doctrine on distinctive and separate powers of national and international institution such as courts.\textsuperscript{31}

In the approach of legal pluralism or constitutional pluralism the choice between monism and dualism is not necessary. According to MacCormick, legal pluralism means on the one hand that each Member State’s own constitution gives validity to its legal order (so that monism is out of the question). On the other hand, EU law is not dependent on the Constitutions of Member States while still being valid law in the Member States. Thus, in legal pluralism, there are two interdependent legal orders which do not have a hierarchical order. Within legal pluralism there are also different views on whether in situations of conflict between national and EU law there is at all a way to resolve them through legal means (radical pluralism) or whether resolving them is only possible through a third, outside legal order (pluralism through international law).\textsuperscript{32}

Jääskinen has argued, along the lines of Harris, that legal orders are necessarily contextual in that they are fixed in relation to a certain moment and subject-matter.\textsuperscript{33} A legal order is constructed in the context of a practitioner of Europeanised national law, having the task of determining what is legally valid in a particular case, organising both EU law and national

\textsuperscript{29} Kelsen. 1946. 387. See also Rigaux. 1998 and Pemberton. 2009. 76-82.
\textsuperscript{31} Eleftheriadis. 2010. 368-370.
\textsuperscript{32} MacCormick. 1999. 118-121.
\textsuperscript{33} Jääskinen. 2015. 673. Harris. 1979. 111.
law into “a consistent field of normative meaning”. Both EU law and national law retain their identity and autonomy, however. The construction of the contextual legal order is guided by a basic assumption of Europeanised jurisprudence (based on Harris’s basic legal science fiat) which includes principles defining the relationship between EU and national law. First, the principle of derogation requires that a national norm cannot repeal an EU norm, and vice versa. The consistency principle requires the primacy of EU law so that national law can be applied only as far as it does not lead to conflict with an EU norm. Thirdly, EU law modifies the exclusion and subsumption principles of national law so that from different interpretational options one has to choose the “best” one for EU law purposes.

The theory of Europeanisation of national law by Jääskinen is not just about the legal order of norms. Europeanisation of law is also analysed at the levels of legal system (an order which consists of the conceptual and axiological elements of law), jurisprudence (societal activities aiming at construing or explaining the contents of valid law) and legal culture (the silent practical knowledge that defines law and legal professions or hermeneutic pre-understanding necessary for legal communication). These levels seem to point to a notion of the ontology of law which expands not only in width (different aspects of the validity of law by Wróblewski) but also in the range of depth.

A key theory of the ontology of law covering its bathymetric range is critical legal positivism by Tuori. According to him, analytical legal positivism (from Kelsen and Hart to MacCormick) has not been able to answer fundamental questions on the limits and the criteria of legitimacy of the law. His theory consists of the law consisting of three layers or sediments: the surface-structure level, the level of legal culture and the deep-structure level of law. The surface-structure level contains individual legal enactments and judicial decisions. At the level of legal culture there are general principles and doctrines of law. The deep-structure level of law includes basic concepts of law and the most fundamental principles of law. Surface-level legal material is normatively legitimate only if it can be justified through the principles of the sub-surface layers.

Tuori sees the scholarly discussion on the relationship between national and EU law as primarily revolving around the question of mutual positioning.

34 Harris. 1979. 70.
35 Jääskinen. 2015. 673-675. Jääskinen. 2008. 156. Harris. 1979. 82-83. See also András who states that “supposition of the basic norm is in fact an act of legal self-obligation by the legal scholar, i.e. normativity is not grounded as generally obligatory, but it depends on individual decisions. András. 2016. 339. See also Dreier. 1989. 54.
37 Tuori. 2002b. 8.
38 Ibid. 147-180.
39 Ibid. 2002b. 245.
Legal pluralism and particularly radical pluralism take as their starting point a conflictual approach to the relationship between two legal systems; an act of exclusive perspectivism where relations between different perspectives are seen merely as conflicts created by adherence to a particular Grundnorm. According to Tuori, European law does not meet the Kelsenian criteria of hierarchical order in its internal relations or in its relations with Member State law. Interlegality offers way out of the solipsistic realm of radical pluralism: “conceiving of this interlegality requires abandoning exclusive perspectivism and portraying perspectivism in legal cultural terms”.40 Under the surface-level law, in the levels of legal culture and especially deep legal culture (undercurrents of legal culture), no hierarchy or clear separation between two legal orders is possible to construct and a way is open for bridging the different perspectives of these orders through dialogue.41 Dialogical pluralists emphasize mutual dialogue and openness between legal orders with the aim of maintaining equilibrium based on mutual recognition.42

A version of dialogical pluralism based on the different levels of law of critical legal positivism can be seen in the One Big System Model suggested by Nielsen. In this model, the legal order can be viewed as one big system at the surface level which consists of sources of law stemming from the EU subsystem, from the national subsystems and from the public international law subsystem. At the surface level of law there is pluralism among different legal orders but at deeper levels of law (especially at the level of legal culture) coherence can and should be ensured.43

Another view of dialogical pluralism is present in the Inter-Institutional view based on mutual reference by Culver and Giudice.44 Here the interaction takes place between legal institutions (for instance the ECJ and national courts) and not legal systems. According to their view:

“...the EU is best understood as an order of interaction, exchange, and translation of legal norms implemented by Member States institutions. What is perhaps most noteworthy in this situation, for our purposes in elaborating an inter-institutional theory of law, is the diminishing importance of the state legal system to an account of law, as the EU legal order is visibly and conceptually apart from phenomena and concepts of legal systems and states. More specifically, at issue and in demand

40 Tuori. 2015. 101-102.
41 Ibid. 2015. 85-86. 326. This view is clearly influenced by the theory of critical legal positivism by Tuori.
42 Key influence here comes from Maduro whose views on pluralism have also been called interpretive and participative. Maduro. 2003. 501-530. See also Klemen, Jaklic. 2014. 102-125. On the question of dialogical pluralism in the context of mutual trust and the protection of fundamental rights see Lenaerts. 2017. Vol. 54. 805-840.
of explanation is no longer the question of how a group of states forms a supra-state legal order, but instead a more basic question about particular versus universal legal orders—what it is that distinguishes particular relatively local variegations of legal orders from claims to super-state legal order found in international law. Once we are oriented toward this more basic question, we are freed from a number of preoccupations associated with the assumption that the state legal system carries the mark and measure of law. Instead we are focused on understanding a variety of contingencies associated with institutions of law and legal institutions: law may but need not be state-based, may but need not be geocentric, and need not have any particular content, as there are a variety of ways of achieving the various goals we have in life under law, using overlapping legal orders, and overlaps between state and non-state legal-normative orders.”

In his work on European Constitutionalism, Tuori goes further than just the issue of the relationship between EU law and national law. According to Tuori, the European constitution possesses a juridical and a political dimension. In the juridical sense, constitutional law relates to the EU legal system and in the political sense to the EU as polity. Tuori calls these framing constitutions. A distinct feature of a functionally oriented transnational polity, such as the EU, where there is limited claim to political and juridical authority (compared to state constitutions), is that the constitution extends to sectoral objectives and competences as well. Thus, in addition to the two framing constitutions, Tuori suggests three sectoral constitutions: the economic, social and security constitutions each with distinct constitutional objects (European economy, social well-being and security). The relationship between the framing constitutions and the sectoral constitutions

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45 Culver – Giudice. 2012. 74-75.

46 The treatment of EU constitutional law is in large parts based on Tuori’s model of critical legal positivism where law is a multi-layered phenomenon with surface level, level of legal culture and a deep-structure level of law. The latter two levels have both constitutive and critique-facilitating function vis-à-vis the surface level phenomena of law. The model of critical legal positivism is not utilized in this study outside the issues of the relationship between EU and national legal orders and the different aspects of the constitutionalization due to the fact that the doctrine of sources of law and legal reasoning are not dealt with in critical legal positivism and because the emphasis of this study is on the systematization of the legal system and not primarily the holistic or critical treatment of the law as a phenomenon.

47 Tuori.2015. 9.

48 Ibid. 22-23. According to Sauter, at least where the internal market and competition rules are concerned, we can speak of a mixed economic constitution, as underpinning the objective of a social market economy. In his view and in contrast to the Ordoliberal view of the economic constitution, the social market economy provides a third way between capitalism and socialism. Sauter.2015. 76-77.
is complex and recursive. On one hand, the political and juridical constitutions frame the sectoral constitutions by framing the institutional framework for sectoral constitutionalization and supplying legal instruments for them. Thus, they enjoy constitutive primacy over sectoral constitutions. On the other hand, the framing constitutions respond to the needs and implications of sectoral constitutionalization and are hence subject to the functional primacy of sectoral constitutions. The economic constitution, in particular, has enjoyed functional primacy over the framing constitutions as well as the other sectoral constitutions.

The economic constitution of the European Union is of interest in a study regarding public procurement law. Tuori examines the European constitutions in the light of a process of constitutionalization. The pre-Maastricht economic constitution was influenced by ordoliberal economic thought and had at its core rules on free movement and competition law, instruments of economic integration. These rules were further constitutionalized through ECJ case law in sync with juridical constitutionalization: “juridical constitutionalization was not an end in itself, but the impetus came from the economic dimension; as Van Gend en Loos clearly intimated, the main rationale was to secure effective implementation of the provisions serving the main objective of the Treaty, namely establishment of a common market.”

The relationship between EU and national constitutions in the context of an economic constitution consisting of free market and competition rules can first of all be seen as a matter of conferral. The Member States have conferred legislative and other policy competences upon the EU through an international treaty which generates a need for explicit constitutional rules on these competences. Secondly, the ECJ has derived economic rights from the Treaty provisions which do not have correspondence in Member State constitutions. The fundamental rights in the Member States’ constitutions, such as the right to property or freedom of contract, serve as prerequisites for economic rights. Fundamental rights and economic rights can, however, also lead to conflicts: the protection of a national fundamental rights has been seen as a justification for restrictions to free movement as long as their application fulfills the three-phase test for the acceptability of such restrictions.

According to Tuori, the post-Maastricht macroeconomic constitutionalization has relativized the significance of law and courts as “macroeconomic objectives and policies succumb with difficulty to legal regulation, and courts are not suited to reviewing decisions which adhere to economic rather than legal rationality”.

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49 Ibid. 24.
50 Ibid. 25-26.
51 Tuori. 2013. 137.
52 Ibid. 165-169. See also ECJ cases C-441/14, AJOS and C-144/04, Mangold.
53 Tuori. 2013. 323.
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legislation seems to be one of the few areas still close to the microeconomic constitution of the pre-Maastricht constitutionalization. There are numerous similarities to be found between the microeconomic orientation of the pre-Maastricht constitutionalization and the characteristics of EU procurement legislation (even in its current form): the internal market law background of procurement legislation, the microeconomic model of auctions as the foundation of procurement procedures, the strong role of courts in assessing the legality of procurement procedures. 54

Another way of assessing EU public procurement legislation in comparison with the microeconomic constitution would be to look at the similarities between neoliberal thought and the pre-Maastricht Treaty and (to a lesser degree) the procurement legislation. The ordo- and neoliberal roots of the economic constitutions are well presented in Tuori’s writings on the constitutions of the European Union. 55 Joerges and Gerber have pointed out neoliberalistic undertows in EU legislation (especially competition law) 56. As Foucault suggested in his lectures on the Birth of Biopolitics, among the key ideas of the neoliberalism were the emphasized role of economic rationality as a measure and guiding principle of the activities of the government, the object of promoting and protecting competition, the role of individuals or enterprises working as fundamental units of society and the strengthening role of courts. 57 Economic rationality of government might be seen embedded in the auction theory model of public procurement procedures where public procurement can be seen (using the approach applied by Graells) as a working tool for public authorities. 58 This procedural working tools acts as a measure and a constraint for the discretion of the contracting authorities up to the point that political aspirations must be subject to the requirements of non-discrimination, measurability and comparability. The economic rationality of the contracting authority is built on that of an individual economic operator acting as a strategically thinking purchaser, and the ECJ in particular has generated in its case law on environmental and social aspects in procurement restrictions on the possibilities for contracting authorities of acting as pure regulators in their purchases. 59

The promotion of competition is achieved though the obligation of publishing procurement notices all over Europe, and the protection of competition is achieved through the key principle of non-discrimination and its various reflections in a myriad of provisions within EU procurement legislation. The obligation of the contracting authority to conduct a non-

54 According to Tuori, the role of the ECJ has been especially significant within the microeconomic field but less so in the macroeconomic dimensions. Tuori. 2013. 327.
55 Tuori. 2015. 127-164.
57 Foucault. 2010. 118-121. 174-176. 311-312. See also Kunzlik. 2013. 283-356.
58 Graells. 2015. 54-55.
discriminatory procedure is mirrored by the right of strategically thinking individual economic operators to be treated in an equal manner. 60 Lastly, the powerful role of the courts and especially the European Court of Justice in interpreting and enforcing EU public procurement legislation is very much the general observation on which this study is built. Even though these similarities are of interest, there is no clear institutional, historical or legal proof of a link between ordoliberalist thought and EU public procurement legislation.

According to Tuori, the social (sectoral) constitution of the EU has two key characteristics: the primacy of the national welfare state and the subordination of the social to the economic constitution. The European economic constitution has always relied on the presupposition of the existence of national redistributive mechanisms and welfare policies. The tension here comes from the fact that this primacy is hard to reconcile with the prevalence of the economic constitution. 61 The microeconomic constitution may impose limitations on national welfare regimes by treating national social policy measures as restrictions on free movement or competition and by subjecting national welfare services themselves to internal market law. 62 In addition, the social constitution of the EU is not, as Tuori suggests, focused on the core fields of national welfare policy such as social security and healthcare but on the fringes of the welfare state which are called European regulatory private law, for instance labour law, consumer law, anti-discrimination law and law on universal services. This European regulatory private law is built on access justice, facilitating (re-)entry to the marketplace to workers, consumers, patients and citizens.63 According to Tuori, in many cases conflicts between economic constitutional law and national social legislation can be re-categorized as conflicts between two types of rights – transnational economic rights established by free movement law and national social rights – and two notions of justice – transnational access justice and national solidaristic social justice.64

The social dimension of the EU constitution could be seen reflected in EU public procurement legislation as well, for instance in the multiple guarantees in the recitals of the procurement Directives of not affecting the national organization and legislation of social security services or the “liberalization of services of general economic interest”.65 National social policy measures such as the exclusion of certain social services from the scope of application of the procurement directives can, however, be seen as restrictions on free trade. An example of this is the inclusion of social and healthcare services to the rules competitive procurement procedure. The Court of Justice in its ruling in

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60 Nenonen. 2012. 351. See also Nenonen. 2014.
61 Tuori. 2015. 231-232.
63 Ibid. 257-267.
64 Ibid. 266-267.
Commission v. Ireland extended the obligation of the basic principles of procurement (transparency and equal treatment) to social and healthcare services procurement, originally mainly situated outside the scope of the procurement Directives:

“For the services coming within the ambit of Annex I B to Directive 92/50 [social and healthcare services for example], and subject to a subsequent evaluation as referred to in Article 43 of that directive, the Community legislature based itself on the assumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposes a requirement of publicity after the fact for that category of services.

It is common ground, however, that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services.”

In the ruling in Commission v Ireland by the European Court of Justice, one can also observe reflections of transnational access justice over national social justice:

“In this regard, according to settled case-law, the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State.

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It follows that the advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex I B, cannot be interpreted as precluding application of the principles resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest.”

The tension between social and (micro-) economic constitution can also be seen in the procedural nature of the EU procurement legislation. Microeconomic rationality is achieved through a competitive tendering procedure regulated by the procurement Directives. The content or object of a particular procurement procedure can, instead, include a large variety of social policy goals. The inclusion of such social matters in a procurement procedure

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66 Case C-507/03. Paras 25-26.
67 Case C-507/03. Paras 27, 29.
is, however, subject to the *prima facie* procedural requirements of non-discrimination and the notion of the government as *purchaser* instead of regulator:

“Furthermore, with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance.

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However, the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

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It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract.”

Avbelj has raised questions as to whether it is at all possible to distinguish between the many constitutions inside a constitution, and if it is, how does one draw the boundaries between them when they are all openly interrelated. If the amendability and elasticity of the language of constitutionalism is extremely open, do the different concepts of constitutions preserve any conventional meaning? It is my view that the ideas of the different constitutions of the EU can be used in a modest way: to conceptualize on an ontological level the relationship between national and transnational legal order and the relationship of different goals of public procurement law in judicial argumentation.

The way in which Tuori’s models of the different constitutions of the EU and the relationship between EU and national legal orders lends itself to the needs of this study is twofold. First, dialogical pluralism helps to conceive of the legal order as one big system comprising both sources of law stemming

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from the EU subsystem, from the national subsystems and from the public international subsystems. Secondly, the tension between the economic and the social constitutions can be utilized when evaluating the goals of EU public procurement law as tension-filled teleological arguments of justification in the section dealing with legal interpretation and reasoning.

According to Sankari, the understanding of law’s validity and pluralism of legal orders influences an analysis of legal reasoning because it “relates to one’s perception of what EU law is, which in turn relates to one’s view of the Court of Justice’s proper role in interpreting it”. Teleological, expansive interpretation has been linked to an integrationist view where one conceives the EU as an autonomic constitutional legal order; whereas more constrained interpretation relying on linguistic or systemic justification has sometimes been linked to a restrained view that sees the EU legal order as international, inter-governmental law. The tension-ridden relationship between the economic and social constitutions of the EU can also affect the role and relationship of different justification arguments in legal reasoning.

3.2 FACTUAL VALIDITY: LEGAL REALISM, HART, AND THE INSTITUTIONAL THEORY OF LAW

According to Wroblewski, the validity of a norm also has a factual meaning (factual validity). Factual validity of a norm means that it has actual efficacy. The study of factual validity has been very prominent in legal realism. Wroblewski himself observed that “the concept of factual validity is strictly related to the concept of ‘observation of law’, and sometimes is even treated as equivalent to the latter”.74

According to Dyevre, legal realism diverges from other positivistic approaches to the study of law in at least three ways. First, legal realists typically put a stronger emphasis on the indeterminacy of legal rules. Second, legal realists share a focus on judicial decision making. Third, within the context of judicial decision making, the realists tend to focus more on the context of discovery (the heuristics of judicial decision making or the causal motives driving judicial behaviour) than the context of justification (the reasons that can be adduced to justify the use of coercive power by judges). 75

Historically, there are at least two established schools of legal realism: Scandinavian legal realism and American legal realism. Scandinavian legal realism defines valid law as the rules the courts (or other law-applying
officials) will follow in future decisions in hypothetical cases because they feel obligated to do so. According to Helin, the Scandinavian realists did not accept the Kelsenian dualism between “Sein” and “Sollen” and the existence of a world of “Sollen”.\(^7\) To Scandinavian Realists, the normative element of the legal system is built on a mental entity, a sense of duty or as a disinterested behavioural attitude. Thus, the system of law is regarded as consisting in norms with were both observed on the level of human behavior and experienced as binding on the level of human attitudes.\(^7\)

Olivecrona, a key member of the Scandinavian legal realists, has argued that the efficiency of legal norms is a practical precedent condition of legal dogmatic research, and it would not be meaningful to study behavioural models which no one regards as binding. On the other hand, the requirement of efficacy is not necessarily followed by any consequences in terms of the method of legal dogmatics.\(^7\) Ross, another key figure in Scandinavian legal realism, has suggested that the validity of a legal norm is determined by the normative ideology that is experienced as binding. According to Ross, “…the legal norms, like the norms of chess, serve as a scheme of interpretation for the corresponding set of social acts, the law in action, in such a way that it becomes possible to comprehend those actions in a coherent whole of meaning and motivation and to predict them within certain limits”.\(^7\) In this model, sentences which express the results of legal dogmatics are statements concerning the future behavior of the courts (i.e. predictions). Helin has argued that the most important manifestation of the ideology of Ross is the doctrine on the sources of law and legal interpretations. In following the judges’ thought process including their doctrine of the sources of law, a statement from the doctrinal study of law would yield a probable prediction on the content of law.\(^8\) The influence of Scandinavian legal realism has been considerable in academic studies within legal dogmatics and can be seen prominently in the ontology of law and the doctrine of legal sources (which is utilized later in this study) by Siltala. According to Siltala, the concept of law may be defined from the point of view of his legal source doctrine and legal argumentation theory as follows:

“Law is the sum total of such criteria of legal decision-making as can be derived from the institutional and non-institutional sources of law of which the normative ideology internalized by the judiciary and other law-applying officials comprises...”.\(^8\)

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76 John Searle is one of the most prominent modern philosophers who have attempted to break the demarcation between is and ought through his speech act theory, although his influence has mainly influenced the institutional legal theory of Neil MacCormick. Searle. 1964. 43-58. MacCormick. 1973. 2.
78 Ibid. 435-436.
79 Ross. 1959.
American legal realism, in contrast with Scandinavian legal realism, is focused on the empirical studies of the law and is closer to sociological, empirical and other social sciences approach to law than Scandinavian realism. According to perhaps the most influential figure to the American legal realists, Oliver Wendell Holmes, judges are not simply deducing legal conclusions in a formalistic manner but are instead influenced by ideas of fairness and other personal and conventional values. In Holmes’ view, “The prophecies of what the courts will do in fact, and nothing more pretentious”, are what is meant by law.82 Because the law and legal reasons are indeterminate, the causal motives for judicial decision making have to be found elsewhere. In deciding cases, judges respond primarily to the stimulus of the facts of the case instead of legal rules and reasons.83

According to Malminen, both Scandinavian and American legal realism were considerably influenced by the late nineteenth century reactionary social thought of critical historicism, instrumentalism and pluralism. In critical historicism the critique was directed towards the observation that conceptual legal studies and romantic legal historicism did not work in the context of the great social transformations of the industrialization, urbanization, immigration and the emergence of modern democracy. Legal formalism contained in the legal historicism of Savigny, the conceptual-systematic jurisprudence of the late-nineteenth century, and the classical liberalism of legal and political elites were in the line of fire. Legal and moral order was found not to be the embodiment of timeless legal, moral, and political ideas but instead the outcome of interest-driven men or even superstition. Law was seen as an instrument generated through political and legal struggles amidst value pluralism and moral relativism. Pluralism opposed the exclusivity of romantic philosophies of identity, harmony, and national unity by its comparative outlook of law and the support of cultural relativism.84

Dyevre has suggested a model of legal integration in the EU based on his view of sophisticated legal realism. According to him, terms like judicial dialogue and constitutional pluralism utilized in the EU legal scholarship described above are more like catch-phrases than theories: they seem to capture some of our intuitions about legal integration, but without really articulating them as empirical, falsifiable propositions. Dyevre attempts to operationalise these concepts within a “well-specified, empirically relevant theoretical framework. 85 The model of EU legal system by Dyevre is based on three key aspects. First, courts are embedded in their broader political environment. EU courts operate within the EU’s broader institutional setting, whereas decision making of domestic courts is constrained by the domestic judicial political. Secondly, domestic courts have diverging incentives and

82 Oliver Wendell Holmes. 1897. 457.
84 Malminen. 2016. 290-299.
constraints. Domestic courts are presumed to differ in their incentives and institutional constraints, depending on their formal powers and position in the domestic judicial hierarchy. Third, inter-judicial relations in the EU multi-level court system are usually a two-way street. This means that national courts can also have an influence on the ECJ. National courts may use the preliminary ruling mechanism in strategic ways. The non-hierarchical nature of the court system comprising national and supra-national courts means that courts at the upper echelon – like the ECJ – cannot reverse the decisions of courts at the lower level, and thus the ECJ has a strong incentive to avoid conflicts with domestic courts. Game theory approach to the complex relationship between national and EU courts helps to ground concepts such as constitutional pluralism in a specific framework.86

Bengoetxea has also argued that dialogue is central to decision-making of the ECJ, especially in references for preliminary rulings:

“The Court does not pick its own cases, but is seized by national courts or by direct parties, and reacts to their claims or queries. It does obviously have some leeway in the way it frames the preliminary questions put to it but even if it were to be considered activist, it would still be reactive, always reacting to the cases brought before it. But in some of its judgments, it has also been proactive, in that its interpretations on the effectiveness and autonomous meaning of EU concepts has generated further references as they are applied to new situations by ‘creative’ jurists.”87

An interesting test case for the approach of sophisticated legal realism and its emphasis on the relationship between national courts and the ECJ can be found in the recent ruling by the ECJ in Ajos. The Court of Justice ruled that the principle of non-discrimination on grounds of age precluded the application of national legislation that stated that only employees who had not yet reached a pensionable age at the time of dismissal were entitled to a special severance allowance. In addition, the ECJ ruled that national courts had to change their own case law if it is based on an interpretation of a national law that is incompatible with the objectives of the directive. However, the Supreme Court of Denmark, in its follow-up ruling, went against the priority of EU law in the case. The national court held that it was impossible to resolve the incompatibility with EU law by applying the general principle of EU law prohibiting discrimination on grounds of age. According to this ruling, the question whether a rule of EU law can be given direct effect in Danish law, turns first and foremost on the Law on accession by which Denmark acceded to the EU. The Supreme Court stated that the Danish Law on accession did not give grounds or support the priority of the principle of non-discrimination over conflicting Danish law in a dispute between individuals, as the principle

87 Bengoetxea. 2015. 188.
did not have any basis in a specific treaty provision nor was there any specific reference to it in the Act on Accession. The Danish Supreme Court considered that it would be acting outside the scope of its powers as a judicial authority if it were to not to apply the national provision in the case. 88

The ruling and reasoning of the Danish Supreme Court in Ajos has met with considerable criticism among some scholars. 89 Others, like Sadl and Mair, have emphasized the relationship between the two courts: “the most distressing result [of the case] is not, as would initially appear, the rebellion of a national high court against a supranational court, but rather the mutual disempowerment of European courts as rights-upholding institutions at a time when the judicial protection of individual rights, public trust in the judiciary to perform the task, and cultivation of an unwavering faith in the European project, are more important than ever before”. 90

Legal realism has been very influential in studies of legal reasoning which emphasize the heuristic aspect of legal interpretation. Study on legal reasoning of the ECJ by Beck or the rational reconstruction model by MacCormick and Summers as well as Bengoetxea contain echoes of legal realism when they refer to the practices of the courts or the context of discovery in legal reasoning. Reflections of legal realism in legal reasoning and the doctrine of sources of law are addressed in later chapters. In the field of EU public procurement law, the descriptive looking glass of legal realism tells us that public procurement legislation has been closely and widely applied both in the courts of Member States as well as in the European Court of Justice. A recent Commission report on the Remedies Directives on public procurement argues that the remedies rules on public procurement have been widely and frequently applied by national courts and other law applying authorities. 91

The efficacy of a norm is not only a question within legal realism. The factual validity has had its place in traditional legal positivism as well. 92 One of the main aspirations of Hart was to distinguish a normative rule from

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88 Case C-441/14.
90 Sadl – Mair. 2017. 368.
91 Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement. 24.1.2017. COM (2017) 28 final. In the report, it is stated that “In general, the remedies that they lay down were frequently used in most of Member States. There were around 50 000 first instance decisions across Member States during 2009-2012. 5.
behavior perceived through empirism. A key critique of Hart in relation to the Stufenbaulehre of Kelsen is eloquently summarized by Culver:

“As Hart observes, for norms to form part of the same legal system, there must be actual practices of recognition of those norms by systemically connected law-applying institutions such as courts. Otherwise, a theoretical presumption of unity will distort rather than illuminate the nature of relations between legal orders, and that distortion may be amplified by the necessary choice of explanatory perspectives generated by Kelsen’s approach.”

According to Hart the legal order consists of primary and secondary rules. The primary rules guide the behavior of the members of a community (rules of obligation). For these rules to be identified, changed and put into force there is a need for secondary rules. Secondary rules include the rules of adjudication, rules of change and the rules of recognition. The rules of change determine how and by whom the primary rules of obligation can be created, changed and revoked. The rules of adjudication determine the procedure through which the primary rules of obligation can be put into force by courts and other authorities. The rule of recognition is an instrument or a criterion to identify the rules of obligation.

The rule of recognition differs from the presupposed Grundnorm of Kelsen. According to Hart, the existence of the rule of recognition is “a matter of fact”. The rule of recognition cannot be said to “exist” or “not to exist” but instead simply as being accepted within the community of judges. Here we can see the link with legal realism: what Hart calls the rule of recognition seems to serve the same function in his variant of legal positivism as what Ross calls the shared doctrine of the sources of law and their interpretation commonly shared by judges. In studies on EU law the theory of Hart has been utilized when there has been a tendency to emphasize the role of legal practices as the basis of the validity of norms. In the study of Jääskinen, for instance, there are elements of the rule of recognition especially in the parts regarding the contextual legal order.

93 The finalistic theory of law by Klami also focused on the interaction between norms and behavior: behavior (such as law-making) generates norms while norms give behavior a legal meaning. Klami 1980.
94 Culver – Giudice. 2012. 64.
95 Hart. 1994. 79–99.
96 Ibid. 107.
97 Nielsen. 2013. 120.
98 There are, however, different views in the utility of Hart’s theory within the context of EU law. According to Brownlie, Hart builds his conclusions on law too much on a unified political system where the rule of recognition is similar which makes it poorly suitable to the study of EU or international law. Brownlie. 1995. 3-6. See also Raitio. 2003. 220.
Siltala has argued that if the rule of recognition cannot be separated from the legal practices to which it is said to influence, it cannot be used as an outside reference to identifying legal norms. If this is the case, the theory of Hart would seem to miss its ontological basis of normativity. The problems in classifying the rule of recognition are not resolved in the view of Siltala by transforming the question of what is law to a question of legal epistemology.\textsuperscript{100}

Siltala points to the interlocked relationship between analytical legal positivism (Kelsen) and analytical legal realism:

“As a consequence, there are two kinds of constitutive elements, intertwined with each other, even in the realism-aligned concept of law now under consideration, viz. the constitutive premises of legal realism that define the effected “law in action” of court decisions, as suggested by Alf Ross and H. L. A. Hart, and the constitutive premises of legal positivism that lay down the criteria for the validity of the norms of constitutional law and the law of court organization and court procedure, among others, as suggested by Hans Kelsen. A mere reference to the law in action of the effected court practice will leave the legally qualified status of the parliament, courts of justice and other law-applying officials unexplained. Taken individually, neither of the two is able to provide a satisfactory definition of law.”\textsuperscript{101}

It is suggested here that both the approaches of legal realism and positivism are needed in an assessment of the validity of EU public procurement law and its uses in judicial reasoning. In the context of this work, the approach of legal realism brings to the evaluation, inter alia, the importance of the context of judicial reasoning, the role of national courts in the decision-making of the European Court of Justice and the institutional relationship between the EU legislator and the European Court of Justice.

In the institutional theory of law, efforts have been made in overcoming the problems of ontology in Hart’s (and Kelsen’s) model and expanding on the ontology of (mainly American) legal realism. Key figures in institutional legal theory have been Neil MacCormick and Ota Weinberger. The institutional theory of law aims to provide a sound ontological and epistemological foundation of legal dogmatics and the sociology of law, contributing to the understanding of legal structures and the proper methods to legal study as well as showing the place of practical reason in law on human social life.\textsuperscript{102} The institutional theory of law is based on John L. Austin’s and John Searle’s speech act theories. According to the institutional theory of law, legal norms are linked to and create institutions. Through institutional speech acts by the legislator and by courts the legal rules of a given legal system can be formally enacted, transformed in content, given effect and enforced by the courts and

\textsuperscript{100} Siltala. 2003. 724-727.

\textsuperscript{101} Siltala. 2011. 160-161.

\textsuperscript{102} MacCormick – Weinberger. 1986. 27.
by other law-applying officials and derogated. The institutional theory of law has been very influential in academic works of legal dogmatics on EU law: it has been put to use, for instance, in the ontological backdrop of Bengoetxea’s work on the legal reasoning of the ECJ. Some elements of the institutional theory of law have even been referred to in the case law of the ECJ itself.

3.3 AXIOLOGICAL VALIDITY: RADBRUCH AND DWORKIN

Wroblewski has argued that the validity of a norm also has an axiological meaning. All legal norms which are formally valid and even factually valid are not necessarily axiologically acceptable. According to Peczenik, the legal orders by Adolf Hitler and Josef Stalin were not law in the full sense of the term since they were incoherent with the basic moral principles within the structure of the law. Wróblewski has presented two versions of the axiological validity of law: according to the radical version legal rules are valid if and only if they are constituent or coherent with certain accepted extra-legal norms and/or evaluations. According to a moderate version of axiological validity, the lack of inconsistency or incoherence therewith is an additional condition of validity imposed on systemic and/or factual validity.

Tuori has argued that the axiological and the systemic validity of a norm are interconnected in numerous ways. According to him the different spheres of validity have a general order where the problems relating to axiological validity or the acceptability of a norm usually arise only after the norm has been held to meet the criteria of systemic and factual validity. If the different spheres of validity can be seen to be reflected in judicial reasoning and the use of different types of arguments, this type of hierarchy can perhaps be seen to support the sequentialist theory of reasoning described later on.

In his influential works from the aftermath of World War II, Gustav Radbruch casted doubts over the powers of positivism to establish the validity of rules. He presented two different elaborations of his Formula according to which: first, the positive law takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute as flawed law must yield to justice; second, where there is not even an attempt at justice and where the

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105 Opinion of the Advocate General in case C-54/07, Feryn.
equality is deliberately betrayed in the issuance of positive law, the statute lacks the very nature of law, because even positive law must be defined as a system and institution whose meaning is to serve justice.\textsuperscript{109} Bix has argued that Radbruch Formulas should be considered as not directed primarily towards debates about the nature of law, but rather towards judicial behaviour. Regarded from this viewpoint, the role of judges is emphasized in the issues concerning the validity of law. Bix has referred to the definition of unjust laws by Finnis where they are not laws “in the fullest” sense, including in the sense of creating reasons for judges to apply them to legal disputes.\textsuperscript{110}

In terms of axiological validity and its relations to adjudication, the theory of Dworkin is also of great relevance. According to Dworkin, the positivist approach to the validity of norms and the rule of recognition is based on the test of pedigree. The valid norms of a legal community can be identified if the norms have been given through a formal procedure set out in the Constitution. This model of validity grants individuals only those rights which the positive legal order affords to them. In Dworkin’s view, however, rights belong to citizens regardless of whether or not the authorities uphold them.\textsuperscript{111}

In hard cases, i.e. where no provision gives a clear answer to a legal question and the intention of the law cannot be deciphered, the systemically or factually valid norms do not give the decision-maker sufficient instruments for judging the case. According to Dworkin, the parties in a case might for instance have opposing or conflicting rights. This conflict of rights has to be resolved through justifying the decision through a theory of law, including, \textit{inter alia}, principles.\textsuperscript{112} Dworkin points out that there is no test of pedigree or recognition for legal principles.\textsuperscript{113} The institutional support for a given legal principle is too complex to be presented as a simple rule of recognition. This support also cannot be clearly characterized as stemming from exclusively legal material. In other words, law or a norm cannot be identified without complex, value-dependent deliberation of an interpretative process.\textsuperscript{114}

Dworkin sees principles as links between legal decision-making and the moral and political elements reflected in the institutional support for the principles:

"If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to justify the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and

\textsuperscript{111} Dworkin. 1977. 43.
\textsuperscript{112} See also Pöyhönen. 1988. 65-67.
\textsuperscript{113} Dworkin. 1977. 40-41.
\textsuperscript{114} Schecaira. 2014. 26.
well past the point where it would be accurate to say that any ‘test’ of ‘pedigree’ exists for deciding which of two different justifications of our political institutions is superior.”\textsuperscript{115}

According to Dworkin, legal principles can be differentiated from rules by two criteria. First, the \textit{logical distinction} means that a legal rule is valid in a binary way whereas principles cannot be exhaustively listed. Secondly, principles have the \textit{dimension} of weight or importance which the rules do not possess.\textsuperscript{116} According to Siltala, the principles (in Dworkin’s work) are not applicable in an “either/or” fashion as rules do, but instead operate on the principle of “more or less” and thus possess a “fuzzy logic”.\textsuperscript{117} According to Raitio, the term ‘validity’ utilized by Wróblewski must be avoided in the context of the Dworkinian pedigree of principles, because it is inconsistent with the dimension of weight which the principles possess.\textsuperscript{118}

One might think, then, that the “validity” or the normative impact of legal principles is completely dependent on the discretion of the judiciary. Dworkin, however, is not a legal realist, and guides (or restricts) judges’ discretion with his one right answer thesis. He has argued that in principle one answer in a judicial question is possible and in most cases obtainable by (re)constructing “the best constructive interpretation of past political decisions” or as Siltala puts it “the most coherent reading of the legal rules and legal principles, policies and other sorts of legal standards that can be inferred from the valid institutional and societal legal source material in the community”.\textsuperscript{119} The concepts of \textit{justification} and \textit{coherence} seem to be of value in Dworkin’s theory. In his later works, Dworkin has combined these elements in his concept of \textit{law as integrity}.

“Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a \textit{coherent set of principles} about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.”\textsuperscript{120}

According to Bengoetxea, MacCormick and Moral Soriano, the \textit{coherence} of the legal system (which is crucial for the rule of law) is quite \textit{dependent} on values:

“But this absolutely requires that the system be conceived as embodying a mutually compatible set of values such that detailed

\textsuperscript{115} Dworkin 1977. 67.
\textsuperscript{116} Ibid. 26
\textsuperscript{117} Siltala. 2003. 44. Siltala 2011. 63–64. The same type of fuzzy logic can be attributed to the use of different types of arguments in legal reasoning.
\textsuperscript{118} Raitio. 2003. 280.
\textsuperscript{120} Dworkin. 1986. 243.
norms and rules can be seen as instantiations of more fundamental principles.”121

The approach suggested by Dworkin would, thus, seem to reflect a moderate approach to axiological validity. It is submitted that this kind of moderate axiological validity forms a part of the ultimate validity and legitimacy of EU law, as principles and values (in the form of different legislative objectives) have quite a strong role in EU public procurement legislation and the Court’s case law relating to it. Even though Dworkin’s one right answer thesis and justificatory standards have been criticized in later academic discussions, they still illustrate quite eloquently the role of values, principles, axiological arguments, coherence and, perhaps most strikingly, the important role of the judiciary in legal ontology.122 As András puts it, Dworkin’s theory of interpretation does not replace legal reasoning with a moral one, but it does strengthen considerably the role of moral arguments, encouraging the interpreter to use them more overtly.123

According to Moorhead, Dworkin has taken statal legal order as the object of his inquiry where the most important functional concern has been to provide a moral form of political governance to the degree that the existing positive law permits interpretative variation. The interpretive approach of the European Court of Justice to the Treaty objectives based upon their substantive content, as well as the institutional context in which the Union operates, have, however, implied an even stronger role for values relating to European integration in the determination of legal outcomes.124 Consequently, it would seem, as Bengoetxea has argued, that the European Court of Justice is a “Dworkinian” Court, as it works on the idea of a coherent legal order of norms, principles and values.125 Let us next examine what the moderate variety of axiological validity and the works by Dworkin have to do with EU public procurement legislation. A special emphasis is given to the nature and role of principles in procurement legislation.

3.3.1 PRINCIPLES, POLICIES AND VALUES IN EU PUBLIC PROCUREMENT LAW

According to Dworkin, “arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole”, while principle is a standard which is based on a

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123 András. 2016. 46. To András, Dworkin’s view is open to objections, because in a pluralistic democratic system, different narratives on the political and moral nature of the legal system ought to be considered as normal, and therefore a general ‘moral base’ of the legal system does not exist.
requirement of justice or fairness and ultimately on the rights of individuals or groups.\textsuperscript{126} \textit{Dworkin} suggests that judges should base their decisions on grounds of principle and not policy. While the applicable text might be influenced by policy, policy does not directly influence the applier of that legal text.\textsuperscript{127}

\textit{Dworkin}’s distinction has been heavily criticized in later academic discussion. \textit{Hart} pointed out the problems of such distinction from the viewpoint of practical lawyers:

“This exclusion of ‘policy considerations’ will, I think, again run counter to the convictions of many lawyers that is perfectly proper and indeed at times necessary for judges to take account of the impact of their decisions on the general community welfare.”\textsuperscript{128}

\textit{Thomas} has argued that no sharp distinction is permissible in theory or in practice. There are a significant number of policies that do not clearly only belong to the political sphere of the legislature or principles that possess only right-oriented characteristics which situate them in legal realm.\textsuperscript{129} \textit{Regan} has argued that a central theme in \textit{Dworkin}’s theory of adjudication is a rather old-fashioned idea of the common law as a system of fundamental moral principles, accessible to all, and regulating intercourse between individuals, with only occasional and incidental reference to general social consequences.\textsuperscript{130} \textit{MacCormick} has viewed legal principles and policies as intertwined and not separated or opposing. He has argued that “to articulate the desirability of some general policy goal is to state a principle and to state a principle is to frame a possible policy-goal”.\textsuperscript{131} Similarly, \textit{Paunio} has argued that the distinction between policies and principles may sometimes be one of perspective: for example, it can be argued that free movement of persons is closely tied to individual rights, for instance, the right to employment or the principle of environmental protection can be derived from the right to clean environment. She has suggested, referring to \textit{Moral Soriano}, that in EU law, principles and policies form an interlocking unit of reasons, where policies are often expressed through principles and the other way around.\textsuperscript{132}

\textit{Dworkin} himself replied to the criticism by stating that any argument that directs the attention to consequences of a judgment is not necessarily an argument of policy and that judges apply the same rights-based approach to

\begin{itemize}
  \item \textsuperscript{126} Dworkin. 1975. 1059.
  \item \textsuperscript{127} Dworkin. 1986. 244.
  \item \textsuperscript{128} Hart. 141.
  \item \textsuperscript{129} Thomas. 2005. 196-197. \textit{See also} Tuori. 1987. 108-109. \textit{See also} Pöyhänen who claims that rights can be derived from policies and that \textit{Dworkin}’s distinction is not permissible. Pöyhönen. 1988. 54-57.
  \item \textsuperscript{130} Regan. 1978. 1262
  \item \textsuperscript{131} MacCormick. 1978. 262-264.
\end{itemize}
both fairness and consequentialism. Raitio has wondered whether this theoretical modification makes the relationship between principles and policies even harder a task.

Tuori has combined the Dworkinian distinction of principles and policies with discursive rationality and the legitimacy of law. Using the three-part classification of practical reason by Habermas, he has suggested that the rationality and legitimacy of a norm can be held to consist of pragmatic, ethical and moral legitimacy. Pragmatic reasoning and formation of intent consist of weighing and consolidating different interests and the formulation of common objectives. The requirement of rationality or legitimacy in pragmatic reasoning demands fairness in negotiations and optimal means to achieve common objectives which in turn require sound criteria for theoretical discourses. According to Tuori, pragmatic legitimacy is more or less connected to what Dworkin means by the term policy: the legitimacy of norms, which are based on pragmatic reasoning. Ethical and moral legitimacy are more connected to Dworkinian principles. Ethical reasoning contains strong evaluations which are connected to collective identities and cannot be changed through negotiations. Their content can and should, however, be clarified through a reflective process. All members of a community should have the right to participate in the discussions leading to the deepening of collective self-understanding. Moral reasoning aims for the unbiased resolution of conflicts and the formulation of norms which guide these resolutions. In discourse ethics, the criteria for the validity of a moral norm is that all participating agents agree or can agree to the validity of its claim. The presuppositions of discourse ethics also require a universal obligation to maintain impartiality.

According to Tuori, ethical and moral reason (principles) set limits to the use of pragmatic reason (policies) in legal regulation and decision-making. Civil disobedience cannot be justified in terms of practical reasoning or rationality (compromises in law should be respected) but can be through ethical and moral reasoning. Legislation (excluding constitutional law) usually operates within the fields of pragmatic and moral reason and does not enter into the field of ethical reason which is increasingly connected to individual or group identities. Ethical reason thus presents boundaries to the use of moral reason and also to legal regulation. In this way, axiologically valid or acceptable or normative law keeps within the values shared by the whole legal community. These values are most commonly reflected in fundamental rights.

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133 Dworkin. 1978. 294-301.
137 Ibid. 143-147.
The big problem regarding the ontology of principles and policies is that they (in particular) seem to exist at the same time as sources of law, norms and as arguments in justifying a legal decision. Policies, in particular, have been assessed in the academic discussion on the consequentialism in adjudication. From Oliver Wendell Holmes\(^\text{138}\) to John Dewey\(^\text{139}\) to MacCormick, who favoured a modest approach: “So I reject both extremes and entertain only the middle view that some kinds and some ranges of consequences must be relevant to the justification of decisions”\(^\text{140}\).

Moral Soriano has emphasized the relationship between policy arguments and moral values: “the major contribution of policy arguments is that they give rise to a discussion concerning their desirability, and in this sense, they are closely connected to rights and values”.\(^\text{141}\) The tension filled relationship between principles and policies as sources of law and as arguments in legal reasoning is tackled later on in this study. In this chapter, we are going to remain on the level of law as a system of norms, and assess principles and policies as parts of this system.

Siltala has described principles and policies as proto-norms. They are pre-norms of conclusive, self-sufficient legal rules, which possess the potential of being transformed into legal rules if there is enough institutional support for them. If the institutional support of these principles and policies decreases enough, they may fall back into the category of non-formal and extra-legal elements of the law.\(^\text{142}\) These proto-norms and the role of the institutional support is of great importance later, when we discuss the theory of sources of law and different degrees of formality by Siltala. It is perhaps sufficient to state here that a legal standard (even though it might stem from a right of an economic operator or certain policy goal) with a high level of formality could be a distinct provision in the EU Treaties while a legal standard with a low level of formality might be classified as Dworkinian legal principles or policies.\(^\text{143}\)

But what are these principles and policies in EU public procurement law? Even if we do not accept the Dworkinian separation between principles and policies and see their relationship as fuzzy at best, it might still prove beneficial to even try to search for the proto-norms which stem from the rights relevant to a public procurement procedure and those proto-norms which stem from the purposes of the legislation and assess their relationship in the light of what has been depicted above. Especially in EU public procurement law, there seems to be stronger than normal differences between their characteristics. There is also considerable variation regarding the formality and the structural

\(^{138}\) Holmes. 1897. 466.

\(^{139}\) Patterson. 1950. 619-622.

\(^{140}\) MacCormick. 1983. 240.

\(^{141}\) Moral Soriano. 2003. 309.

\(^{142}\) Siltala. 2000. 54-55.

\(^{143}\) Ibid. 53.
axiology\textsuperscript{44} of these proto-norms: some might be formulated as Treaty provisions or mentioned in the recitals of the EU Public Procurement Directives while others have been derived from these provisions or texts by the ECJ and are not represented in the written legislation.

As mentioned before, EU public procurement legislation has been classified within Internal Market legislation. This means that the rights which the judiciary should “take seriously” seem to grow from the basic freedoms of the Internal Market. The right-holders are, in the context of a procurement procedure and based on the language of the procurement directives, economic operators.\textsuperscript{45} According to Arrowsmith, the key freedoms regarding procurement are as follows. First, Article 34 TFEU forbids measures that restrict access of goods to government contracts. Second, Article 49 TFEU concerns the freedom of establishment meaning the right for firms from one Member State to set up and carry on a business in another Member State on a permanent basis. This covers restrictions on access to public contracts which affect the activities of non-nationals established in the state in question, or affect their ability to establish there. Third, Article 56 TFEU concerns the freedom to provide services and prohibits, inter alia, restrictions on those who wish to provide services on a temporary basis in another Member State.\textsuperscript{46}

If one concludes that public procurement is also part of EU Competition Law, one might also make references to Article 107 TFEU, which prohibits government from giving aid to industry that distorts or threatens to distort competition. In addition, Article 101 and 102 TFEU, concerning anti-competitive practices between undertakings and undertakings which abuse a dominant market position, might be called into question.\textsuperscript{47} Because the interrelations of principles and rights within EU legal system are vague and because their order of hierarchy – at least between Internal Market and competition principles and rights – cannot be confirmed, one cannot categorically leave competition law rights out of the picture. It is submitted, however, that there are restrictions in invoking EU competition law rules in the context of EU public procurement cases. This issue will be covered in Chapter 8.10.

\textsuperscript{44} These issues, derived from the work by Siltala, will be more closely addressed in the chapter 3 concerning the sources of law.

\textsuperscript{45} Look for example into Article 2 (1) subparagraph 5 of Procurement Directive 2014/24/EU where, in the concept of “public contracts” we can see a reference to “one or more economic operators”. Drijber and Stergiou also pointed to the older classification of the ECJ’s case law, where public procurement cases were ranked under the heading “law relating to undertakings” (droit des entreprises). Drijber – Stergiou. 2009. 805. The classification has since changed and now public procurement matters are scattered among many different headings from Rapprochement des legislations to Libre prestation des services.

\textsuperscript{46} Arrowsmith. 2014. 237-238.

\textsuperscript{47} Ibid. 238.
The problem of deriving proto-norms or principles from the rights of the economic operators in connection with public procurement procedures is that in many cases, the content of these principles have been derived in the case law of the ECJ from the purpose of the EU procurement legislation and not (at least expressively) from the rights of the economic operators which would categorize them more as policies in the terminology of Dworkin. In addition, public procurement scholars have had different views on whether the proto-norms (or perhaps we should say rights or policy based legal standards) regarding procurement legislation should be dealt as principles, Treaty provisions or policy goals (or a combination of these). Here the theory on sources of law by Siltala (and influenced by Summers) is of use, because a legal standard could be classified as any one of these categories based on its legal formality and institutional support. The role of these is dealt more closely in Chapter 3 devoted to the sources of law.

3.3.2 LEGAL STANDARD BASED ON RIGHTS

In the recitals of the EU public procurement Directive 2014/24/EU, it is stated that:

“The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.”

The key principles of public procurement which reflect Internal Market rights and freedoms are thus a) the principle of non-discrimination, b) the principle of equal treatment, c) the principle of transparency and d) the principle of proportionality. The relationship between these principles is quite fuzzy as is their status as either principles or policies. The rights which these principles would seem to protect are, first, the right of the economic operator to gain open access to public procurement procedures. This is of

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148 See for example ECJ case C-243/89, Storebaelt.
150 Arrowsmith. 2014. 237-337.
151 Graells. 2011. 75-110.
relevance at the beginning of a public procurement procedure as it is vital for economic operators to gain information of a procedure which is about to start and have open access to the procedure. These principles seem also to be protecting the economic operators’ right to be treated equally during and within the procurement procedure. This distinction might offer a useful tool to separate the principles from one another (for example the principle of non-discrimination might be more applicable at the beginning of a procurement procedure while the principle of equal treatment might be more handy later on in the procedure), but in the case law of the ECJ there do not seem to be clear divisions between non-discrimination or equal treatment.

As Drijber and Stergiou have suggested, “the interrelationship between the principle of non-discrimination, the principle of equal treatment and the transparency principle raises conceptual difficulties”.153 The relationship between non-discrimination and equal treatment seems to be especially vague. In its ruling in Correos, the ECJ stated that “besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to such contracts, even in the absence of discrimination on grounds of nationality”.154 In Parking Brixen, the Court held that Articles 43 and 49 EC as well as the prohibition on discrimination on the ground of nationality are “a specific expression of the general principle of equal treatment”.155 In Commission v Italy, the ECJ stated that “as far as concerns [Articles 49 TFEU and 56 TFEU], those articles do not lay down a general obligation of equal treatment but contain…a prohibition on discrimination on the basis of nationality”.156 There is also uncertainty as to whether the principle of transparency is subordinate to the principles of non-discrimination and equal treatment or whether it is a standalone principle.157

The principle of (direct and indirect) non-discrimination (based on Article 34 TFEU) can be seen, inter alia, in ECJ ruling in Commission v Netherlands in which the ECJ held that a requirement for the use of the “UNIX” operating system in a contract for the supply of an information technology system infringed Article 34.158 In a more recent case Medipac, the Court stated that “not only the wording of…Directive 93/42 but also the purpose of the harmonization system established by it preclude a contracting authority from being entitled to reject...medical devices which are certified as being in compliance with the essential requirements provided for it by that directive.159

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154 Case C-220/06. Para. 74.
155 Case C-458/03. Para. 48.
156 Case C-412/04. Para. 106.
158 Case C-359/93. Whether or not a single procurement procedure amounts to a “measure” which Article 34 applies to, see Arrowsmith.2014. 255.
159 ECJ C-6/05. Para. 50.
Among the first cases where the principle of equal treatment was invoked in the context of public procurement was the ECJ’s ruling in *Commission v Denmark (Storebaelt)*. In the ruling, the ECJ stated:

“On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.”

As the ECJ has stated in its ruling in *Commission v Italy* and *Correos*, the principle of equal treatment seems to be something different from the principle of non-discrimination and is not, for instance, based on Articles 49 and 56 of the TFEU. These two principles of EU public procurement law seem to be two sides of the same coin, with very few discernible conceptual or functional differences. There are some distinct features in the principle of equal treatment. In *Fabricom*, the ECJ stated that the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified. The principle of equal treatment requires, *within the procurement procedure*, that tenderers should be afforded equality of opportunity when formulating their tenders and that the bids of all tenderers must be subject to the same conditions. In *ELV Slovensko*, the ECJ held that the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure.

The principle of transparency was first explicitly stated, in connection with public procurement, in the ECJ *Telaustria* Case. In its ruling the ECJ held that certain types of concession contracts were outside the scope of application

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160 Case C-243/89. Para 33. Arrowsmith has brought up this ruling in connection to non-discrimination and not equal treatment which seems to run contrary to the wording used in the ruling. On the other hand, the key fact in the case was a clause in a Danish public construction contract requiring the use of Danish materials as far as possible. Arrowsmith. 2014. 614.

161 Cases C-412/04. and C-220/06.

162 Joined Cases C-21/03 and C-34/03. Para 27.


164 Case C-599/10. Paras 36 and 37. However, in some procurement procedures such as the competitive procedure with negotiation, negotiations are expressly allowed. In addition, the new public procurement directive allows for more room for clarifications and supplementations to the tenders. Article 56 (3). Directive 2014/24/EU.

of the procurement directives but the principle of non-discrimination based on nationality must be complied. Requirement of the transparency of the procedure was a key part of the principle of non-discrimination. According to the ruling, transparency “consists in ensuring for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed”.166 In a later ruling in Coname, the ECJ clarified that a sufficient degree of advertising does not necessarily involve “an obligation to hold an invitation to tender” as long as an economic operator in another Member has enough access to information about the award procedure.167 Arrowsmith and Drijber and Stergiou have all suggested that based on the principle of transparency, a certain type of competitive procedure must take place in the award of the public contract.168 Again, the conceptual vagueness of the use of these principles in ECJ case law presents a question of why such procedural requirements (such as the requirement to draw up the rules of the procedure or the requirement not to change the weightings of the award criteria after receipt of tenders) are built on the principle of transparency and not on the principles of non-discrimination or equal treatment.

In a larger scale, outside the connection to the principle of equal treatment, the principle of transparency can be found in Article 15 TFEU and Article 1 TFEU, as well as in Articles 41 and 42 of the Charter of Fundamental Rights of the EU. In addition, the principle of transparency has been seen to have connections to the principles of effective judicial protection and the rights of defence, the principle of legal certainty and sound administration as well as a number of secondary legislation in the EU.169 According to Buijtze, the principle of transparency owes its popularity largely to its instrumental value in promoting democracy, trust in public institutions or market efficiency.170 She argues that transparency is necessary to allow participation: “Whenever EU law grants a right to participate, there should be an auxiliary transparency obligation to render this right effective.171 Here we can once again see the

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166 C-324/98. Para 62.
167 Case 231/03, Coname.
169 Buijtze. 2013. 3.
170 Buijtze. 2013. 4-5.
171 Ibid. 23. Georgieva has classified the main features of transparency into two streams to which its most recognisable functions belong. The first stream includes representative features including information provision, legitimacy of state institutions, demonstrating the political will for openness in governance; strengthening the relationship between state institutions and public. The second stream includes control features which include enabling the monitoring activities of all government bodies, clarity regarding the rights and obligations of individual institutions, allowing the public to take part in the decision making of the government bodies, and anticorruption tools against backroom manipulation to the detriment of the society. Georgieva. 2017. 13.
principles of EU public procurement law as securing the *procedural rights* of the relevant economic operators.

The principle of proportionality has traditionally been used as a tool in Internal Market Law. As Shuibhne has stated, the Court of Justice follows an established template consisting of three distinct questions, when resolving disputes engaging the Treaty’s free movement provisions: First, does the challenged measure or action constitute a *restriction* on free movement rights conferred by the Treaty? Second, if it does, can the measure or action be *justified*? Third, if it can, is the measure or action nevertheless *proportionate*?\(^\text{172}\)

The proportionality standard applied in EU free movement law involves two tests: first, assessing the *suitability* (or *appropriateness*) of the contested measure for achieving the stated policy objectives; and, second, evaluating its *necessity* for that purpose. Assessing the proportionality of a national measure in the latter sense will also involve consideration of whether alternative measures could be *equally* effective in terms of achieving the public interest objective accepted in principle, but *less* restrictive having regard to their effect on intra-EU trade.\(^\text{173}\)

Proportionality in public procurement procedures has traditionally been tested in assessing the lawfulness of the requirements, technical specifications and other criteria by the contracting authority or by national legislation.\(^\text{174}\) These criteria delineate the *access* to the procedure and ultimately to the public contracts. In *Connexxion Taxi Services*, the ECJ stated (concerning the earlier Directive on public procurement 2004/18/EC) that “it follows from recital 2 thereof that the principle of proportionality applies in a general manner to public procurement procedures.”\(^\text{175}\) The traditional three-part test depicted above has been applied in relation to national law provisions which required contracting authorities to exclude from the procurement procedure tenderers which had committed infringements relating to social security contribution\(^\text{176}\) or where the national legislation provided that a consortium and its member companies had to be excluded from a procurement procedure if the member companies had submitted tenders in competition with the consortium’s tender\(^\text{177}\). It has also been applied in relation to criteria set up by a contracting authority in a case regarding a requirement of the tenderers to

\(^\text{172}\) Shuibhne. 2013. 24

\(^\text{173}\) Ibid. 28. Case C-205/07, Para 53.

\(^\text{174}\) See recital 83 of the Public Procurement Directive which states: “Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in public procurement. Any such requirements should be related and proportionate to the subject-matter of the contract.”

\(^\text{175}\) Case C-171/15. Para. 32.

\(^\text{176}\) Case C-358/12. Paras. 31–40.

\(^\text{177}\) Case C-376/08. Para. 29.
commit to certain legality protocols which were intended to prevent organized crime. 178

Kumm has suggested that the proportionality principle, applied in Internal Market law as a test, generates risks of excessive judicial activity:

“Proportionality has become the lawyers’ framework to engage in policy analysis in a way that is neither directly guided or constrained by legal authority. Courts engaged in this type of rights reasoning are no longer enforcers of a political will that has previously created and defined a set of legal rights. Such a court has transformed itself into a veto-holding junior-partner in the joint legal-political enterprise of developing and enforcing rational policies that reflect equal respect and concern for each individual.”179

Petursson has suggested a more delicate approach to the principle of proportionality as an instrument of balancing. According to Petursson, a fair, structured and balanced application of the proportionality principle requires that issues are debated and spelled out. Sometimes the more *stricto sensu* approach to the principle requires that the Court enters the practice of balancing and weighing interests. Thus, moral discourse has a role alongside proportionality assessment in balancing. What is essential is coherency, transparency and, to a degree, foreseeability in the reasoning of the Court.180 Shuibhne, has argued that it is “precisely the responsibility of the Court of Justice to provide and reinforce a coherent guiding structure for the application of proportionality for cases with an EU legal dimension”.181 The key word here seems to be “coherence” which would hold the discretion of the judges within the realm of a legal system. Issues regarding coherence are addressed below.

3.3.3 LEGAL STANDARDS BASED ON THE PURPOSE OF LAW

In addition to those principles (or proto-norms), which can be derived (more or less) from the rights of the economic operators participating in procurement procedures and the market, we can distinguish legal standards at play in public procurement law, which are more clearly derived from the purposes of the legislation. Graells has listed, as the goals of public procurement (as regulated by the procurement legislation) as *value for money, the efficiency of public procurement and transparency (oversight, Anti-Fraud Objectives).*182 Arrowsmith has added *horizontal policies,* i.e.

178 Case C-425/14.
179 Kumm. 2010. 110.
181 Shuibhne. 2013. 28.
182 Graells. 2015. 101-114.
industrial, environmental and social policies into the mix.\textsuperscript{183} In the directive on public procurement we can see references to the promotion of innovations and SME participation.\textsuperscript{184} These purpose oriented legal standards will be dealt in more detail below when tackling the issue of legal reasoning.

The peculiar aspect of the legal standards in EU public procurement law based on the purpose of the law is that they seem to be based more on the fundamental rights of the European Union, rather than the procedural rights of the economic operators participating in a procurement procedure. As such, they seem to act as a balancing tool for the excesses of applying the principles of non-discrimination and equal treatment. Thus, it was stated by the ECJ in Concordia Bus Finland, that “the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment”.\textsuperscript{185}

3.3.4 RELATIONSHIP BETWEEN THE TWO STANDARDS

It is suggested in the present work that because the fundamental logic of public procurement legislation is of procedural nature (a tendering procedure), the Court has chosen to prioritize legal standards based on the procedural rights of the economic operators in a procurement process by presenting these standards as principles. The system of public procurement legislation has been built on these procedural rights and they form a majority of the building blocks keeping the system coherent. For instance, in the remedies system the sanctions issuable by courts have the common goal of restoring a non-discriminatory procedural state of affairs, not a “good public contract” by whatever measure. The competitive tendering procedure does, by itself, nothing to promote environmental or social protection or innovations. The objectives of EU public procurement legislation have been used more as counterweights (supporting a choice made by the contracting authority in terms of its decisions concerning requirements, subject-matter or other criteria) with a lesser autonomous status than the principles of equal treatment. Although these objectives of policies mirror the desirability of a certain state of affairs, they cannot, by themselves, completely override the protection of the procedural rights of the economic operators in a procurement procedure. The interests contained in the purposes of EU public procurement law are also so pluralistic that the risk of conflicts between these interests is constantly apparent. Should we first take into account environmental or social protection, or perhaps small and medium sized enterprises or the competitiveness of the EU through promotion of innovation? The fundamental core and framework of EU public procurement legislation (as

\textsuperscript{183} Arrowsmith. 2008. 148-162.
\textsuperscript{184} Directive 2014/24/EU. Recitals 47, 124.
\textsuperscript{185} Case C-513/99. Concordia Bus Finland. Para. 86.
stated in the start of public procurement directives) is the protection of the economic freedoms as rights of economic operators in the Internal Market. This is also why arguments based on principles of public procurement law in legal reasoning improve the cohesion of legal reasoning and help to systematize the legislation, in the sense of its original core. This also reflects the argument by Tuori that economic constitution (reflected in the procedural rights of economic operator) enjoys functional primacy over social constitution (reflected in the objectives of the procurement legislation).

The difference between procedural rights in a procurement process and objectives of EU public procurement legislation can also be conceptualized using the three elements of legitimacy of law suggested by Tuori. It is submitted that in EU public procurement legislation, principles based on the procedural rights of economic operators belong within the realm of moral reasoning, as all participating agents can probably agree to the validity of these rights: procurement legislation is about securing the rights of the participants of a tendering procedure to be treated equally and in a transparent manner. This is embedded in the structure of the procedure itself. On the other hand, different objectives of EU public procurement legislation such as environmental or social protection or the promotion of innovations reflect pragmatic reasoning where the legitimacy requires fairness in negotiating different interests. Although issues such as protection of environment or social protection are closely related to fundamental rights which clearly belong to the realm of moral or ethical reasoning, the inclusion of these issues within a legislation concerning procurement procedure is not, in the view of this work, a question of moral or ethical reasoning, where negotiations cannot change evaluations or where all participating can agree to the validity of such inclusion. From this viewpoint, it can also be stated that moral reason (principles) set limits to the use of pragmatic reason (policies). Consequently, social, environmental or innovation considerations cannot be invoked in overriding the principles of equal treatment, transparency or proportionality. On the other hand, the principles of equal treatment and transparency do not prevent contracting authorities in taking account such considerations, especially within a procurement procedure. As the Advocate General has stated in his opinion in Spezzino, solidarity and social considerations cannot be pursued by acting outside the scope of the common rules on public procurement, but by operating within the boundaries of these rules.

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186 Case C-513/99.
When talking about morality and values in judicial reasoning one also has to keep in mind the natural law philosophy, which distances itself from legal positivism and legal realism and defines the law as subordinate to criteria of religious, social, or political justice. Setting aside classical, scholastic and rationalist natural law of previous centuries, key proponents of modern natural law philosophy (from 1950s onwards) are Lon L. Fuller and John Finnis. According to Fuller, law-makers and the enforcers of the law are bound in their discretion to the internal morality of law. In the Morality of Law, Fuller lists eight requirements of the rule of law: laws must be general and widely promulgated. Laws should also be prospective, specifying how individuals ought to behave in the future. Laws must be clear, non-contradictory and relatively constant. Law must not ask the impossible. Finally, there should be congruence between what written statutes declare and how officials enforce those statutes. Last requirement is clearly addressed to the interpreters of the law. Mendelski has compared Fuller’s internal morality of law to the formal legality of law while Waldron has explained it as the rule of law. Fuller has illustrated his main theses in a story about a king Rex who attempts to lay down law but finds out that there are at least eight ways (mirroring the eight requirements of the rule of law) in which the attempt to create and maintain a system of legal rules may end up short.

The Aristotelian influence can be seen in that law-makers and its enforcers (such as courts) should take into account the purpose-laden nature of the law. For Fuller, law can only be understood by attending to its purpose and this purpose has “an essential component of collaboration and reciprocity in the enterprise of subjecting human conduct to the governance of legal as distinct from merely managerial norms”. In his views on adjudication, Fuller stated that problems which possess “too strong polycentric aspects” such as problems of economic management are not suitable for the adjudicative process, while “the laying down of rules that will make a market function properly is one for which adjudication is well suited.”

The distinction, made by Fuller, between “morality of duty” and “morality of aspiration” has importance as well. Morality of duty lays down basic rules

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188 Siltala. 2011. 201. This approach could be characterized as the radical version of axiological validity, using the terms of Wróblewski.
190 Fuller. 1969. 39.
191 Ibid. 184.
193 Fuller. 1969. 33-41.
without which an ordered society is impossible. The morality of aspiration is an ideal which a citizen or an official should strive for. The former could be compared to “externally” duty-imposed rules while the latter has elements of principles which guide judges and other law-applying officials towards the high standards of the Dworkinian Hercules.

According to John Finnis, there are seven basic values or goods that the legislator and the courts should adhere to: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and “religion”. The first value, life, signifies “every aspect of the vitality (vita, life) which puts a human being in good shape for self-determination”. Knowledge is a self-evident good, “an aspect of authentic human flourishing”. Play refers to engaging to performances which have “no point beyond the performance itself, enjoyed for its own sake”. Aesthetic experience is the appreciation of beauty, found in nature for instance. Sociability covers everything from peace and harmony amongst men to the “flowering of full friendship”. Practical reasonableness means the “basic good of being able to bring one’s intelligence to bear effectively...on the problems of choosing one’s actions and lifestyle and shaping one’s character”. Finally “religion” refers to the transcendental, free will and responsibility and the universal order of things. All of the goods mentioned here are self-evident and do not possess different hierarchical roles.

The work by Finnis has been utilized in studies on the legal reasoning of the ECJ to support and to give weight to the benefits of consistent and institutionalised judicial interpretation which increases clarity in life. Conway has quoted Finnis who stated that “the law’s distinctive devices: defining terms, and specifying rules with sufficient and necessary artificial clarity and definiteness to establish ‘bright lines’ which make so many real-life legal questions easy questions”.

Siltala has summarized the merits and demerits of modern natural law philosophy as follows:

“For the adherents of natural law, the subjugation of positive law to the precepts of political morality is one of the strongholds of the approach, as it is thought to effectively safeguard the public against any legal wrongs committed by the legislator or the courts

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197 Fuller. 1969. 5-6.
200 Ibid. 85.
201 Ibid. 64-65.
202 Ibid. 87.
203 Ibid. 88-89. Here one can find aspects of Aristotle’s phronesis. Siltala 2011. 218.
204 Finnis. 1980. 89–90.
205 Ibid. 92–93.
of justice. For the critics of the approach, such as H.L.A. Hart, the intertwinement of law and morality is a source of conceptual confusion and has the unfortunate side effect of collapsing the distinction between the formal validity of law and its moral merit or demerit."207

Trying to find the internal morality, the standards of the rule of law, or the marks of basic values behind the EU public procurement law, or even those of Internal Market law, is a hard task, irrespective of whether one tries to find these from the institutional premises of EU law or some more ultimate premises of law. As Davies has argued:

“The rules and principles stated by Court are far better understood as embodying a series of compromises, perceptions of fact, and pragmatic approximations which aim to deal with the problems of evidence, workload, and legal clarity, rather than as an ongoing monologue about market philosophy...Looking in the case law for clear or consistent guidance about the conceptual foundations of economic integration is, as internal market lawyers know, a hopeless cause.”208

During the last few decades an increasing amount of academic discussion on value-laden general principles and basic rights have emerged in the context of EU law and the legal reasoning of the ECJ.209 According to Walkila, the inclusion of fundamental rights into the EU’s legal order is almost entirely the result of the case law of the ECJ. This case law has reflected the growing intensity and weight of human and fundamental rights considerations in the Court’s jurisprudence.210

Values of the European Union can be found in Article 2 of the TEU. There we can find values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. In Article 3 of the TEU we can also see, inter alia, references to security and justice, social justice and the sustainable development. Still it seems quite hard to identify, even after the Lisbon Treaty, the moral identity of the EU or much less that of its legislation on public procurement.211 Thus, it seems that we once again face the notion that EU Internal Market or public procurement law operates within the axiological validity of a norm at the levels of practical and moral reasoning (and the negotiations and discourses contained at these levels) and not at the level of ethical reasoning with inalienable rights.

In addition, the pluralistic and polycentric legal problems which the ECJ is facing to an increasing degree seem hard to discard altogether from the sphere

208 Davies. 2012. 27.
210 Zucca. 335-336.
211 Williams. 2010.
of adjudication, as Fuller has suggested. The internal morality theory by Fuller and the role of the rule of law in do, however, have their merits when focusing on the coherence, formal rationality and the different justificatory arguments in legal reasoning discussed below.

3.4 SUMMARIZING THE ONTOLOGY OF EU PROCUREMENT LAW

This study takes as its starting point the positivist view that there is an EU legal order which gains its validity from its Treaties and is ultimately constituted in the momentary legal order. The constitution of such order is, however, influenced in the dialogue between the constitutions of Member States and the European Union. The autonomy of EU legal order is justified by the emphasis on legal reasoning of the European Court of Justice with the Court as the institutional point of reference. The view from dialogical pluralism is chosen because, similarly to the views of the ECJ, EU legal order is viewed as an integrated legal order\textsuperscript{212} and because national legislation is seen as having a role as a source of law\textsuperscript{213}. In this study, at least a modest degree of systemic validity is presumed in the legislation on public procurement with references to the Treaties' provisions on free movement. At the same time, through the connections to the Treaties, the EU procurement legislation is influenced by both the (micro)economic and the social sectoral constitutions of the EU and their tensions. The factual validity of EU procurement law stems from the fact (influenced by legal realism and Hart) that it has been recognized as criteria of legal decision-making by the Court of Justice and by national courts (and other law-applying officials) and also is likely to be recognized as such decision-making criteria in the future based on the consistent field of normative meaning.\textsuperscript{214} The axiological validity of EU procurement law comes from the fact that it enjoys institutional support and practical, ethical and moral legitimacy, in the sense that it is regarded as having legal significance and belongs to the normative premises of legal decision-making.\textsuperscript{215} In addition, the EU legal system possesses enough Dworkinian cohesion that values can be taken into account in legal reasoning of the judiciary and where legal principles and policies (or consequentialist or teleological arguments) operate, along with the written legislation, as intermediaries (proto-norms) between values and the interpretative actions of the ECJ.\textsuperscript{216} This is manifested in the principles and objectives of the EU procurement legislation which reflect the value foundations and the protection

\textsuperscript{212} Eckes. 2013. 175.
\textsuperscript{213} More on this in Chapter 3.
\textsuperscript{214} Siltala. 2003.931.
\textsuperscript{216} Siltala. 2003. 931.
of the procedural rights of economic operators in public procurement. This starting point does have, as I will show in the chapters below, influence on the analysis of the role of the ECJ and its reasoning. This study does not, however, focus on the questions whether the ECJ is an activist or a minimalist court in issues on public procurement law. 217 The systemic, factual and axiological elements of the ontological validity of norms are, instead, taken more extensively into account in the analysis of legal reasoning.

Before heading to the themes on legal interpretation, reasoning and justification, we must take a look into a specific instance of the validity of law: the sources of law.

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217 Bengoetxea, MacCormick and Sorianno have suggested that the activism analyses of the ECJ should be replaced by an approach based on legal reasoning. Bengoetxea – MacCormick – Sorianno. 2001. 43.
4 SOURCES OF LAW

The doctrinal study of law or legal dogmatics (such as this study) is about legal argumentation in terms of its methodology. The source material is restricted to the institutional sources of law.218 The doctrine of the sources of law draws a boundary between what is legal and what is not.219 These features narrow out the legally possible meaning alternatives. The sources of law form one of the entities of which the normative ontology of law is constructed.220 According to Wróblewski, a metadecision of sources of law concerns the choice of arguments justifying law-applying decisions. The decision of validity determines what rules the court treats as valid and, because of that, what are sources of law in the decisional meaning and may be used as arguments justifying a decision.221

4.1 SILTALA’S MODEL OF THE SOURCES OF LAW

According to Siltala, there are six elements involved in any theory or model of the sources of law:

a) correspondence of the model with the normative ideology that is collectively internalized by the judiciary and other law-applying officials with reference to the field of coverage and relative accuracy of the model vis-à-vis the normative decision-making criteria that are in fact utilized by the courts and other officials;

b) static or dynamic characteristics of the model, with reference to whether the impact of a certain kind of legal argument on judicial discretion can be determined ex ante as being part of a constant and rigid system of legal sources, in which case the model of legal sources is based on a static systemic logic, or whether the impact of a certain kind of legal argument on judicial discretion can only be determined ex post facto, vis-à-vis the actual case at hand, in which case the model of legal sources is based on dynamic systemic logic;

c) different facets of legal formality involved in legal arguments, with reference to their elements of constitutive or validity formality, systemic formality, mandatory formality, structural or norm-logical formality, methodological or argumentative formality, and linguistic or expressive formality;

219 Aarnio 2011. 147.
d) **structural axiology** of law, with reference to the relative degree of institutional support and societal approval enjoyed by a legal argument;  
e) **institutional justification premises** of the legal source doctrine; and  
f) prevalent **meta-theory of law**, in the sense of the institutional meta-context of law.

*Siltala* himself focuses on aspects of institutional justification premises as he suggests that the justification for the Finnish model of legal sources may be given in institutional terms. First of all, the principle of **democracy**, in the sense of respect for the institutional value choices made by the Parliament, provides an institutional justification for the binding character of statutes and other decrees. **Equality before the law** provides an institutional justification for precedents and other court decisions of a constant and uniform kind and possibly for other decisions given by the law-applying officials, on the condition that the material *ratio* of the decision may be generalized or universalized so as to cover other, similar decision-making situations. The **prevalent theory of social justice** provides a non-institutional justification for other possible kinds of legal source material, such as the idea of uniform legal interpretation within EU law or anticipated social consequences of a certain legal interpretation in light of the principles of the prevalent political morality in society. The principle of **legal sovereignty** provides a (weak) institutional justification for such norms of EU origin which cannot draw support from the principle of parliamentary democracy.\(^{222}\)

*Siltala*’s model of the sources of law in Finland has both static and dynamic characteristics. These characteristics can also be attributed to EU law. The “pedigree” of norms in *Dworkin’s* terminology or the *Kelsenian* hierarchy of norms reflects the static characteristic of the sources of law. The impact of written secondary law such as procurement directives, with appropriate legal basis in EU primary law can be determined *ex ante* as being part of a constant system of legal sources. However, the impact of the case law of the ECJ, for instance, cannot be determined based on its origins. The use of precedents and principles follows a dynamic systemic logic and can change over time and between different cases. Dynamic characters of legal sources are hence more closely connected to judicial decision-making.

*Siltala* has utilized in his model of the sources of law the theory by *Summers* concerning the formality of legal norms. According to *Summers*, the level of formality of a legal norm may be the following kind:  
a) Constitutive formality: validity formality, with reference to either formal or non-formal source of origin of a legal norm or argument, and rank formality, with reference to the hierarchical or non-hierarchical status of a legal norm or argument. Within constitutive formality, the effect of legal rules have gained relative independence from the social values and goals at the back of law and exert a normative, binding effect

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upon the legal discretion of the judge by force of their formal source of origin, whereas legal principles enjoy possibly oblique but still adequate institutional support and content-based approval in the community and are, by force of their definition, closely intertwined with social values and/or goals;

b) Systemic formality: static and closed systemic totality of legal rules in the sense of constituting Kelsen’s hierarchic norm pyramid, or no more than a loosely defined “system” of legal principles that are, by force of definition, open-ended vis-à-vis certain set of social values and/or goals;

c) Mandatory formality: strong binding force of legal rules vis-à-vis a judge’s legal discretion, or the – at least prima facie – weaker, merely persuasive force of legal principles vis-à-vis a judge’s legal discretion;

d) Structural, or norm-logical, formality: binary logic of the either/or kind of applicability in legal rules, or multi-valued logic of the more-or-less kind of applicability in legal principles;

e) Methodological formality: semantics-oriented interpretation of legal rules, where recourse to social values and/or goals is at least prima facie ruled out, or the openly value-laden weighing and balancing of legal principles where recourse to social value-laden or goal-oriented elements is required;

f) Expressive, or logico-linguistic, formality: semantic characteristics of the legal norm formulation.

The sum total of the various tenets of legal formality (a)–(f) may be called deontic formality.223

According to Siltala, legal rules (á la Dworkin) are legal decision-making arguments with high legal formality (á la Summers), and legal principles (á la Dworkin) are legal decision-making arguments with low legal formality (á la Summers):

“Robert S. Summers’ idea of the different categories of legal formality and Ronald Dworkin’s corresponding idea of legal rules and ‘standards that do not function as rules, but operate differently as principles, policies and other sorts of standards’, would seem to quite neatly match to one another. A legal norm or legal argument that ranks high in all (or most) of Summers’ categories of legal formality is a legal rule in Dworkin’s terminology, valid because of its formal source of origin, or pedigree. A legal norm or legal argument that ranks low in all (or most) of Summers’ categories of legal formality, by contrast, is a legal principle, if it enjoys adequate institutional support and sense of approval in the community.”224

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Siltala has argued that the structural axiology of law looks upon the law from the point of view of the social values and goals entailed in the sources of law. It also comprises the inherent potential of such values and goals of being transformed into value-laden legal principles, if they come to satisfy the criterion of enjoying institutional support (Dworkin) and a sense of approval in the community. There is also potential of being transformed into legal rules, if the values and goals become incorporated in, and acknowledged by, individual decisions given by institutional law-making or law-applying authorities in the legal community.\textsuperscript{225}

The question on how different sources of law and the institutional justification premises align with each other are affected by the meta-theory or the institutional meta-context of law. The principle of democracy and equality before the law both share the same legal meta-theory of the Rule of Law. Theories of social justice and the principle of legal sovereignty also have roles as meta-theories of law.\textsuperscript{226}

4.2 CATEGORIES OF SOURCES

The material included in the prevalent legal source doctrine can be classified under the three categories of the binding sources, persuasive sources and other feasible sources, depending on structural axiology of the arguments involved, their degree of legal formality, their dynamism, their institutional justification ground in the light of the prevalent institutional meta-theory of law and the presence or absence of a constant and uniform practice of interpreting certain sources of law.\textsuperscript{227}

According to Siltala, Nordic (written) legislation belong to the binding sources, as they have strong institutional justification grounds based on prevailing meta-theories of democracy and the principle of sovereignty. Their bindingness is also increased by their high level of formality as well as their static characteristics. Persuasive sources comprise of, among others, precedents and other uniform national court practice and decisions given by other law-applying officials the material ratio of which can be generalized to apply to other cases of a similar kind. The bindingness of the role of precedents is diminished by a lower level of legal formality and their dynamic nature. The role of the decisions of the ECJ have a variable role in the categorization of Siltala, depending on their position according to the different tools for categorization suggested above. Some ECJ cases have been transformed into binding legal sources through constitutionalisation and have achieved a high level of formality as well as strong institutional justification grounds. Others are only of persuasive nature because they lack these characteristics. Other

\textsuperscript{225} Siltala. 2011. 260.


\textsuperscript{227} Ibid. 943-944.
Sources of Law

feasible sources are comprised of, among others, arguments derived from legal history, economic analysis of law or anticipated social consequences of a certain legal interpretation in the light of the principles of the prevalent political morality.

Raitio has summarized the influence of Dworkin, Summers and Siltala in his study on the legal certainty of EC (EU) law:

“Siltala’s combination of Dworkin’s theory of law and Summers’ division of legal formalities may serve as a theoretical basis for defending the idea that the territory between legal rules and legal principles is occupied by a variety of less than entirely formal legal instruments. The different categories of legal formality are conceptually independent of each other and in each category a legal norm may fail to gain the status of a fully-fledged legal rule. This theoretical framework is especially suitable when analysing the various legal instruments of the EC (primary and secondary rules, even ‘soft law’) and the case law of the European Courts.”

The model suggested by Siltala is focused on the sources of law in the Finnish legal order. The principles of categorization can, however, be transferred, mutatis mutandis, to the EU legal order as well. In the context of the EU legal order, Bengoetxea has classified constitutional norms, international agreements, and law derived from the Treaties as binding norms. Innominable acts and the jurisprudence of the ECJ as precedents have been classified as norms of persuasive nature. However, a series of decisions in the same sense on an issue of principle can be treated as binding authority. A number of additional reasons guiding the Court are comprised of, inter alia, legal dogmatics, answers to parliamentary questions by representatives of the other institutions and notices and other statements of policy issued by the EU institutions.

Regarding this classification of different types of sources of law, we should take into account the difference between norms and sources of law. According to Shecaira, sources of law should not be confused with legal norms, i.e., the normative propositions, or meaning-contents, which can be derived from sources like statutes and precedents, and by which judges are guided in arriving at their final decisions. A source of law is “something, most commonly a piece of text approved by law-making officials, from which legal norms can be derived.” This holds meaning in relation to the categorisation of different sources of law, because the persuasiveness of a certain source of law refers “exclusively to the use of the source” and not to the enforcement of the norm which can be derived from the source. The norm is not a mere permission, but a prescription to the effect that a certain action ought to be undertaken.

228 Raitio. 2003. 298.
230 Shecaira. 2015. 17.
According to Schecaira, “a permissive source may be used, but once used, it generates a reason for acting as the source prescribes”.231

This distinction is applicable to binding sources as well. The bindingness of a source of law refers only to the use of the statute and not necessarily to the norm it issues. A judge cannot ignore an applicable statute, but he may be able to refuse to apply the norm it issues, as long as “he has cogent argument to give in defense of his defiant deed”.232

Principles also have many faces. They can be seen as norms applicable in legal decision-making. In this sense, they cannot also be at the same time sources of law. Legal principles as legal norms must find support in acknowledged legal sources and thus they cannot themselves be considered as such sources. Legal principles can also be seen as legal sources supporting legal norms. Principles as sources of law have to be inferred from their discursive expressions as norms and not the other way round: “These elements must be reconstructed starting from the discursive traces they leave on the surface level, but they should not be equated with these traces”.233

4.3 SOURCES OF LAW IN THE LEGAL SYSTEM OF THE EUROPEAN UNION

Using the model of legal sources by Siltala, we can try to draw out the sources of law in EU law and in particular the law concerning public procurement. The system of sources of law in this work is based on the classification of EU law norms by Rosas and Armati. According to them, a distinction should be made between the following categories of norms:

- the value foundations of the EU legal order (Article 2 TEU);
- general principles of Union law (including fundamental rights);
- written primary law, such as the TEU and the TFEU with protocols;
- international agreements binding on the EU; general international law;
- secondary law in the form of legislative acts;
- legal acts adopted by the Commission on the basis of delegated powers (delegated acts);
- legal acts adopted by the Commission or, as the case may be, the Council, on the basis of implementing powers (implementing acts);
- measures of national law necessary to implement Union legal acts;
- (the case law of the Union Courts).234

231 Ibid. 25
232 Ibid. 25.
233 Tuori. 2010. 189-190.
234 Rosas – Armati. 2012. 53. Rosas and Armati emphasize that the list is not exhaustive as it does not include decisions adopted under the Common Foreign and Security Policy (CFSP). See also Määttä – Voutilainen. 2017. 89-111.
The value foundations of the EU legal order are based on Article 2 TEU, according to which the Union is founded on the values of respect of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. This Article forms the ideological basis for the more precise objects of the Treaty and acts as a condition for the right to apply for membership of the Union and enjoy the rights derived from the Treaties. In its ruling in Kadi the ECJ stated that the EU constitutional order consists of core principles which may prevail over provisions of the written primary law.\textsuperscript{235} The value foundations of the EU legal order could be classified, by using the tools for categorization suggested by Siltala, as binding sources, even though in Siltala’s model many of these values have been defined as classification tools and not as sources of law themselves. By way of being written in the Treaties and being in fact used as sources of law with institutional support, the value foundations have begun to enjoy the qualities of legal sources through structural axiology. The binding nature can be derived from their very strong institutional justification grounds (as they constitute institutional meta-contexts themselves) and the structural axiology of these value foundations.

The view of the ECJ on these value foundations can be found in its opinion 2/13 to the Accession of the European Union to the European Convention of Human Rights.\textsuperscript{236} In the opinion, the ECJ has stated that the legal structure which forms the EU “is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”. The Court continues: “That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”. Respect for the fundamental rights recognised by the Charter is a condition of the lawfulness of EU acts, “so that measures incompatible to those rights are not acceptable in the EU”.\textsuperscript{237}

EU primary law consists of the Treaties (the TEU, the TFEU and the Euratom Treaty), a number of protocols and annexes which form a part of the Treaties, the Charter of Fundamental rights of the European Union and the general principles and the fundamental rights of the EU law.\textsuperscript{238} EU primary law can also be classified as binding legal source due to the strong institutional justification grounds (sovereignty), a high level of legal formality and its static characteristics. If one accepts the model by Tuori on the benefits of interlegality in analysing the relationship between the EU and the Member States’ legal orders, one might suggest, along the lines with Rosas and Armati,

\begin{itemize}
\item \textsuperscript{235} Rosas – Armati. 2012. 54. Joined Cases C-402/05 P and C-415/05 P, Kadi.
\item \textsuperscript{236} Opinion 2/13 of the Court of 18. December 2014. OJ C 65, 23.2.2015, p. 2–2.
\item \textsuperscript{237} Ibid. Paras. 168-169.
\item \textsuperscript{238} Rosas – Armati. 2012. 56-59. In C-101/08, AudioLux, a constitutional status was awarded to the general principles of Community/Union law.
\end{itemize}
that the national constitutions also have a role in EU primary law through provisions in the TEU or through a “shared view of the most elementary constitutional principles”, although the principle of primacy of the EU law applies also with regard to national constitutions.239

According to Arrowsmith, the most important primary law rules in terms of public procurement are the rules on free movement.240 The Court of Justice has referred to the fundamental rules of the Treaties in numerous decisions concerning the appropriate procedure in procurement contracts below the monetary thresholds which form the limits of application of the procurement Directives.241 The status of primary law rules as principles, policies or just plain rules has been addressed above.

Rosas and Armati place binding international agreements and general international law below primary law but above secondary law in their system of hierarchy. First of all, the ECJ has held that international agreements have primacy over acts of secondary law. Secondly, the ECJ has annulled decisions to conclude international agreements on the ground that they violate primary law.242 In Air Transport Association of America, the ECJ held that customary international law may be relied upon by an individual for the purpose of examining the validity of a Union act in a situation where the customary international norms are capable of calling into question the competence of the EU to adopt the act in question and where this act is liable to affect rights which the individual derives from Union law or to create obligations under Union law.243 International agreements and general international law can also be classified as binding sources for their high level of legal formality and structural axiology and static characteristics. The institutional justification ground could be defined as a combination of legal sovereignty of the EU and the principle of pacta sunt servanda.

A key international agreement within public procurement law is the Agreement on Government Procurement (GPA), a plurilateral agreement within the framework of the World Trade Organisation (WTO). The Agreement has 19 parties comprising of 47 WTO members. European Union and its Member States are a part of the Agreement. The current version of the GPA entered into force April 6th, 2014. The Agreement provides for open and transparent government procurement procedure which is open for the economic operators of the other parties. The coverage of the procurement obligations varies, however, between different parties. European Union has also a number of bilateral or plurilateral agreements on public

240 Arrowsmith 2005, s. 181-182.
241 Case 324/98. Telaustria.
243 Case C-366/10, Air Transport Association of America.
procurement. The Court of Justice has not, however, invoked rules of the GPA in its case law on public procurement.

Secondary EU law has a lower hierarchical status than the sources presented above. First of all, secondary law consists of legislative acts (directives, regulations and decisions) which are adopted by the European Parliament and the Council. Regulations are directly applicable in the Member States’ legal orders. Directives have to be adopted into national legislation through transposition by the Member States, but can have direct effect if the deadline of the transposition has ended. The decisions are binding in their entirety but may be addressed to a limited group of persons. The decisions can sometimes also amend primary law: the European Council can under certain conditions decide to amend all or part of the provisions of Part III of the TFEU. Syrpis has evaluated the relationship between secondary legislation and primary legislation in the EU. Even though the case law of the ECJ indicates the existence of a hierarchical relationship between primary and secondary law (in favor of the former), in situations of conflict the ECJ often chooses not to annul EU legislation, but instead finds a way of interpreting either secondary legislation or the Treaties in such a way as to avoid the conclusion that there is a direct collusion between the two.

According to Syrpis, the relationship between primary and secondary legislation can be conceptualized from the viewpoint of the “proper role” of the ECJ. On one hand, one could emphasize the Court’s explicit authority to interpret the Treaties and to annul secondary legislation which is not compatible. Based on this view, “the Court should use the Treaties as its touchstone, and be prepared (within the limits of judicial propriety, however defined) to strain the meaning of legislation so that it most closely corresponds with, and indeed furthers, the Court’s conception of the dictates of the Treaties.” On the other hand, especially from the viewpoint of institutional actor theory (dealt with in Chapter 4.7.), it is not only the judiciary, but also the legislature which has a role in defining the meaning of the EU’s constitutional text. Syrpis makes a reference here to Craig, who has argued that “where the [Union] legislature has given considered thought to the more particular meaning to be accorded to a right laid down in a Treaty article and expressed this through [Union] legislation, the [Union] courts should treat

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244 See for instance Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part. 28.10.2000 L 276/45. Article 10.

245 Syrpis. 2015. 468. See also the references to ECJ C-293/12 and C-594/12, Digital Rights Ireland, where secondary legislation was annulled on the basis that it did not comply with the primary law, and to C-402/07 and C-432/07, Sturgeon, where the provisions of a Regulation were interpreted in accordance with primary law and especially the principle of equal treatment. See finally C-346/06, Rüffert, where the limits of national autonomy were set by the interpretation by the ECJ of a directive and the Treaties rather than the Treaties themselves.

246 Syrpis. 2015. 483.
this with respect. The tension filled relationship between primary law and secondary law can be seen, *inter alia*, in the fact that in the recent EU Public Procurement Directives, the legislator has wished to include in this secondary legislation its variation of a number of key interpretative doctrines of the ECJ on issues regarding the scope of application of tendering obligations.

Secondary law also consists of delegated acts and implementing acts. Through delegated acts (Article 290 TFEU) the Commission can be enabled to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Through implementing acts the legislator confers implementing powers on the Commission or the Council. By implementing acts, the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to it. Different types of comitology procedures have been used to control the exercise of the implementing powers of the Commission. According to Lenaerts and Desomer, in case of conflict, delegated acts will have primacy over implementing acts. The secondary legislation can also be classified as binding, based on the same arguments than the primary law rules.

The key secondary law statutes are the directives on public procurement procedure. Directive on public procurement 2014/24/EU sets out obligations to build up a transparent and non-discriminatory public procurement procedure for most contracting authorities in all Member States in their procurement contracts over a certain financial threshold. The utilities directive 2014/25/EU regulates procurement procedures of contracting authorities and entities operating in the fields of energy and water as well as certain transport and postal services. In 2014, a new directive on the procedures of public concession contracts was introduced (2014/23/EU). The high level of systemic formality and the institutional justification grounds in public procurement directives are derived from the *legal basis* in EU primary law emphasized in the directives themselves. The key legal basis of public procurement directives is Article 114 TFEU which states that “the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

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247 Craig. 2006. 520.
248 Article 12 of the Directive on Public Procurement 2014/24/EU and, for example, the rulings of the ECJ in Cases C-107/98, Teckal, C-480/06, Commission v Germany.
249 Case C-403/05, Parliament v. Commission.
251 In addition to the directives on procurement procedure, there are also directives on the remedies of EU public procurement legislation. Directive 92/13/EEC, Directive 89/665/EEC and Directive 2007/66/EC.
According to Prechal, the ECJ has put considerable effort into increasing the effectiveness of directives and the protection of rights which individuals derive from them. First, the Court has expanded the obligations arising from a directive with respect to the subjects actually bound. It is not only the Member State as such, or their central governments which are bound by the obligations at issue, but also regional authorities. This has been reinforced by the strengthening focus of the case law on the practical application and enforcement of the Directives. In public procurement law we have seen numerous instances where the ECJ has evaluated, in an infringement procedure where it determines whether a Member State has fulfilled its obligations under EU law, whether a particular procurement procedure by a contracting authority has been conducted in accordance with EU public procurement directives. In its ruling in case C-503/04, Commission v Germany, the ECJ stated that Germany had failed to fulfil its obligations under Article 228 EC (Article 260 TFEU) when it had not rescinded contracts between German municipalities and their parties which were found in breach the EU public procurement directives in a previous ECJ ruling. Arguments based on the principle of pacta sunt servanda or the fundamental right to property relating to the problems of the federal government intervening in a contractual relationship of another authority held little weight in the Court’s assessment.

Secondly, with relying on the content of EU directives and the principles of full effectiveness, legal certainty and effective judicial protection, Prechal has argued that the ECJ has curtailed Member States’ powers in choosing the form and methods of the transposition itself. Even though EU public procurement directives have been historically characterised as having a framework character which tries to preserve national rules of procedure, the scope of discretion has been diminishing year by year. As Arrowsmith, has stated:

“Whilst it is still broadly correct to characterise the directives as framework rather than a uniform set of rules, however, it is important to emphasise that the scope of Member States’ discretion in implementing national policy has very substantially diminished since the directives were first adopted, and continues to do so at a rapid pace. This has resulted from a number of related developments, including the development and expansive

253 For example, Case C-337/05, C-368/10, Commission v Netherlands, C-480/06, Commission v Germany.
254 Case C-503/04, Commission v Germany. This case law is quite interesting compared to rulings such as the one in Case C-287/03, Commission v Belgium, where the ECJ has stated that “although a State’s action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature”. In any case, the ruling in Case C-503/04 has been taken into account in Article 73 of the public procurement Directive 2014/24/EU.
interpretation of the general principles of equal treatment and transparency by the ECJ; an approach to interpretation of the Court that frequently favours internal market considerations at the expense of national discretion; specific limitations in the 2014 directives that curtail the extent to which Member States may limit certain powers of their procurement entities; and legislation that has increased in detail which each wave of reforms.”

In addition to the procurement directives, the Commission Implementing Regulation (EU) 2015/1986 establishes standard forms for the publication of procurement notices. The Commission has also given an Implementing Regulation on the establishment of standard forms for the European Single Procurement Document. Moreover, there is a Regulation on the Common Procurement Vocabulary (CPV), which contains a massive list of numeral codes for the effective communication of the different objects of public procurement.

The jurisprudence of the ECJ has, as suggested by Siltala, a dynamic position between binding and persuasive characteristics. Some key decisions have been constitutionalised (using Tuori’s terminology) and thus enjoy a high level of structural axiology and legal formality (using Siltala’s terminology). These could be classified as binding sources. Others have lesser degrees of formality and structural axiology and can be classified as persuasive sources. The case law of the ECJ is also dynamic in nature which decreases the bindingness of the jurisprudence as a source of law. The institutional justification ground for the case law as a source of law is equality before the law.

The principles of EU law can have higher or lower degrees of formality as sources of law, depending on whether they are represented in the Treaty rules or whether they have been derived from these rules by the ECJ. The key principles and policies in EU law do, however, enjoy a high degree of structural axiology and are in fact applied by the ECJ in a constant fashion in its jurisprudence. With the emergence of fundamental rights in EU law, these

255 Arrowsmith. 2014. 177.
can also be included in the proto-norms.\textsuperscript{259} According to \textit{Bengoetxea}, the following principles of Community (EU) law can be identified within a systemic conception of the law: a) general principles which define the legal structure of the Community and the scope of Community law within the Member States, b) fundamental principles which assure the protection of citizens from public authorities, principles drawn from the legal systems of the Member States, d) principles as the special standing of certain provisions because of their importance in the system or their axiological import and e) principles which do not fall within the types of principles in a-d.\textsuperscript{260} Key principles in EU procurement law, as depicted above, could be categorized as type d principles as they have a special standing in the legal system of EU procurement law.

\textit{Graells} has suggested that within EU public procurement law there is also a principle of competition. This principle underlies and guides (or at least it should) the rules and regulatory options adopted by the EU public procurement system. The existence of such a principle is first of all supported by many of the provisions in EU public procurement directives concerning, \textit{inter alia}, dynamic purchasing systems or framework agreements.\textsuperscript{261} In its ruling in \textit{Lombardini and Mantovani}, the ECJ observed that all the requirements imposed by Community rules on public procurement should be applied in such a manner as to ensure compliance with the principles of free competition, equal treatment of tenderers and the obligation of transparency. This point of view has also been consistently shared by several options of Advocates General.\textsuperscript{262} According to \textit{Graells} the substance of the competition principle needs to be determined according to the general principles and criteria of EU competition law. From this viewpoint, EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition – and contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.\textsuperscript{263} The principle of competition within procurement law used to have low degree of formality, as its content was heavily determined by the general principles of EU competition law. In the procurement directives from 2014, there is now a specific mention of the principle which has increased the level of its formality. According to Article 18 (1) of the public procurement directive 2014/24 concerning the principles of procurement, the design of the procurement shall not be made with the intention of artificially narrowing

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\item\textsuperscript{259} According to \textit{MacCormick}, new principles are adopted into the law through judicial decision-making. MacCormick. 1978. 235–236.
\item\textsuperscript{260} Bengoetxea. 1993.76-78.
\item\textsuperscript{261} Graells. 2015. 195-215. The provisions referred to here have not been changed in these regards in the new procurement directives from 2014.
\item\textsuperscript{262} Joined Cases C-285/99 and C-286/99. See the multiple references in Graells. 2011. 194. Footnote 27.
\item\textsuperscript{263} Graells. 2015. 486-487.
\end{itemize}
\end{footnotesize}
competition. Competition is considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. The references to the competition goals and principles in the ECJ case law and the directives on procurement would seem to present a relatively high degree of structural axiology. Graells also supports his argument by stating that competition and public procurement remain largely complementary fields of law and provide each other with useful interpretative criteria. This would suggest towards the notion of a shared institutional justification ground.

Travaux preparatoires, arguments presented in legal dogmatics, large number of Commission Communications and other guidelines and anticipated social consequences are not featured in the jurisprudence of the ECJ on public procurement cases. According to Raitio, only in the early cases of the ECJ have the records of the proceedings in the national parliaments been taken into consideration by the Advocate-Generals. Lenaerts and Gutierrez-Fons have argued that, as the public access to the travaux préparatoires of EU law has been improved, the Court has started to take them into account. The Commission has given Communications regarding themes of the application of EU procurement law on, inter alia, Public-Private Partnerships, contracts outside the scope of application of the directives, the cooperation of contracting authorities and defense procurement. They hold a quite low level of structural axiology and have low level of legal formality. They also lack institutional justification grounds with references only to the material, non-institutional justification grounds. The ECJ has referred to the publications of the Commission in its case law on the tendering requirements of cooperation between public and private partners. These could be classified as other feasible sources of law.

264 Graells. 2015. 207.
268 Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C (2007) 6661; Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02; Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’) SEC(2011) 1169 final; Commission Interpretative Communication on the Application of Article 296 EC in the Field of Defence Procurement COM(2006) 779 final. See also Williams. 2008. NA115-NA118.
270 Case C-215/09. Mehiläinen. Para 33. In the Finnish Market Court case MAO 232/09 the Court made a reference to the Commission 2005 Buying Green Handbook where it was stated that a
According to *Tuori*, the *polycentricity*, i.e. the plurality of legal sources, has been deemed increasing in the Scandinavian scholarly discussion. The rise of polycentricity has changed the doctrine of sources of law in a way that legal sources can no longer be ordered in an unequivocal hierarchical order with formal determinants, as has been previously assumed in Scandinavian doctrine. This phenomenon is very apparent in EU law due to, *inter alia*, the high number of different legal sources and the essential role of judicial legislation. In addition, the entry of EU law into the municipal legal order through direct applicability and direct effect has been a “crucial factor in enhanced polycentricity at the national level”.

A good illustration of this in terms of public procurement law has been the high number of questions caused by the direct effect of the public procurement directives in (the majority of) Member States who had not implemented the directives by the deadlines prescribed in the directives. Many member state institutions, scholars and legal firms have provided considerable amounts of guidance on how to operate during the time between the deadline for transposition of the directives and the entering into force of national legislation.

*Summa summarum*, the sources of EU public procurement law relevant in this study is built on the theory of legal sources by *Siltala* and contains the general branches formulated by *Rosas* and *Almati*: from EU primary law to the ever bloating directives on public procurement to the key principles of equal treatment, transparency and proportionality to legal acts by the Commission regarding the publication of procurement notices and the case law of the European courts and to some extent, guidelines by the Commission.

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requirement which puts economic operators at disadvantage based purely on the distance of the supply of goods is discriminatory.

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271 Tuori. 2013. 81-82.
5 ON LEGAL REASONING AND INTERPRETATION

5.1 THE EUROPEAN COURT

The European Court of Justice interprets EU law to make sure it is applied harmoniously in all EU member states (through preliminary rulings), and settles disputes between national governments and EU institutions. The Court is divided into two bodies: Court of Justice which deals with requests for preliminary rulings from national courts as well as certain actions for annulment and appeals and the General Court which rules on actions for annulment brought by individuals, companies and EU governments.273 Issues relating to public procurement Directives are handled by the Court of Justice, either through requests of preliminary rulings or through actions by the European commission against a member state. General Court deals with procurement issues of EU institutions. The ECJ is a multilingual court which drafts its judgments in French but gives and publishes them in all 24 languages.

In 2015 a total of 1711 cases were brought before the three courts of the EU, which was the highest number of cases brought over the course of a year in the courts’ history. The three courts completed 1755 cases in the same year. The share of the ECJ of that number was 616.274 In 2015, there were 22 references for a preliminary ruling, two appeals and two appeals concerning interim measures of interventions concerning public procurement.275 In terms of completed public procurement cases by judgments, by opinions or by orders involving a judicial determination, the numbers were 12 in 2013, 13 in 2014 and 14 in 2015.276

A substantial reform of the EU’s judicial structure is ongoing. The reform takes place in three stages. At the beginning of 2016 12 new judges entered into office. In 2016 the number of judges in General Court was increased through the integration of the Civil Service Tribunal into the General Court. In 2019 nine more judges will be added to this number, bringing the total number to 56.277

According to Article 19 TEU, the European Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed. In its case law, the Court has derived from this provision a requirement that all EU acts must be interpreted so as to guarantee that the European Union is

273 Civil Service Tribunal was integrated into the General Court in 2016.
275 Ibid. 77.
276 Ibid. 84.
based on the rule of law. According to Itzcovich, the EU Treaties do not contain any provision concerning the methods of interpretation that the ECJ must follow, which means that the ECJ enjoys a degree of freedom in terms of its approach to reasoning cases.

According to their report on the performance of case management at the Court of Justice from 2017, the European Court of Auditors found that, in 2015, procurement cases requiring a preliminary ruling took approximately 23.9 months. By using a case complexity analysis, the Auditors came to the conclusion that there is a relatively strong positive correlation between complexity factors such as the number of pages in the documents related to the cases and the historical average duration for cases of the same type. As procurement cases were among the lengthiest in the case types assessed, it could be concluded that the nature of procurement cases seems to be quite complicated in the work of the ECJ.

How does the European Court of Justice approach issues regarding procurement legislation and how should it approach these issues? Next, we will proceed to the question of reasoning in the European Court of Justice.

### 5.2 LEGAL INTERPRETATION: WRÓBLEWSKI AND FRIENDS

In the previous Chapters we have put some effort into assessing principles, policies, fundamental rights and other proto-norms as elements of the ontology of EU law or the sources of law. Starting from the rights thesis of Dworkin, to the distinction between rules, principles and policies, and the problems with this distinction in EU law and in particular, EU public procurement law. We finally arrived at the idea by Siltala of principles and policies as proto-norms. But if the focus of this study is on legal reasoning and interpretation, should not the emphasis be on the interpretive actions by the judiciary, rather than on Treaty rules, principles, policies or other types of norms? In other words, one could ask: what is the validity of a judgment by the European Court of Justice?

Gerard Conway has presented a thorough view of the vast legal literature on the activities ECJ, from 1960s to the 2010s. He starts with Bredimas’ “Methods of Interpretation and Community Law” which is “a detailed and descriptive survey of the methods of interpretation in EC law”. He continues on to Rasmussen’s “On Law and Policy” from 1986 which suggested that the judiciary should be careful not to extend its activism and policy-making too far. After shedding light to the different literary reactions to Rasmussen,
Conway goes through “The Legal Reasoning of the European Court of Justice by Bengoetxea which “looks to the institutional standards of the ECJ itself as criteria of evaluation”. Finally, Conway looks to the discussion about whether the ECJ is an activist court. According to him, a striking feature of this literature is the relatively few attempts at directly engaging with the issue of a normative theory of interpretation for the Court of Justice:

“Of accounts in legal literature over the last 30 years or so in English, Bredimas’, Rasmussen’s and Bengoetxea’s were all essentially descriptive, although Rasmussen clearly offered an important critique. Although Rasmussen clearly indicated that a normative problem with the reasoning of the Court existed, his later work only began to sketch a normative account of legal reasoning. Maduro’s very thorough work on the reasoning of the Court in the area of free movement moved beyond an assessment of the Court’s own reasoning, but assumed the general normative validity of the kind of policy considerations the Court did take into account...A common tendency...is to link the Court’s varying degrees of activism and self-restraint with the political environment in which the ECJ operates, but again only hinting at deeper normative explanation of legal reasoning (as opposed to a pragmatic understanding of the Court’s various advances and retreats in different periods of its history).”

How should we approach the normative theory of legal reasoning? In his main work “The Judicial Application of Law” Jerzy Wróblewski analysed the concepts of validity and justification and examined their use in the different ideologies of the judicial application of the law. This treatise seems to have had an enormous dynamic influence on the recent vast theoretical discussion on the legal reasoning of the European Court of Justice, even though it is not that often directly referenced to in this literature. The influence of the models of interpretation by Wróblewski can certainly be observed in the works of Neil MacCormick and the Beilefeld Kreis and later on in the work on the ECJ by Bengoetxea.

According to Wróblewski, in a concrete situation, a court must determine the meaning of an applied rule by “operative interpretation”. The meanings of an expression formulated in a defined language are determined by the directives of sense of this language. In legal language, there are at least two key types of directives which determine the meaning of expressions. Firstly, there are directives which control the direct understanding of linguistic expressions. When the legal text is “clear”, the directives of direct meaning are used. In legal

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language, there are also directives whose validity is presupposed by the interpreter. These directives are chosen by the interpreter for working out (heuresis) or for justifying (justification) his decision.\footnote{Wróblewski. 1992. 87-90.}

In “The Judicial Application of Law” Wróblewski presented a theoretical model of operative interpretation which was based on a few key elements. The first element of this model is built on the presupposition of doubt concerning the meaning of the rule which has to be applied (this means that the directives of direct understanding of linguistic expressions cannot be applied). The second element consists of the use of so-called first level directives of interpretation which are linguistic, systemic and functional directives. According to Wróblewski, the sequence of their use is determined by second level procedural directives of interpretation. The second level directives are also used in determining the proper meaning of a rule between different interpretative options suggested by the different first level directives of interpretation. The final element of the model is the formulation of the decision of interpretation whose meaning has to be relativized to justificatory arguments.\footnote{Ibid. 91-93.} This division into levels is not unlike the theory by MacCormick of having a second-order justification of legal decisions which involves consequentialist arguments as well as the criteria of consistency and coherence.\footnote{MacCormick. 1978. 101-107.}

Wróblewski’s model is not exhausted just by the different directives of interpretation. There is need for evaluations as well. First, the starting point of operative interpretation has an evaluative character: one has to make an evaluative judgment whether or not the applied rule is clear enough for application or whether there is need for operative interpretation. Secondly, there are directives of interpretation which are conditioned by the evaluative distinction of the situations stipulated for their application. Thirdly, some directives of interpretation are expressed in an evaluative manner. Lastly, interpretative directives grouped in sets constitute normative theories or ideologies of interpretation which formulate the directives but also set the values which the interpretation ought to implement.\footnote{Wróblewski. 1992. 95-96.}

There are all together 18 different directives of interpretation listed in “The Judicial Application of Law”. These directives are divided into three groups according to the different first level directives of interpretation. Directives within the linguistic context deal with, inter alia, the presumption of common natural language and the pursuit of consistency and logic of language. According to Wróblewski, linguistic interpretation seems to be a necessary kind of interpretation, although not always sufficient in itself. Systemic interpretation determines the meaning of the interpreted rule according to the context of the system it belongs to. Systemic interpretation is backed by the
presupposition of consistency in a legal system, accepted by the interpreter along with the responsibility for eliminating any discovered inconsistencies in the legal interpretation. Finally, there are the directives of functional interpretation, determining the meaning of rules taking into account their functional context (the socio-political and economic system in which legal rules are valid or the general culture expressed in the rules). These directives of functional interpretation include, among others, teleological interpretation according to the purposes of the institution to which the interpreted rules belong and interpretation consistent with the approved extra-legal social rules and evaluations.289

The directives of interpretation in “The Judicial Application of Law” are quite fuzzy in terms of their relations and system. Some directives are awarded higher ranking as second level directives and some may operate on both levels. The contents and justificatory powers of these directives appear to be quite context-dependent.

5.3 JUSTIFICATION AND RATIONALITY

According to Siitala, judicial decision-making can be approached from two different viewpoints. One approach is that of legal heuristics or discovery. Through legal heuristics one can evaluate how a decision was actually made, what kind of thinking led to a certain outcome or whether or not rational and unbiased legal reasoning was applied or what avenues of inquiry were followed in the decision-making.290 This descriptive approach is evidently influenced by legal realism.291

A judicial decision can also be approached from the viewpoint of theories on legal justification which study how a judicial decision is justified or how it should be justified in order for the decision to be lawful from a certain viewpoint.292 It seems that the question of legal justification of a judicial decision is at the heart of what could be considered the validity of a judgment. According to Bengoetxea, MacCormick and Moral Soriano, the test of acceptability of judicial decisions has to be made from the context of justification and not from the context of discovery or heuristics. They do, however, add a caveat to this distinction: “there are aspects of procedure, or even of judicial culture, which are categorized neither as discovery nor as justification, but which affect both”. For example, the fact that the paradigm

289 Ibid. 97-107.
291 Beck. 24-25.
of justification is deductive, is a matter that belongs to the wider context of
discovery but which influences the justification of the decision.\footnote{Bengoetxea – MacCormick – Moral Soriano. 2001. 49-50. In hard cases, however, the writers point to the fact that the distinction between discovery and justification is not so clear-cut. Wróblewski’s model of operational interpretation seems to exist at the level of heuristics and the level of justification at the same time. One can gather empirical data on whether and how the different directives of interpretation serve as instruments in seeking and discovering an interpretative decision (heuresis). One can also use the directives as arguments justifying a decision of interpretation (rationalization function), independently of whether and how they operate in the heuresis of the decision.}

A great variety of measuring sticks can be utilized when assessing the
validity of legal justification. Many, such as \textit{Aarnio}, \textit{Alexy} and \textit{Peczenik}, to
tame a few, have used the notion of \textit{discursive rationality} as the yardstick.\footnote{Aarnio. 1987. Peczenik. 1984. See also MacCormick. 1986. 189-206.} \textit{Dworkin} has emphasized \textit{coherence}.\footnote{Dworkin. 1986. 243.} Others have searched for certain
corporate goals as a reference.\footnote{Klami has criticized those analyses of legal reasoning which start from the assumption of rationality of legal decision-making and its various aspects. According to him, decision-making is based on legal norms which express different teleologies. In this situation, an assumption of rationality is too far-fetched: “...legal decisions are based upon legal and other social norms without a common rationality. For this reason, it is important also to understand the choices between teleologies...due to the stratification of society one cannot accept an analogous unity of interests of different groups or classes, even if we should start from a majority principle”. Klami. 1986. 32}

\textit{Wróblewski} has tied justification of a judicial decision (presenting
arguments supporting a decision) to the notion of \textit{rationality}.\footnote{Rationality has also been used as a measuring stick in the works of \textit{Aarnio}, \textit{Alexy}, \textit{Peczenik} and \textit{MacCormick}.} According to
him, a meaningful statement in a specific discourse is rational, if it is justified
by its premises. Rationality presupposes use of the rules of justificatory
reasoning which links the justificatory arguments as premises to the justified
conclusion. According to \textit{Wróblewski}, there are five levels of justification
expressing the rationality of a judicial decision, three of which are dealt with
in “The Judicial Application of Law”. The first level consists of the \textit{internal rationality} of the decision which means the consistency of the accepted
premises with the final decision according to the rules of justificatory
reasoning that have been used. The second level concerns the \textit{justification of
the premises} of decision from a critical standpoint. The third level is the
\textit{appraisal of the rules of justificatory reasoning} that have been used.\footnote{Wroblewski. 210-211.}
Knowledge in internal rationality requires (in connection with factual validity) that the court accepts and treats the law as binding. From the objective point of view, the internal rationality of a judicial decision can be analysed by assessing to what degree the decision follows from the premises which the court has accepted and the directives of reasoning it has used and whether these stem from the knowledge, norms and evaluations that the court has accepted. The internal rationality of a judicial decision shares characteristics with the systemic validity of a norm. From the internal point of view, the scheme of reasoning is *syllogistic* or *deductive.* According to Aarnio, the nature of the inference is closed, which affords the conclusion to be drawn deductively from the premises. Syllogism is only suitable for *ex post* rationalisation of the justificatory procedure.

The external rationality of a decision is its qualification from a critical point of view. This concerns both epistemic and axiological premises (second level rationality) as well as the justificatory reasoning (third level rationality). Control of *epistemic premises* means asking whether the knowledge (valid law and facts) used by the decision-maker to justify his decision is adequate. Criticism of the *axiological premise* is directed to evaluation and its justification. The external rationality seems to share characteristics of the factual and axiological validity of a norm.

According to Peczenik, the external justification of a judicial decision entails a *transformation* from the grounds to the interpretation. This transformation is *not* syllogistic in nature, but instead a non-deductive “jump” from the arguments to the conclusion. There are different views as to how the external rationality (the “jump”) of a judicial decision is to be assessed. To Peczenik and Aarnio, this jump is governed by the standards of *rational discourse* which means that the rationality of external justification is *discursive* in nature. According to Aarnio, there are *preconditions of Rational Legal Discourse* which stem from the theory of communicative rationality by Habermas such as freedom, truth, normative correctness and sincerity. Justification succeeds if and only if one has convinces and addressee accepting the principles of discursive rationality that it is right to accept the offered interpretation. In his view, an interpretative standpoint which is supported by the greatest rational consensus has the greatest societal relevance. Alexy has also built his theory of external rationality from Habermas’ theory of communicative rationality, but has divided external

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299 Wróblewski. 211-213.
302 Wróblewski. 213-229.
305 Aarnio. 2011.142. See also Habermas. 1989. 51.
rationality into subgroups of canons of interpretation, rules of dogmatic argumentation, rules governing the use of precedents and rules of legal methodology.\textsuperscript{307}

Discursive rationality is not, by any means, the only measuring stick suggested by scholars as the tool for the external justification of a judicial decision. To \textit{Dworkin}, the external justification of a judicial decision is ultimately a question of the (ideal) principles of justice, fairness, and procedural due process which represent the community’s legal practice. Rationality or coherence is a part of the integrity of the law but it is ultimately built on the aforementioned principles of moral values.\textsuperscript{308}

\textit{MacCormick} has offered an interesting account of rational acceptance which has been quite influential in studied on the reasoning of the ECJ. According to \textit{MacCormick}, there are cumulative \textit{constraints} in legal reasoning which are designed to resolve interpretative uncertainty in legal rules in hard cases (where the deductive justification does not work). First of these constraints is the criterion of \textit{universalisability}, which requires any rational decision-maker to treat like cases alike and different cases differently. The second group of constraints are a set of \textit{consequentialist} criteria which are connected either to the immediate concerns for the parties concerned or to the longer-term consequences of the case for the development of the law. There are also the requirements of \textit{consistency} and of \textit{coherence}.\textsuperscript{309} Of these, \textit{consistency} and \textit{coherence} seems to be nearest to the notion of rationality or rational acceptance:

“An examination of the models of legal reasoning both confirms and reveals the meaning of saying that reason can play, and in law appears to play, an indispensable role in the governance of practical affairs, but that there are limits to practical reason. Arguments from consistency and coherence reveal the former, the evaluative element of consequentialist arguments, the latter.”\textsuperscript{310}

\textit{Lyons} has described this approach by \textit{MacCormick} and previously by \textit{Dworkin} as a theory that tries to explain “how decisions can be based on existing law even when they cannot be derived syllogistically from clear, specific rules”. In a hard case, a court must seek a justified decision. But a satisfactory justification “must develop within the constraints imposed by law”. If a hard case can be decided on the \textit{same grounds} that justify the \textit{original legislation}, then it can be decided on grounds that are \textit{both constrained by the legislative act and capable of justifying a decision}. Thus, a court’s reference to the intentions of the legislature can be understood as the search for principles and policies that justify the original legislation. At the

\textsuperscript{308} Dworkin. 1986. 225
\textsuperscript{309} MacCormick. 1978. 102.
\textsuperscript{310} MacCormick. 1994. 271.
same time, the reasoning of such decision can claim to be respecting the criterion of universalisability that like cases be treated alike.\textsuperscript{311} This is how the element of coherence by MacCormick ties together a judicial decision, the legislation that is being applied and their respective objectives.

The idea of rationality or validity of a ruling in terms of coherence has had a profound influence in the theories of legal reasoning of the ECJ. It has been utilized in the works on the ECJ by Moral Soriano, Bengoetxea and MacCormick, just to name a few.\textsuperscript{312}

\section*{5.4 COHERENCE}

According to MacCormick, there are two types of coherence, which are relevant to legal argument: normative coherence and narrative coherence. Normative coherence is utilized in the context of justification of normative propositions, while narrative coherence concerns the justification of factual propositions.\textsuperscript{313} MacCormick suggests three crucial requirements of coherence. First, to possess normative coherence, norms have to be rationally related to the realization of a common value or values. Secondly, the coherence of norms is also determined by the extent to which such norms are oriented towards the fulfilment of some common principle or principles. Third, the relevant principle or values that justify a set of norms must express in their totality a “satisfactory form of life”.\textsuperscript{314}

On one hand, normative coherence links the system of norms to shared values, principles and ultimately, satisfactory form of life, something that seems quite close to the ideas of the natural law philosophers. On the other, normative coherence operates, as depicted above, as a constraint or a basis for legal arguments in hard cases. Moral Sorano has emphasized this distinction between theories of coherence in legal systems and theories of coherence in legal reasoning.\textsuperscript{315}

There has been much academic discussion about coherence in legal systems. Along with MacCormick’s theory of normative coherence, the theory of law as integrity by Dworkin has been widely debated. According to Dworkin, “the adjudicative principle of integrity instructs judges to identify regal rights and duties, so far as possible, on the assumption that they were created by a single author – the community personified – expressing a coherent conception of justice and fairness”.\textsuperscript{316} In this way, the coherence or

\begin{thebibliography}{99}
\bibitem{} Lyons. 1984. 95-97.
\bibitem{} MacCormick. 1984. 37.
\bibitem{} Ibid. 43.
\bibitem{} Dworkin. 1986. 225.
\end{thebibliography}
integrity of judgments creates a chain novel, where judges take in past material and create new chapters in the novel. This does not, however, mean that the judges enjoy discretion, because integrity determines what the law is. Siltala has classified this type of approach to coherence as qualitative criteria of coherence.

Raz has criticized Dworkin’s notion of global account of coherence, stating that it ignores the authority of the law. In hard cases, Raz argues, Dworkin’s notion of coherence allows for deviation from the law, based on moral values. Thus, the supporting structure of coherence is based on moral values and not law. In addition, Raz, suggests that Dworkin has not given enough thought to the fact that moral pluralism is “the normal state for human beings” and that there is no correct way of establishing hierarchy between competing values under the general umbrella of justice and fairness. Coherence, to Raz, is coherence of “doctrine in specific fields” which is not a virtue of itself but instead a by-product of consistent application of “sound moral doctrine”.

Moral Soriano has stated that these theories of global (Dworkin, MacCormick) and local (Raz) coherence do not differentiate between coherence in law and coherence in legal reasoning. They focus primarily on the former. Her theory of modest notion of coherence is less about normative coherence (does a ruling cohere with the legal system or a system of integrity) and more about the coherence of reasoning (does the argumentation which supports a particular ruling cohere). In the context of reasoning, this theory of coherence could surpass the problems of conflict between the authority of law and the authority of moral values or between value pluralism and principles of justice and fairness. According to Moral Soriano:

“By a modest notion of coherence is meant an indeterminate criterion of rightness which is not able to provide an ultimate answer for every case; by an operative notion of coherence is meant a conception which allows one to decide by simultaneously taking account of values, principles, and rules, and paying attention to the particular.”

Moral Soriano starts out from a comprehensive account of reasons: justification is the activity of supporting a particular statement with good reasons which, in a comprehensive sense, include both authority reasons (legal norms, precedents, and legal doctrine) and substantive reasons (values, principles, and policies). What matters, however, is not the kind of reasons

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317 Ibid. 219. See also the model by Peczenik, who emphasizes the coherent weighing and balancing of moral and legal reasons in legal justification. Peczenik. 1998. 7-15.
318 Siltala. 2011. 73.
321 Ibid. 314-315.
used to justify a decision, but whether they are *coherently connected*. Reasons justify whether there is a supportive structure between a set of reason and a decision. This supportive structure requires making connections between the reasons used. Connections can be *deductive* or *plausible*: a supportive structure represents a relationship of coherence between reasons in terms of both logical consistency and fitting together.

Utilizing the criteria of coherence by Alexy and Peczenik, Moral Soriano lists criteria of coherence which determine the properties of the supportive structures as *cumulation-chains* and *cumulation-nets*: 1) **The number of supportive relations.** This criterion instructs the judge to connect reasons rather than to provide a great number of reasons. This requirement follows from the description of the supportive structure of reasons as cumulation-netting; 2) **Strong support.** This criterion refers to the formal correctness of the chain of arguments, rather than to the weight attributed to every reason. Thus, the judge should not only connect reasons and create long supportive chains; he or she also has to create strong supportive links between premises; 3) **Cumulation-netting of reasons.** General provisions, such as the Treaty provisions in the EU, can support different premises and, therefore, different conclusions. This requires cumulating reasons which contribute to the elaboration of sets of premises; 4) **Priority orders between reasons.** These have to be established in the event that more than one reason applies to a single situation. Priority orders establish that a particular valid rule has preference over another valid rule in a particular case. In terms of *principles*, a conflict is solved by the logic of preference or the logic of balancing. According to Moral Soriano, “priority orders reveal that although incommensurable, values and principles can be evaluated”. Priority orders are “the outcome of a process of abstraction of the particular in order to produce categories which can be used to approach future cases”. These priority orders do not, however, “prevent the judge from appreciating new features, and in this sense, creating a new priority order”; 5) **Reciprocal justification.** Reciprocal justification is connected to the idea of plausible connections between reasons. In a net of reasons, reasons reciprocally support each other. This form of *circular* legal reasoning does not follow logic-deductive reasoning, but is still accepted because reasons are connected with fuzzy logic of reasons.

Siltala has criticized the approach to coherence in *quantified terms* by Alexy and Peczenik. According to him, such a definition of coherence fails to take into account the constructive character of coherence. Siltala has argued that coherence is a *qualitative* and *semantic quality* that is internal to the narrative pattern of a set of linguistic sentences, assertions or propositions,

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323 Ibid. 308-309.
324 Ibid. 310-311.
325 Ibid. 317-318.
defined as their mutual match, reciprocal support, common alignment, absence of dissonance and/or shared congruence, to the effect that they collectively make sense when inserted in the same narrative structure.327

Moral Soriano, too, suggests that legal justification depends on the supportive structure, which links together given arguments, rather than the number of reasons; the weight of the given reasons depends on the supportive structure rather than on a previously attributed weight, and finally, netting reasons is preferred to cumulation. This type of modest coherence means that Moral Soriano does not accept that there are definitive criteria for determining the external justification or the “rightness of a judicial decision”. However, the requirements of coherence provide tools to prevent arbitrariness and promote rationality.328

According to Aarnio, the emphasis by Moral Soriano on the coherence in legal interpretation is of importance because “the entire discussion of coherence conducted in the area of the theory of argumentation has exclusively concerned the compatibility of the grounds presented in support of the interpretative statement”.329 Aarnio views that the benefits of coherence in legal interpretation could be seen especially in the discursive acceptance of a judicial decision. According to him, the “ending point” of interpretative coherence from the grounds to the proposition is connected to the rational acceptability and argumentation is thus always connected to the difference between internal and external justification.330

Whether one adopts the approach by Aarnio of rational acceptability or the approach by Dworkin concerning the integrity of law, the coherence of law, both in terms of law and in legal reasoning is submitted to be an important and necessary part of justifying a legal decision. This is due to the fact that, as Siltala has argued, it acknowledges the normative impact of the various kinds of sources of law on the legal discretion of the judiciary. It also helps to tackle hard cases where no provision gives a clear answer to a legal question and the intention of the law cannot be deciphered.331 It is not, however, the only crucial part of legal justification. As Siltala has stated, “The trouble with the notion of coherence in law has to do with its profoundly constructivist nature and the resulting lack of control as to the outcomes of legal discretion, at least if conceived in line with Dworkin’s quest for all-encompassing coherence in

327 Siltala. 2011. 73.
329 Aarnio. 2011. 144. Here he refers to the work by MacCormick and Dworkin.
330 Aarnio. 2011. 146. A similar approach in the context of coherence theory can be found in the model by Amaya, who suggests that “a factual or interpretative hypothesis is justified if it is such that an epistemically responsible legal decision-maker might have accepted it as justified by virtue of its coherence in like circumstances. We reach this ‘optimally coherent’ solution to a factual or normative problem in law by a process of inference to the best explanation. Coherence is, on this model, a matter of constraint satisfaction and a standard of justification that varies with context.” Amaya. 2011. 318.
331 Siltala. 2011. 77.
law...Moreover the frequently voiced critique against the coherence theory of letting coherent fairy-tales pass the test of truth is difficult to answer in a convincing manner.\textsuperscript{332}

The different facets of coherence (in law and in legal reasoning) seem to have a tension-filled relationship because of their differences in emphasis between the contextual and the global. According to the distinction presented by Conway, the theory by Moral Soriano would seem to reflect a “loose version of coherence” which requires that the conclusion in a case is not inconsistent with existing law. A “tight requirement” of coherence requires, however, that the existing law \textit{must entail} a conclusion.\textsuperscript{333} This way the discussion of the different aspects of coherence is tied to the question of one right answer.\textsuperscript{334} Raitio has criticized the modest notion of coherence as promoting the context-bound characteristics of judicial decision-making too much. Raitio suggests that although the Court’s decisions should be context-bound, this does not mean that the coherence of the legal system as a whole can be hampered: “It is not enough to make sure that a decision contains coherent arguments from the beginning to the end”. Raitio has called such casuism ‘the Casanova method’, named after the famous seducer who told his mistresses what they wanted to hear. He could trust that no-one really knew how the stories differed from one another depending on the casual wishes of his numerous partners. According to Raitio, if the courts settle for casuism and neglect the systemic interpretation, the coherence of the legal system will be hampered.\textsuperscript{335}

Raitio does, however, admit that the modest notion of coherence by Moral Soriano could, itself, be interpreted “in a modest way”, as a tool for improving the quality of reasoning of the Court of Justice.\textsuperscript{336} This is specifically the way in which it is of benefit in the present work: it can be utilized effectively as a tool in using and assessing legal reasoning and the role of systemic reasoning within it.

\textbf{5.5 IDEOLOGIES OF JUDICIAL DECISION-MAKING}

In the previous Chapter, it was depicted how the validity of a judicial decision can be assessed in different terms. According to Wróblewski, the conceptions of the correctness of decisions are related to the \textit{ideologies of...}

\textsuperscript{332} Siltala. 2011. 77.

\textsuperscript{333} Conway. 2012. 126. Alexander – Kress. 1995. 313-314. See also Amaya, who divides theories of coherence to “strong” and “weak” where the former claim that coherence is both necessary and sufficient condition of legal justification, and the latter claims that coherence is a necessary, but not necessary condition. Amaya. 2011. 307.


\textsuperscript{335} Raitio. 2013. 107.

\textsuperscript{336} Ibid. 108.
judicial application of law. Interpretative directives can be grouped in more or less coherent sets which constitute whole normative theories or ideologies of interpretation. These ideologies not only formulate the directives of interpretation but fix the values which the interpretation should implement. The classification is based on fundamental values presupposed by them.337

In the ideology of bound decision-making, the correctness of a decision is identified with the consistency of the decision with law. In the ideology of free judicial decision-making, the correct decision is the one which gives the best decision for the concrete case. There is also the ideology of legal and rational decision-making, where the correct decision implements the value of legality (and rationality).338

Wróblewski, himself, does not accept the ideologies of bound decision-making or the idea of free judicial decision-making. Judicial decision-making cannot be reduced to logical and mechanical operation in accordance to the bound decision-making, as there are judicial evaluations which determine judicial choice in many instances. On the other hand, several of the postulates of the ideology of free judicial decision-making can undermine the authority of the law, and there is danger of subjective and arbitrary evaluations which affect the decision-making.339

The ideology of legal and rational judicial decision-making is based on the values of legality and rationality. Formal legality means that the correctness or approval of a decision is built on it being seen as serving “the maintenance of a legal order as such”: the value of preserving some kind of order in the social relations independent of the internal values of the legal rules. Material legality relates to the consistency of the applied rule with a defined extra-legal axiological system. Rationality is the value which decisions should implement through their proper justification. Internal rationality seeks consistency of decisions and external rationality requires the premises to be adequately connected with the axiology of the law.340

Siltala has combined the three ideologies of judicial decision-making to the different frames of legal analysis (many of them depicted above in connection with the issue of ontology of law and justification of judicial application of law) on how to construct and read the law:

Connected to the ideology of bound judicial decision-making are the isomorphic theory of law and legal formalism. The former seeks to analyse the judge’s legal discretion as the presence or absence of an isomorphic relation between the two states of affairs compared, the one as given in the fact-description of a legal rule and the other as existing in the world. The latter

338 Ibid. 253.
339 Ibid. 280, 301.
340 Ibid. 305-311.
puts emphasis on the logico-conceptual and systemic tenets of legal construction and interpretation.341

Connected to the ideology of free judicial decision-making are social consequentialism and natural law philosophy. Social consequentialism emphasizes the economic and other external effects of law in society (in terms of, inter alia, economic efficiency and effected translation costs). Natural law philosophy stresses the inherent relation that the law has to the criteria of religious or communal justice. According to Siltala, the teleological element in social consequentialism and the axiological dimension in natural law philosophy have the effect of cutting legal interpretation off from the institutional premises of law.342

Connected to the ideology of legal and rational judicial decision-making are the coherence theory of law, new rhetoric theory, legal exegesis, analytical legal realism and legal conventionalism. The coherence theory of law attaches the criteria of how to construct and read the law to the relations that prevail among the institutional and societal goals of law. The new rhetoric by Chaim Perelman and its correlative phenomena in legal argumentation take the approval of the methodology and outcome of interpretation in the ideal, universal audience as decisive in legal construction and interpretation (Aarnio and other scholars emphasizing the discursive acceptability of a judicial decision are representatives of this group). Legal exegesis comprises a theory of legal interpretation which seeks to retrace the original intentions of the legislation or a precedent. Analytical legal realism, represented by Alf Ross among others, is connected to the effected law in action of the actual court practice. Legal conventionalism defines the law as commonly accepted or recognized societal practices that might be defined as mutual expectations or cooperative dispositions of the members of a legal community.343

Different ideologies of judicial decision-making tie together the ontology of law and the different frames of legal analysis depicted above. According to Siltala,

“Taken together, the ten frames of legal interpretation present a fairly comprehensive catalogue of the philosophically defensible approaches to legal interpretation. The meta-context of legal argumentation and the related criteria of how to construct and read the law to a great extent vary from one frame of legal analysis to another.”344

But what is the role of the ultimate validity or acceptability of judicial decisions in the needs of this study? First, it provides a critical tool for the assessment of the case law and reasoning by the ECJ. Second, it grounds this assessment into a particular philosophical approach (and usually a view on the

342 Ibid. 243.
343 Ibid. 242.
344 Ibid. 243.
ontology of law) and acts as a passage to the theme. Third, it connects the key issue of the use of arguments into a larger picture of a theory of legal reasoning. But how does this connection take place?

In talking about the ideologies of judicial decision-making Siltala has pointed to the sequentialist theory of legal reasoning by MacCormick. Siltala argues that in *Legal Reasoning and Legal Theory*, MacCormick suggests that legal reasoning at a court of justice commonly takes place in the following order: from deductive consistency among the linguistic arguments to the attainment of legal coherence among the pertinent set of legal principles, if the deductive approach fails to resolve the issue. Finally, if legal coherence fails to solve the matter, legal reasoning moves into consequentalist arguments of the external social effects of legal adjudication and the values entailed therein.

According to Siltala, the three-part approach to legal reasoning by MacCormick can be connected to different theories of law. Linguistic consistency would seem to be close to the isomorphic theory of law. Legal coherence is connected to the coherence theory of law. Finally, the consequentialist arguments would seem to match with theories on social consequentialism. In Wróblewski’s terms the connections would emerge between the ideology of bound decision-making and consistency in the linguistic level, between the ideology of legal and rational decision-making and coherence and finally between the ideology of free judicial decision-making and consequentialism. These connections can also be found in Raitio’s view of the relationship between philosophical approaches to law, the ontology of law, and the different types of legal arguments.

The ultimate test of validity of a judicial decision is thus constructed of the elements of consistency, coherence and consequentialism (including values). As MacCormick has argued:

“The justification of decisions... [in hard cases] must look beyond ‘rules’ as defined by the validity thesis to principles of law. Principles of law certainly authorize decisions: if there is no relevant principle or analogy to support a decision, that decision lacks legal justification; and if there is a relevant principle or analogy the decision supported thereby is a justifiable decision – but the adduction of the principle or analogy although necessary is not sufficient for a complete justification of the decision. The ruling which directly governs the case must be tested by consequentialist argument as well as by the argument from ‘coherence’ involved in the appeal to principle and analogy. And just as the absence of any supporting principle or analogy renders

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a decision impermissible, so the test for consistency must be applied..."\(^{348}\)

In the work by MacCormick, arguments of coherence and consequence seem to be linked together as second-order justifications of legal decisions with no respective hierarchical or sequential order. We can see this combination later on in the work of the Bielefelder Kreis. It is also quite similar to the theory of the different levels of interpretative criteria by Wróblewski, where the second-level directives of preference hint to aspects of interpretation which override the second-level directives of procedure (sequence).

It is submitted that, in conformity with the sequentialist approach to legal reasoning, justification of a judicial decision requires all of the different elements of the sequences: consistency, coherence and consequentialism. These elements have to be reflected in the decision in the form of arguments. Before heading onto the issue of arguments, however, we first need to address the question of is and ought, the normative and the factual, but this time in the context of legal reasoning.

5.6 BETWEEN IS AND OUGHT IN LEGAL JUSTIFICATION – RATIONAL RECONSTRUCTION

The theories of justification, the ideologies of judicial decision-making and of the directives of interpretation by Wróblewski have proven very influential in the academic discussion on legal reasoning (and especially that of the ECJ).\(^{349}\) The vastness and complexity of Wróblewski’s theory of legal adjudication has still left many uncertain on whether to focus on the descriptive or the normative elements of legal justification.

Decisional and functional models of the judicial application of law by Wróblewski could be classified as descriptive theory on legal justification.\(^{350}\) On the other hand some aspects of his theory, such as the validity of law and the rationality of judicial decision-making, seem quite normative in nature.\(^{351}\) In recent academic literature on legal reasoning of the ECJ one can find studies focused on both of these sides. According to Bengoetxea, both approaches - when taken as the sole starting point - have their downsides in the context of studying the decision-making of the ECJ:

“...the descriptive focus can be superficial or analytical or reconstructive. In a superficial analysis, the Court is described as using one argument or another in order to interpret a provision or a concept. This analysis requires little or no theoretical

\(^{348}\) MacCormick. 1978. 250.


\(^{351}\) Ibid. 56-57.
background and does not aspire to have any predictive impact. The normative focus...moves directly to postulate how the Court has to decide its cases and to impose from the outside the standards upon which it is to be evaluated: sticking to the ordinary meaning, paying heed to the subjective intention of the law-maker and (thus) respecting the rule of law. But, arguably, that is already a partie prise...Situations of doubt and disagreements on meaning are minimized or downplayed and judicial methodology becomes like following a manual, simply following the rules.”  

According to Bengoetxea, between descriptive and normative approaches to legal justification is rational reconstruction which aims for the construction of ideal abstract types of legal justification. This method has famously been used by the Bielefelder Kreis on their studies on legal reasoning:

“By ‘rational reconstruction’ we mean the activity of explaining fragmentary and potentially conflicting data by reference to theoretical objects in the light of which the data are seen as relatively coherent, because presented as parts of a complex, well-ordered whole. In a wide sense, this can apply to the methods of the natural as well as the human sciences, but in case of cultural objects, such as law, the object presented as a coherent whole is so presented on the assumption of some degree of internal rationality in the relevant human activity. Specifically, in the present case, the rational reconstruction of interpretational justification involves presenting it as consisting in structured types of arguments which all belong within a coherent mode of justificatory reasoning.”

Thus, rational reconstruction seems to be a way in which normativity in legal justification is built from the description of the judgments by creating (or assuming) some degree of coherence and rationality. In this type of constructive legal interpretation, coherence and rationality act as bounds for the discretion of the judge. As Bengoetxea, Moral Soriano and MacCormick have stated in relation to the EU:

“...there is no denying that interpretation is and should be teleological in the sense indicated. This is a bounded teleology, bounded by one’s self of the limits to which the Treaty or regulatory language can be pushed, and thus bounded also by the need to connect the texts to values that belong to the whole constitutional enterprise, not just to a judge’s own idiosyncratic world view and personal value system.”

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352 Bengoetxea. 2015. 212. See also Aarnio. 1987. 22-23.
353 Bengoetxea. 2015. 121.
How is it possible to generate (or even assume) a degree of coherence (or integrity à la Dworkin) which covers all aspects from the most minute details in legal provisions to the high arching values of a legal system? The particular nature of this coherence in connection with rational reconstruction is that the coherence is built on the judicial activity itself.

Bengoetxea has utilized the approach of rational reconstruction in his study on the legal reasoning of the ECJ. The starting point of his model is descriptive approach, but it has added an internally critical dimension that “allows the observer to evaluate the Court’s decision-making on its own standards, as analytically reconstructed from a series of sources amongst which the Court’s own doctrine of interpretation as expressed in its own case-law feature prominently”. 356 Bengoetxea, influenced by the institutional theory of law by MacCormick and Weinberger, utilizes the institutional standards of the ECJ itself as a yardstick for critical evaluation. The influence of legal realism on Bengoetxea’s work can be seen in the distinction between the heuristics-based process of discovery and the external process of justification. Discovery is the actual process or influences producing a judicial decision while justification is the reasoning actually provided in the public record of the judgment.357 This approach by Bengoetxea has been followed in a number of recent studies on the reasoning of the ECJ.358

The way in which Bengoetxea has applied the model of rational reconstruction is as a measure of the distance between the real and the ideal discourse of the ECJ.359 By following this method, Bengoetxea has first revealed a doctrine of justification operative within the practice of the ECJ and then applied this rationally reconstructed doctrine to assess actual justifications of the Court. The operative doctrine of justification of ECJ is constructed from its coherence which connects the decision with enacted law (reasons or arguments of authority drawn from sources of EU law). When operating within the theory of Bengoetxea, it is sometimes difficult to distinguish between the reconstructed and the ideal as the measuring stick of a ruling. The ideal approach can be seen in Bengoetxea’s writing on rational acceptability. According to Bengoetxea, the concept of rational acceptability is an ideal model for legal reasoning, an evaluative parameter of all justification which goes beyond just legal rationality.360 Through this ideal, one can measure the legitimacy of legal interpretations as well as criticize the results of the interpretative work.361 Deep justification (external justification in the words of Wróblewski) of legal justification combines elements of moral justification, political justification and rational practical justification. The

356 Bengoetxea. 2015. 212-213
discourse wherein the deep justification proceeds according to Bengoetxea is rational (practical) discourse \(^{362}\): practical reasoning involves the practice of justifying one’s normative stances and critiques by giving reasons and engaging in rational discourse with interlocutors and audiences. The aim of rational practical discourse is to achieve rational acceptability of justificatory arguments within a universal situation \(^{363}\).

In the model of Bengoetxea, the ideal is also something which has been reconstructed from the work of the ECJ. Here, the second level procedural directives of interpretation by Wróblewski are utilised. According to Bengoetxea, “they are expressly identified and formulated by the Court and have a latent function of giving ulterior interpretations in the sense that ulterior interpretations will be rationally acceptable to a given audience when and in so far as they follow those criteria” \(^{364}\). How can one assess, when the second level directives of interpretation reconstructed from the work by the ECJ are rationally acceptable? If they are not, what should they be replaced with? Is the test of the justification of a decision ultimately based on the Court’s own standards or of the acceptance of the legal community as the audience? The model by Bengoetxea does not tackle this issue in much detail.

The tension between reconstructed and ideal is present in the criticism by Conway. According to him, “driven as it is by an assessment of the ECJ according to its own standards and offering a rational reconstruction of those standards, Bengoetxea’s work could be understood as an apologia for the Court’s actual reasoning” \(^{365}\). Conway continues:

“The book draws on many strands of legal and political theory to its end, but in so doing demonstrates at times tensions and potential contradictions within itself...Among other examples of such apparent tensions are that the model of reasoning that the ECJ has adopted is described as both mechanical and transformative, when the former notion tends to emphasise the neutral, conserving character of interpretation; and that the ECJ is described as having great scope for interpretative leeway, at the same time as being subject to a straitjacket on discretion.” \(^{366}\)

To address the issue of the relationship between the ideal and the reconstructed, it is helpful to go deeper into the theme of interpretative arguments or topoi, used by the ECJ. These bring us back to the theory by Wróblewski and, in particular, his above-mentioned notion of the directives of interpretation.


\(^{364}\) Ibid. 230.

\(^{365}\) Conway. 2012. 71.

\(^{366}\) Ibid. 71–72.
5.7 ARGUMENTS

Let us go back for a second to Wróblewski’s theory of the directives of interpretation. There were the first level directives of interpretation: linguistic, systemic and functional directives. The “sequence” of the use of these directives of interpretation was determined by second level procedural directives of interpretation.367

5.7.1 FIRST LEVEL ARGUMENTS

In academic discussion, there have emerged numerous different ways of defining, categorizing and systematizing different types of legal arguments used in legal adjudication. One of the most popular models is given by MacCormick and Summers, who created a theory of legal reasoning as members of the Bielefelder Kreis. These arguments are a combination of legal arguments used in the higher national courts in numerous countries. The argument types can be divided into four basic categories:

1) Linguistic arguments
2) Systemic Arguments
3) Teleological-evaluative arguments and
4) Transcategorical arguments.

The linguistic arguments are related to the semantic and syntactic meaning of the words in the text. Systemic arguments relate to both the position of the norm sentence or a single word in a wider legal context in which it appears. Teleological-evaluative arguments give weight to the purpose of the statute which is being interpreted. Transcategorical argument refers to the legislative intention at the back of legislation, by which the prior categories of argument can be “transcended” and priority be given to some specific linguistic, systemic or teleological-evaluative arguments, because it is the best match with the authentic intentions of the lawmaker.370

According to MacCormick, there are values and principles underlying each of the categories of argument:

“Behind linguistic interpretation lies an aim of preserving clarity and accuracy in legislative language and a principle of justice that forbids retrospective judicial rewriting of the

368 For example, Wróblewski 1992, 31.
legislature’s chosen words. Behind systemic interpretation lies a principle of rationality grounded in the value of coherence and integrity in a legal system. Behind teleological-evaluative interpretation lies respect for the demand of practical reason that human activity be guided by some sense of values to be realized by action and by principles to be observed in it. 371

Lenaerts and Gutierrez-Fons have described these arguments as “classical methods of interpretation” which are recognized by national legal orders and in public international law, such as the 1969 Vienna Convention on the Law of Treaties. Unlike Summers and MacCormick, Lenaerts and Gutierrez-Fons use the term contextual interpretation instead of systemic interpretation. 372

The demarcation between the different categories of argument is not usually clear. Different categories of arguments are in many occasions combined and hard to set in a hierarchical order. 373 Some scholars have questioned whether one can objectively measure the quality of reasoning of the ECJ or follow the sequentialist approach. According to Beck, there is uncertainty at the level of legal rules that require interpretation and also in terms of the rules of interpretation. This uncertainty is based on a combination of linguistic vagueness, value pluralism and rule instability associated with precedent. This uncertainty cannot be resolved in judicial or doctrinal terms according to Beck. Beck argues that there is also no clear hierarchy or sequence between the linguistic, systemic and purposive arguments. 374

In the model of Summers and MacCormick, the first three of the categories of arguments form the ground for a prima facie ordering of arguments:

“When the interpretative conditions for linguistic arguments are satisfied, these arguments should be tried out prior to consideration of any other arguments; one should move to considering systemic arguments only after a preliminary scrutiny of the output of linguistic ones, and only if there is some reason to doubt the satisfactoriness of the linguistically derived interpretation; likewise, one should move to the teleological-evaluative arguments (if at all) only after the scrutiny of the former two.” 375

This ordering is based on the principle of economy of interpretative effort which reflects the sequentialist theory by MacCormick. If linguistic arguments support one clear interpretation of a statutory provision, it is justifiable to move along that line of interpretation, unless there are reasons for proceeding to a more complex mode of argumentation. Similarly, if the systemic arguments generate a satisfactory interpretation, there is no need to proceed

to teleological-evaluative arguments. Summers and MacCormick also provide a more profound justification for this ordering. The primacy of linguistic reasoning is based on the authority of legislature and the authority itself is built on democracy, separation of powers and the Rule of Law. The systemic aspects of interpretative or justificatory reasoning have their ground in the ideal of coherence. A system of norms cannot have normative coherence over time unless each of its provisions is so read as to be compatible with relevant others. The appeal to coherence can also be linked to the deeper values embodied in the rules and principles of the legal order (the global notion of coherence): “Coherence is exhibited precisely in the interpretation and maintenance of the system so that it secures a relatively ordered and structured scheme of political, social and human values.” The teleological arguments have their basis in the basic human values:

“...basic human values both play a part in underpinning the commitment to implementing statute law and yet at the same time place constraints on acceptable interpretations thereof. If there are statutes which cannot be, or simply are not, interpreted so as to exhibit consistency with values considered fundamental for the law, its legitimacy and justificatory power are thereby weakened.”

Summers and MacCormick do stress, however, that teleological-evaluative arguments are not the only types of arguments where values are relevant: the justificatory force in all the argument types depends on “fundamental legal-constitutional and political values”. This seems to be the deep justification of this sequentialist approach to the use of the topoi.

Because the principle of economy of interpretative effort is not a first-level argument itself, it would best be described as a second-level argument which effects or governs the procedure or sequence of use of the first-level arguments. Is it the only one?

5.7.2 SECOND LEVEL ARGUMENTS

The categories of arguments by MacCormick and Summers seem to correspond largely to the sequentialist theory of legal reasoning suggested by MacCormick in his 1978 study. The use of transcategorical argument is an addition to the 1978 study but it does have characteristics which point to the important role of the second-order justification of consequentialism of that previous work. This class of transcategorical arguments seems to be influenced by the theory of second-level criteria of justification by

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376 See also Conway. 2012. 142-153.
378 Ibid. 537.
379 Ibid. 538.
Wróblewski. The existence of transcategorical arguments seems to bypass, or at least undermine, the effects of the principle of economy of interpretative effort, or sequentialism, from systemic to teleological-evaluative arguments.

The role of these second-level arguments has been influential in later studies on legal reasoning and the ECJ by Bengoetxea and by Sankari. This behoves us to look at it more closely. According to Wróblewski, the second level directives of interpretation can be divided into two groups: directives of procedure and directives of preference. The directives of procedure determine the sequence of use of the first level directives.380 The principle of economy of interpretative effort which creates a sequence from linguistic to systemic to teleological arguments seems to be such a procedural second level directive of interpretation.

According to Wróblewski, the second level directives of preference determine the choice between meanings ascribed to the interpreted rule according to the first level directives, if these meanings are different.381 Wróblewski presents a standard case where these directives of preference are needed: “according to the linguistic directives the interpreted rule has a meaning Ml, according to the systemic directives Ms, and according to the functional directives Mf, and these differ inter se”. In these situations the “court has to make a choice declaring that one of them is ‘the true meaning’ or the ‘proper meaning’”.382

The second level directives of preference can be based on legal rules, guidelines and/or binding interpretative decisions or “commonly accepted” directives of interpretation. Wróblewski presents an example from Polish law, where the directive “provisions of civil law ought to be interpreted and applied according to the constitutional principles and purposes of the Polish People’s Republic” commands taking into account the functional (teleological) context in an interpretation of the civil law.383 This would mean that the sequentialist directive of procedure (such as the principle of economy of interpretative effort) would be bypassed and the interpreter would use teleological arguments irrespective of whether linguistic arguments or systemic arguments offer enough justificatory power. This seems to be somewhat inconsistent with the suggestion above by Wróblewski that the second-level directives of preference would be applicable only if comparisons of meanings based on first-level directives of interpretation (applied in sequence as per second level procedural directives) would lead to incompatibility of meaning between the different classes of arguments.384 Thus, it seems that in cases of incompatibility of meaning, there would be a need for such directives of preference, but if there are normative reasons for using the directives of

381 Ibid. 91.
382 Ibid. 93.
383 Ibid. 96.
384 See the scheme of operative interpretations by Wróblewski. Wróblewski. 1992. 94.
preference, no need or incompatibility of meaning is required. The other factor here is that in order to find out if there is an incompatibility of meaning between using the linguistic, systemic or teleological (functional) arguments, the interpreter would have to apply all of them irrespective of whether arguments lower down in the hierarchy possess enough justificatory power, which goes against the principle of economy of interpretative effort.

A peculiarity of the actual directives of interpretation listed by Wróblewski is that there does not seem to be one, which would be in direct conflict with the procedural directive of sequence in a way which would command the interpreter to jump across or bypass certain levels or sequences of arguments and go directly to the next. Wróblewski refers to, inter alia, to the following second level directive (DI-10): “If, according to linguistic interpretation there are still doubts concerning the meaning of a legal rule, then one has to choose a meaning consistent with the principles of the legal system, or of the relevant part of legal system, to which the interpreted rule belongs”.385 Another second level directive of interpretation is mentioned (DI-12): “When determining the meaning of a rule, the interpreter should take into account the internal and external systematic of the normative act to which the interpreted rule belongs, but one can omit this argument, if determination of the meaning according to other directives indicates that the systematization in question is faulty (erroneous).386 Then there is one second level directive of preference connected to values and evaluations (DI-16): “If there are various possible meanings of an interpreted rule one ought to choose the meaning in which the rule is most consistent with the approved extra-legal social rules and evaluations”.387 All of these directives seem to be applicable in a sequentialist process of interpretation: if there is doubt as to the proper meaning of a normative proposition and a particular first-level directive or type of legal argument does not justify the decision in a sufficient manner, one ought to move to the next sequence. None of them seem to require that the interpreter should jump across or bypass a certain first-level directive of interpretation and necessarily take into account another type of directive, if the directive in the previous sequence is enough to justify the decision.

MacCormick and Summers have only one second-level directive of preference (they naturally use the second-level directive of procedure or the principle of economy of interpretative effort) and that is described as the transcategorical argument, i.e. the argument derived from the intentions of the lawmaker. Siltala has not seen a need for this type of argument:

“It is left for such a transcategorical, meta-level argument to determine the ranking order for the case at hand between the first-level arguments of linguistic, systemic, and teleological-axiological kind. Recourse to the transcategorical argument is

386 Ibid. 102.
387 Ibid. 107.
open to critique, since there is no way of finding out whether the proposed content of such a closing argument in fact corresponds to the original intentions of the parliamentary at the time of issuing the enactment or those of a court of justice at the time of its giving out a precedent. If the linguistic, systemic, and teleological-axiological arguments cannot settle the issue, some kind of meta-level criterion is of course needed to resolve the argumentative deadlock. Still, it would be fairer to present the constitutive premises of any meta-level arguments in as open terms as is possible, without invoking a reference to any postulated entity that escapes scientific control, as the use of a transcategorical argument in effect does.”

Beck has also criticized the additional class of transcategorical arguments: “...it often remains unclear what, if anything, they add to the aforementioned categories [of linguistic, systemic and teleological arguments]: any court will try to, or at least purport to attempt to, give effect to the intention of the legislator, and whilst originalists argue that intention may only be inferred from the text itself and the historical material associated with it, there are other views which maintain that intention must not be construed anachronistically evolving over time”.

The role and hierarchy of different types of arguments according to Summers and MacCormick could, on the other hand, be assessed by following the same kind of logic that Siltala suggested regarding the sources of law. The institutional justification grounds (and the meta-theory behind these grounds) for linguistic arguments would be democracy, separation of powers and the Rule of Law. Institutional justification grounds for systemic arguments would seem to be based on the ideal of coherence. The institutional justification grounds for teleological arguments would be the underlying values of the law which, itself, would have a role in the in the institutional justification grounds and especially the meta-theory behind these grounds in all of the three types of arguments.

There also seem to be differences in terms of the level of legal formality between the types of arguments. According to Raitio, linguistic arguments have a high level of legal formality, whereas teleological arguments have low level of legal formality. In between are systemic arguments with mixed level of legal formality. The structural axiology of the different types of argumentation could perhaps be evaluated from the viewpoint of the rational reconstruction model by Bengoetxea explained below.

In this context, the institutional justification grounds, legal formality and the structural axiology of certain arguments would give them in different

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389 Beck. 2012. 231.
situations, more or less weight which could override the procedural or sequentialist order based on the principle of economy of interpretative effort.

The problem of transferring the model of legal sources by Siltala directly to the different types of arguments presented by Summers and MacCormick is that arguments have dynamic and fuzzy characteristics. Not unlike principles, the arguments are weighed and balanced with each other. This is also the approach by Beck who suggests that there is no hierarchy between the different topoi:

“A fundamental feature which defines the relation between various types of interpretative arguments within all legal systems is the absence of an accepted hierarchical order between them and of any clear rules for their application. Nor is there an accepted clear division of the respective areas of application of the various types of arguments, which could tell the judge which type of argument is to be applied in relation to which kind of interpretative problem and in precisely what circumstances. Courts, in consequence, especially higher courts, have considerable discretion in the application of most interpretative criteria, over how to balance one legal topos against another, over which amongst various conflicting criteria to give preference to, and thus, in consequence, in effect over the interpretation to adopt which will be based on the criteria they choose to apply or to prioritise.”

According to Moral Soriano, there can, however, be priority orders between reasons (such as different types of arguments) even though there does not exist a “metric to measure the weight” of values and principles (or in this case, arguments). Moral Soriano suggests that the evaluation of the weight of principles (arguments) “depends on the particular case”:

“Indeed, priority orders are the outcome of trying to encapsulate particularities into general rules...That is, priority orders are the outcome of a process of abstraction of the particular in order to produce categories which can be used to approach future cases. However, these priority orders...do not prevent the judge from appreciating new features, and in this sense, creating a new priority order.”

The key question here is as follows: *is there a general second-level directive of preference* concerning the judicial decision-making of the ECJ, built from institutional support, high level of legal formality and structural axiology, which would override the sequentialist process of going from linguistic arguments to systemic arguments to finally teleological arguments? Is this second-level directive justifiable? In CILFIT the ECJ held that special attention had to be given to the characteristic features of EU law. According to

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391 Beck. 2012. 278.
the ruling, as EU legislation is drafted in several languages and the different language versions are all equally authentic, an interpretation of a provision of EU law consequently involves a comparison of the different language versions. In addition, EU law concepts do not necessarily have the same meaning in EU law and the law of the Member States. Finally, the Court stated that every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, “regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.393

It is the view of this study that particularly in the EU public procurement legislation, where there is a great need for improved coherence and legal certainty, the sequentialist approach to the use of legal arguments is and should be the starting point to legal justification and the key second-level directive of interpretation in the legal reasoning by the ECJ. This means that there is a second-level criterion of procedure, using the terminology of Wróblewski.

But what about values and the “axiological acceptability” of a judicial decision, the consequentialist test by MacCormick? Surely there can be a legal decision based on linguistic and/or systemic arguments only which is perfectly consistent and coherent but not morally acceptable. Should we not need second-level directives of preference here? Here is where the question of the procedure of going through the sequence is of great importance. The view of the present work is that the test of validity of a judicial decision has to include enough justificatory force in all the aspects of justification: it has to be both internally and externally justifiable. If it is not, the second-level directive of procedure allows and actually demands for taking the next step in the sequence.

A problem of using the models by the Bielefelder Kreis or Wróblewski is that they have not been designed for a transnational legal order such as the EU and for a transnational Court such as the ECJ. If one looks for a model tailor-made for the ECJ, a good starting point could be the model of legal reasoning by Beongoetxea.

As mentioned above, in Beongoetxea’s model of rational reconstruction on the reasoning of the ECJ, the Court’s doctrine of justification has been reconstructed with the help of an analytical model of justification, an empirical research into the grounds given by the ECJ in support of its decisions, those judgments where the Court explicitly states how justification ought to proceed and the doctrine elaborated by many judges at the ECJ in their academic writings regarding the Court’s theory of justification. According to Beongoetxea, his model stands between normative-critical and descriptive approaches, because on one hand, the model of justification works as a standard against which particular justifications of the ECJ can be assessed.394

394 Beongoetxea. 1993. 140.
The descriptive nature of his model stems from this standard being reconstructed from the actual jurisprudence and the writing of the judges themselves.\textsuperscript{395}

According to \textit{Bengoetxea}, justification in hard cases requires argumentation. Good legal reasons in the justification of the ECJ are those that fit into a legal system and follow the two tiers of interpretative criteria the Court has set for itself. First-order interpretative criteria of the ECJ consist of semiotic, systemic and dynamic arguments (in the lines of MacCormick and Summers). The second-order criteria influence the hierarchy of the first-order criteria:

“...the literal meaning of a provision \textit{gives way} to the argument from the general scheme and context of application. This is the most important criterion on the choice of interpretative methods. The second-level criteria for the use of first-level criteria are those of extensive interpretation...”\textsuperscript{396}

“More important than the formulae actually expressed is the idea that the Court usually has recourse to three types of first-order criteria in typical hard case –situations: (i) semiotic or linguistic arguments, (ii) systemic and context-establishing arguments, and (iii) teleological, functional, or consequentialist arguments – and that preference is usually given to systemic-functional criteria.”\textsuperscript{397}

Such views would seem to reflect, using the model of sources by \textit{Siltala}, a high level of \textit{structural axiology} of the systemic/teleological arguments in the interpretative activities of the ECJ. This would also mean that the second-order directive of \textit{Bengoetxea} gives precedence to systemic and teleological arguments over linguistic arguments. This hierarchy is based on the case law itself (for example Cases 61/73, \textit{Mij PPW International},33/74, \textit{van Binsbergen} and 142/77, \textit{Danish Goldsmiths}) as well as the academic writings of the judges at the ECJ (for instance, the views of judge Mertens de Wilmars).\textsuperscript{398} \textit{Bengoetxea} provides four examples of judgments which he considers to be legally justified and internally rational according to his model of rational reconstruction, all of them utilizing systemic/teleological arguments.\textsuperscript{399} \textit{Bengoetxea} does not, however, seem to go very far in assessing the rational acceptability or deep justification of the second order criteria of giving preference to systemic-cum-teleological arguments. Unlike \textit{MacCormick} and \textit{Summers}, he does not go into the reasons giving justificatory

\textsuperscript{395} Bengoetxea. 2015. 212-213
\textsuperscript{396} Bengoetxea 1993. 233.
\textsuperscript{397} Ibid. 233-234. Bengoetxea combines teleological, functional and consequentialist arguments under the concept of \textit{dynamic arguments}. Bengoetxea. 1993. 251-262.
\textsuperscript{399} Ibid. 263-270, the cases being 6/72, Continental Can, 14/68, Walt Wilhelm, 43/75, Defrenne, and 2/74, Reyners.
weight to different types of *topoi* nor the reasons giving weight to the preference mentioned above.

In addition, one could ask if there actually is such a big difference between the models of sequence or the principle of economy of interpretative effort by Summers and MacCormick, on one hand, and the model by Bengoetxea, on the other? From the case law and academic writings referred to by Bengoetxea, one could see a similar principle of economy of interpretative effort progressing from linguistic arguments to the other types of arguments as suggested by Summers and MacCormick: the precedence of systemic-cum-teleological arguments seems to grow out from problems in using linguistic or semantic arguments: inconsistencies in interpreting multi-lingual legislation, special context of the applicable text and problems of evaluation and qualification.400

The rational reconstruction approach of Bengoetxea has been used by Sankari in her study on legal reasoning of the ECJ in cases regarding the citizenship of the EU. The study found that the Court of Justice was applying the interpretative criteria, as provided by Bengoetxea’s study, in the case law regarding EU citizenship. The study, however, found that the linguistic and systemic approach to interpretation was more prominent in EU citizenship case law than teleological interpretation:

“…the legal reasoning most often remained as close to applying the semiotic criteria of interpretation as possible. Whether the text was interpreted restrictively or extensively followed from classifying it, as a norm, according to Bengoetxea’s general second-level criteria for constitutional interpretation…If simply applying semiotic criteria of interpretation did not provide an answer to the question of legal interpretation at hand, the Court of Justice applied systemic criteria of interpretation. If placed the norm in its norm-context and interpreted it in a way that best fit with preserving or developing the consistency and coherence of the normative framework of the field of law.401

The aim of Sankari’s study was to test Bengoetxea’s model by applying it to case-law on certain articles of the TFEU. If the model would “fit” the interpretative reasoning of the ECJ in these cases, these cases would be considered to be reasoned in accordance with the normal interpretative criteria of the Court of Justice.402 According to Sankari, the ECJ has relied on its normal established ways of interpreting the law, i.e. to the principle from Bengoetxea that systemic/dynamic arguments are given precedence over linguistic arguments. But what can be said of the finding that the systemic criteria of interpretation and even linguistic or semiotic criteria were much more prominent in the cases than dynamic or teleological criteria? Does this
mean that the ECJ has not applied its interpretative criteria? Does this mean that the balance of the second-level interpretative criteria has changed towards a model based more on systemic or linguistic interpretation? Given the consistency of the findings in Sankari’s study, and even taking account of the limited field of law in question, the latter option seems justifiable.

Jacob has suggested, based on a data of the use of precedents in fifty-two ECJ Grand Chamber judgments from 2010, that the ECJ’s actual behaviour “calls into question its all-too-quick stigmatisation as a ‘purely teleological court’ in the sense that it is suggested that the Court is exclusively forward-looking or grandly pondering the next development in European history”. According to Jacob,

“...like any other legal worker, the ECJ very often starts from bland, often downright dull, textual provisions. Where necessary, it might then look to context and purpose. Its visible preference for drawing on precedents when interpreting legal provisions discerns it as an adjudicatory body that tries to fit any chosen meaning into the existing discourse as manifest in prior cases. Even if this were to be little more than a façade, the need to appear coherent alone has an impact on room for manoeuvre.”403

Beck has argued that the approach of the ECJ diverges to an extent from the sequentialist model of MacCormick and Summers because the framework of EU law provides a variety of reasons for taking account systemic and purposive criteria in addition to literal arguments: a) the multi-lingual nature of EU law; b) the fact that EU law is drafted in less exhaustive and more abstract style of the civil law tradition; c) EU law is characterised by a high degree of norm collision and value pluralism; d) there have arguably been more ‘gaps’ or unregulated cases in EU law than in most national legal systems. This has lead Beck to suggest that the use of the three types of argument in the work of the ECJ has at least to distinguishing features. First, literal arguments have a primary status rather than a strong presumptive status: although linguistic arguments form the starting point of the interpretation, they more often than not have to be bypassed because of linguistic vagueness and value plurality. Secondly, where the wording conflicts with the general scheme or the spirit and objectives of the Treaties, there is in EU law no one set of arguments which prevails as a general rule and none of the individual topoi have an absolute fixed weight.404

Beck’s model of the use of legal arguments in the Court’s legal reasoning has a couple of additional characteristics. First, he argues that the preponderance of integrationist topoi available to the Court give the Court’s approach to legal reasoning a broadly communautaire tendency: an argumentative default position which favors expansive interpretation of the Union’s powers and the scope of Union law. This presumption can, however,

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403 Jacobs. 2014. 120.
be rebutted and need not prevail, as principles such as the principle of conferral and subsidiarity may act as counterpoints to the pursuit of integrationist objectives. Secondly, there are a number of steadying factors, within the *heuresis* (context of discovery) of the reasoning of the ECJ, which place constraints upon judicial reasoning. The legal steadying factors require that the Court justifies its conclusions with reference to accepted *topoi* of legal argumentation, the accepted standards of their respective weight and relevance to the interpretative problem at hand. The extra-legal steadying factors provide “pointers as to how the Court will exercise the discretion afforded by the context of justification of EU law and how it is likely to adjust and modulate the broadly expansive and *communaute* tendency built into its cumulative approach in light of particular cases and within the parameters of the questions the Court is asked to consider in each case.

Beck’s approach to the legal reasoning of the ECJ is strikingly heuristic. He argues that “the heuristic view of legal reasoning is the only meaningful tool in explaining the Court’s interpretive approach and decision-making” and that the “scientific” (normative or critical) view of legal reasoning is based on an illusion. According to Beck, legal certainty cannot be achieved in scientific approach to legal reasoning (examples used here are the theories of legal reasoning by MacCormick, Alexy and the Bielefelder Kreis) through invoking a second level of interpretative rules. First of all, Beck criticizes the scientific approach of not providing a sufficient meta-rules or second-order criteria of justification. Even if it did, Beck sees that secondary legal uncertainty is as inescapable as primary level uncertainty (uncertainty concerning the use of the different *topoi*). Beck argues that “the sources of legal certainty cannot be overcome because they are built into the defining features of language, ordinary moral experience, the nature of ordinary moral experience and normative thinking and for these reasons into the structure of second-level interpretative argumentation itself”. Here Beck does not seem to take into account that in both the models by the Bielefelder Kreis and by Wróblewski there are procedural second-level criteria of justification.

As with the model by Bengoetxea, one could ask if the descriptive model by Beck actually represents a considerable departure from the sequentialist model of by Summers and MacCormick. Some passages in Beck’s work seem to suggest that this is not so. According to Beck, “the ECJ’s cumulative approach favours a purposive outcome notwithstanding the fact that the Court relies on literal arguments more often than on any other form of argument, because in conflictual cases where the literal meaning conflicts with the purposes and general scheme of a provision and/or of the Treaties, the Court is more likely to attach added weight to purposive and contextual criteria”. On the other hand, based on the legal steadying factors, the Court “cannot too

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406 Ibid. 156.
407 Ibid. 133-139.
often and without good reason go against the natural meaning of the rules to be interpreted, the accepted interpretative rules, or against the need for judicial consistency over time enshrined in relevant precedents”.408 This does not seem to be at odds with the approach that if the use of an argument is not internally and externally justifiable, the judge must move to the next sequence of arguments. Key elements suggested by Beck such as clarity of the relevant provision are very much parts of this justification.409

In Paunio’s study on legal reasoning in multilingual EU law, the emphasis is on teleological argumentation. According to Paunio, linguistic argumentation cannot alone exhaust the argumentative task of the ECJ. Its interpretations need further justification. First, telos ties the case at hand to the broader systemic context of EU law. In addition to providing a specific legal outcome for an individual case, it also offers a broader normative toolbox with which future cases can be decided.410 Second, because of the complexity of the EU law-making process, it is difficult to ascertain the legislator’s will with certainty. Third, the EU Treaty provisions, unlike national constitutions, formulate a project with an objective of integration, loaded with teleology.411 Paunio states:

“An approach that does not attempt to follow – sometimes artificially – the wording of EU law provisions, but rather takes as a starting-point the underlying objectives of the text and the legal system as a whole, might be said to better ensure that the task of guiding national courts in interpreting and applying EU law is realized. In this respect, it may also be said to better promote substantive acceptability of judicial decisions within the context of EU law.”412

According to Bengoetxea, Paunio’s study adopts his rational reconstruction approach, where one can evaluate the decision-making of the ECJ on its own standard, as analytically reconstructed from a series of sources amongst which the Court’s own doctrine of interpretation as expressed in its own case-law features prominently.413 The arguments for emphasizing teleological arguments (cohesion of jurisprudence, the effectiveness of legal interpretation etc.) do not, however, seem to stem from a specific interpretative criteria of justification by the ECJ. The standards of legal reasoning in Paunio’s study seem to be built more on communicative practices of interpretation between a judicial decision and its legally relevant audience,

409 Ibid. 436.
411 Ibid. 60–61.
412 Ibid. 63.
413 Bengoetxea. 2015. 213.
which would seem to fall, using the classification by Siltala, more under critical-normative approach⁴¹⁴:

"...to realize the aim of (rationally and substantively) acceptable judicial decision-making, it seems important that interpretive choices made by the court in question are accepted not only normatively but also rationally by the particular audience...In this respect, ECJ legal reasoning is somewhat atypical: it not only tries to establish a rationally acceptable decision (by reference to legal sources and case law), but it also aims at persuading its audience (by means of purpose-oriented argumentation).⁴¹⁵

The hierarchy and the relationship of types of arguments can also be based on a more (external) normative approach to the reasoning of the ECJ.⁴¹⁶ In the work by Conway, there is a clear external normative approach to the reasoning of the European Court of Justice. According to him, the interpretative perspective of the judiciary should be aligned with that of the law-maker and that of other reasonable participants, i.e. ordinary citizens, in the legal systems, through which one can formulate a hierarchical scheme of interpretation that reflects “ordinary constraints on interpretation”.⁴¹⁷ Conway has presented a normative model of legal reasoning for the ECJ, called the “rule-bound theory of interpretation” which has five main criteria of interpretation: 1) the centrality and authority of the constitutional text and the normative priority of its ordinary meaning; 2) the application of the lex specialis principle for structuring systemic or integrated interpretation; 3) the resolution of indeterminacy resulting from abstraction through originalist interpretation; 4) a preference for dialectical reasoning and the explication of interpretative assumptions; and 5) the relevance of the argument from injustice only in exceptional cases. Conway’s model takes as its starting point the sequentialist theory of reasoning by MacCormick:

“The present work is largely supported by MacCormick’s hierarchy of interpretative methods, but it seeks to be more specific in relating interpretation to a rule-bound method linked normatively to the rule of law and democracy, and it more narrowly defines the role of systemic and consequentialist reasoning.”⁴¹⁸

It is the viewpoint of this study that the sequentialist approach to using topoi can be supported by, or at least is not in contrast with, all of the different models of legal reasoning of the ECJ (normative-critical, descriptive and the rational reconstruction). The acceptability in the realm of deep justification of

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⁴¹⁶ On the depiction of Conway’s work by Bengoetxea, see Bengoetxea 2015. 193-198.
⁴¹⁷ Conway 2012. 51.
⁴¹⁸ Ibid. 142.
sequentialist approach to using the *topoi* can also be supported through means of looking at the interpretative actions of the ECJ from the viewpoint of the relationship between *institutions*. According to these lines of argumentation, the Court should take into account in its interpretation the choices (in terms of the chosen words) made by the *legislator* or, at least, be restrained by the same provisions and principles as those other institutions.

*Rasmussen* has criticized the dynamic approach to judicial interpretation (i.e. the strong role of teleological interpretation) based on the argument that the interpretative action of the ECJ has to be assessed primarily in light of the reactions of other external actors, mainly the Union legislature and the Member States.419 Rasmussen presents critique in his view on the classic case in *Van Gend en Loos*: the “Treaty does not offer the Court the slighted justification for ruling the way it did. [The ECJ] went beyond the textual stipulations of [Article 189(3) EEC] leaving behind it a variety of well-merited, legal interpretative principles.420

According to *Horsley*, the scholarship on judicial activism is all too often built on abstract theories by judicial reasoning and do not sufficiently engage with the specificities of the constitutional context within which the ECJ is required to operate.421 In his view, assessments of the ECJ’s activism only make sense if the Court is understood as an *institutional actor*. The activities of the ECJ are not unlike the activities of the Union’s legislative organs. The principles of direct effect and primacy of EU law have transformed the Court to a political actor in EU integration. There are, however, differences between the legislative organs and the ECJ. These have to do with different competences and the “distinct judicial environment” of the Court the last of which can actually strengthen or privilege the role of the Court compared to the legislator. 422 One example of this is presented by a reference to issues of existing secondary EU legislation. On one hand provisions of secondary legislation might be read as exhaustive statements of the scope of application of EU law in particular fields. On the other hand, the Court’s position within the Treaty as the final arbiter of the interpretation of EU law grants it a broader competence to review, adjust and fill gaps in the legal framework established by specific EU directives, regulations and decisions.423

According to *Horsley*, the institutional actor thesis offers a good analytical framework to structure legal discussion of the Court’s approach of its interpretative competence.424 The Treaties offer the starting point as to the legal limits of the Court’s freedom, as an institutional actor, to engage in activism. There are a series of legal provisions in the Treaties (for instance,

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419 Rasmussen. 188.
420 Ibid. 12.
422 Ibid. 941-943.
423 Ibid. 947.
424 Ibid. 945.
exceptions to free movement based on, inter alia, public health) which are intended to restrain the interpretative actions of the ECJ. While these legal limits are not primarily addressed to the ECJ, the Court should take them into account as it has interposed itself as an institutional actor alongside the Union’s legislative bodies.

Davies starts from the concept of departmentalism and suggests that the ECJ should exercise deference to acts of legislation as constitutional interpretations of the other branches of government. According to him, there must be at least some room for such adjustments without loss of face or compromise on the law. The views of the legislature can be absorbed in interpretation particularly well in internal market law, where the Treaty articles on free movement have a very open nature which makes a wide variety of interpretations potentially defensible. Although Davies seems to be arguing for a more open model of interpretation (taking more into account the view of the legislature), in terms of using different arguments in justification of a decision, this seems to be emphasizing linguistic approach.

Lenaerts and Gutierrez-Fons have also argued, based on a combined reading of Les Verts and UPA that, when interpreting EU law, the European Court of justice “must strike the right balance between, on the one hand, the principle of effective judicial protection, and, on the other, the principles of interinstitutional balance and mutual sincere cooperation”.

The institutional actor thesis provides a very interesting viewpoint into EU public procurement legislation. The role of the ECJ in procurement law has been very active with a notable number of rules having the jurisprudence as their origins. In the field of legislation, too, we have witnessed a remarkable increase in the number of provisions, with the latest directive reform including up to several hundreds of Articles. As many of the new provisions of the directives seem to elaborate on the jurisprudence of the ECJ, one cannot help but wonder whether the increase of the written legislation has to do with the legislator wanting to have the final say in matters of public procurement. By increasing the level of detail in the text of the procurement directives, the legislator could restrict the judicial activity of the ECJ by keeping the interpretative action at the level of linguistics. This is only possible, however, when the principle of economy of interpretative effort (à la Summers and MacCormick) is used as a method for progressing between the different types of arguments. If this method is not actually applied by the ECJ or if it does not even act as an internal-critical standard for assessing the jurisprudence, the efforts of the legislator seem to be in vain.

In this study, the approach to the legal reasoning of the ECJ is based on the sequentialist theory of legal reasoning by MacCormick, or – as Siltala has...
described it – *Theory of the Three C’s in Legal Reasoning*: “from linguistic consistency to the pursuit of principled, analogy-aligned coherence among legal principles and, ultimately, to the value-laden social consequences of law”, but with a clearer division between coherence and consequence.\(^{429}\) This approach would seem to cover, in the most complete form, all of the important properties of legal reasoning as well as the different characteristics of the different ideologies of judicial decision-making by Wróblewski. The sequentialist approach is also in tandem with the model of Summers and MacCormick, where the principle of economy of interpretative effort provided a standard method of progressing from linguistic arguments to the other types of arguments. In this model, no type of argument is given *a priori* precedence over others. This need not necessarily be in collision with the model of second-order criteria suggested by Bengoetxea as the case law and academic writings referred to by Bengoetxea could also be seen as utilizing the principle of economy of interpretative effort. In addition, one wonders in the light of the study by Sankari whether the second-order criteria applied in recent case law of the ECJ actually give *a priori* precedence to systemic-teleological arguments over linguistic arguments. As suggested above, the principle of economy of interpretative effort is not necessarily at odds with the descriptive model by Beck either.

This starting point is also supported by the more normative-critical approach by Conway where the sequentialist use of legal arguments is linked normatively to the rule of law and democracy. As Conway has argued:

“Implication in law undermines democratic accountability for the same reason that it undermines the rules of law. Citizens have less potential for being aware of implication and thus for being able to have input in and correct the democratic law-making process. For these reasons, implication is best avoided when reasoning about the meaning and content of legal texts, unless there is something necessary or inevitable about the implication read into the text”\(^{430}\).

In addition, the institutional actor theories by Horsley and Davies seem to give additional weight to the use of the principle of economy of interpretative effort. Finally, the model of legal sources by Siltala can be utilised in promoting this approach, as the sequentialist use of legal arguments seems to be supported by the institutional justification premises of the rule of law and democracy and the high level of legal formality in the types of arguments used first in the sequence. The basis for the sequence running from linguistic arguments to systemic to teleological is built on these normative-critical considerations. This does not necessarily mean that the sequence is reflected in the actual use of the different types of arguments: as the wording may not often bring sufficient justificatory power in a multilingual legal system, we may

\(^{429}\) Siltala. 2011. 12.

\(^{430}\) Conway. 2012. 145.
find that the Court would have to invoke systemic or teleological arguments often. *Summa summarum*, the goal is to present reasons on why systemic arguments have their use when linguistic arguments dry out and when the excessive use of one of teleological or consequentialist arguments has created problems in terms of consistency and coherence.

The sequentialist approach and the support for consistency and coherence seem to fit particularly well to judicial decision making in public procurement cases as EU public procurement law is considered to be primarily a part of EU Internal Market Law. According to Mathisen, the ECJ case law on national restrictions to free movement in Internal Market Law, seems to support the requirements of consistency and coherence: “...if national legislation restrictive of free movement does not only further the attainment of its purported objective but at the same time also undermines or even contradicts this, there may be good reason to conclude that the objective cannot properly be attained by means of the given legislation.”431 Importance can also be given to inconsistencies in how the restrictive legislation, practices or measures relate to the objectives of the legislation at issue. Coherence, on the other hand, is connected to the intelligibility of a national measure and the fit between the measure and its objective.432 In the Court’s case law it has been insisted that restrictive national legislation is “appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner”.433

It is the starting point of this work that, especially in the context of EU public procurement legislation, with a great need for systematization and improved coherence and with the complicated relationship between principles based on procedural tendering rights and a multitude of objectives based on fundamental rights, the principle of legal certainty434 supports the emphasized use of systemic arguments and the sequentialist approach to legal reasoning. The excessive use of teleological or consequentialist arguments is considered to decrease the level of coherence (both in law and within reasoning) and the ultimate justification of a ruling by the European Court of Justice. It is not suggested here, however, that teleological or consequentialist arguments are not necessary in justification of procurement cases or that linguistic or systemic arguments would in every or even in most cases be sufficient in justifying decisions even in the context of EU procurement legislation. It is only suggested that if linguistic or systemic arguments are overridden or too

431 Mathisen. 2010. 1039.
432 Ibid. 1048. Mathisen suggests that these requirements of consistency and coherence may, however, if interpreted too strictly, be used as easy grounds for challenging national measures, as they usually entail compromises and imperfections.
434 The principle of legal certainty is used in this context in a formal sense. On the different aspects of legal certainty, see Raitio 2003. 374. See also Paunio. 2016. 62-64.
often coupled with teleological arguments, this can lead to problems in the justificatory power, as coherence, as a part of the justification, is sacrificed to a degree. The benefits and disadvantages of the different types of topoi are covered in more detail below in Chapter 4.7.

It also must be taken into account that the criteria of justification do not, in every situation, require the use of all of the topoi or types of argument to achieve sufficient justification – otherwise the sequentialist approach would have no merit. According to MacCormick and Summers, “it is indeed by no means necessary in every interpretational situation to go deeply into purposes or values of substance. But a general failure to regard these matters, however pressingly relevant in particular cases, is both formalistic and also objectionable for its potential effects.”

A sensible approach to the use of different topoi has been suggested by Lenaerts and Gutierrez-Fons:

“Where the EU law provision in question is ambiguous, obscure or incomplete, all the methods of interpretation employed by the ECJ operate in a mutually enforcing manner. A literal interpretation of an ambiguous EU law provision may be confirmed by its context and purposes. Similarly, to determine the objectives pursued by an EU law provision, the ECJ may have recourse to its drafting history and/or its normative contexts....A combined application of the ECJ’s methods of interpretation shows that the philosophical foundations of EU law are not those of a hierarchical legal order where interpretation is the result of a top-down and dogmatic approach. On the contrary, ‘to say what the law of the EU is’ involves a complex balancing exercise which must be carried out in a pluralist environment allowing for a mutual change of ideas.”

5.8 INTERLUDE: NORMS IN INTERPRETATION

We have now addressed both the themes of norms, valid sources of law and interpretative arguments. But given that they seem to hold similar characteristics, one could ask: what is their difference? Especially in the case of those principles and other proto-norms which are derived from the written law by the ECJ (and not written into the law), are they sources of law, norms or just arguments utilized by the judiciary? If the Court can be seen to generate norms and even legal sources, how can we differentiate between the norm and the practice of generating it? As Raitio has suggested, “the requirement of acceptability imposed on the validity of a legal norm may mean that the legal principles and policies, or proto-norms in general, used as

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arguments to promote different objectives and values may come to have a normative character as a source of law”.

In Chapter 2.3, we discussed about the dual status of principles (proto-norms) as both norms and sources of law. Tuori argues that principles have a plethora of meanings: principles as norms applicable in legal decision-making, legal principles as arguments in interpreting written sources of law, legal principles as summaries of the normative contents of a branch of law or the legal order as a whole, legal principles as legal sources supporting legal norms and legal principles as normative premises for legislative solutions. The different meaning contents of legal principles are interdependent.437

According to Bengoetxea, the features of the European Community (European Union) largely influence the interpretation of the EU law. Especially the general principles of EU law have been used in two ways: as general concepts relating to the institutional features of the EU, and as binding, though not necessarily written, general norms, which must be effectively observed if actions of the EU authorities are to be lawful:

“General principles of law can be used in order to fill in gaps in the law, in order to provide further (subsidiary) arguments for a proposed interpretation where the justification is based on more precise legal norms, and in order to guide interpretation functioning as protected reasons or legal norms”.438

Here, the theory of finalistic law by Klami and its application into the realm of legal reasoning by the ECJ by Raitio, is of great benefit. The ontological assumption of law by Klami was based on a dialectical relationship between norms and behaviour:

“Law is a set of norms, but it is also a social order, consisting of behaviour and a feeling of normativity, which are interconnected. This dualism is not a simple conjunction of two things, norms and behaviour, but rather a dialectical relationship where norms and behaviour are different aspects of the human mind...the essence of law is a question complicated by the fact that law has a social impact and that it is generated by social activity, where knowledge and belief is in a complicated manner transformed into normativity. Quite simply: it is thought that a certain state of affairs is good. It is known – or believed – that the behaviour $p$ is a necessary or sufficient condition to achieve $q$. Therefore, the implication $p \rightarrow q$ is – in certain epistemic conditions – declared to be normative: you should do $p$ ($\rightarrow$ in order to achieve $q$).”439

437 Tuori. 2010. 189.
439 Klami. 1986. 11.
According to Klami, norms exist in acts of interpretation. He argues that normativity is a special kind of reality, referring to behaviour and its normative interpretation after considering a peculiar justification which transforms social teleology into normativity. On the other hand, normativity is connected with behaviour which is interpreted in a normative manner. Normativity also exists at the level of teleology used for justifying the normative interpretation mentioned above. Thus, the practice (of interpreting legal sources) affects the norm-propositions which law-applying officials are giving, but this practice (interpretation) is influenced by the norms.

This work is influenced by the model of Raitio who has combined the finalistic theory of Klami and its justification levels and the theory of norms by Siltala and Dworkin into an illustrative picture where the ontology of law as a system of norms is combined with the system of practice (interpretative arguments) where these norms are used. In his model, linguistic legal arguments are connected to the ontology or rules and to systemic validity and teleological arguments to proto-norms of principles and policies and to axiological validity. Between these are systemic arguments, which are connected to concepts.

By combining the ontology of law and the arguments of justification, we can utilize many of the findings of Chapter 2 on the ontology of EU public procurement law in assessing the reasoning of the ECJ. First, we can see the underpinnings of the different approaches in legal thinking or frames of legal analysis as ideologies of judicial decision-making. There are other benefits as well. We can also point to the suggestion by Tuori that problems relating to axiological validity or the acceptability of a norm (values) usually arise only after the norm has been held to meet the criteria of systemic validity. When transformed into the issue of arguments, this would support the sequentialist approach.

According to Beck, principles are commonly classified (when used as arguments or topoi in the judicial application of the law) as a sub-category of systemic arguments. In the model by Raitio, principles are situated in the same group as teleological arguments. Beck argues, however, that “as many principles reflect the specific features of EU law as a hybrid treaty-based legal system between national and international law and in virtue of the overlap of many general principles with teleological arguments in EU law, principles are perhaps best examined sui generis when assessing the relative importance of

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441 Klami 1986. 20–21.
442 The influence of the types of arguments by the Bielefeld Kreis is also apparent.
443 Raitio. 2013. 103.
444 Ibid.
the various groups of interpretative criteria in the ECJ’s justificatory discourse”. Here the notion by Tuori of the different characteristics of principles is of benefit. As we can see in Chapter 7.1., principles can be used in quite the same way as concepts, which grounds their use firmly to the group of systemic arguments. Some principles may be more akin to policies, which would move them closer to teleological arguments. But if one accepts even a degree of division between rights-based legal standards and purpose-based legal standards, we can see that at least in EU public procurement law, the benefits of clarity and systemic coherence are more apparent in rights-based legal standards (principles of equal treatment, non-discrimination and transparency), as they ensure the protection of the economic rights or freedoms of economic operators (in a tendering procedure), based on the purpose of the “economic constitution” of the EU. In addition, the variations of legal realism in EU law, represented for instance in the work by Duyevre, could be held to support an approach which takes as its starting point (or first sequence) the wording of the law, instead of the objects of that law, because this seems to be the approach utilized by the ECJ working in its institutional setting. As Sankari has stated, the approach where one is “deeply aware of the perils of misplaced extensive and restrictive (re-)interpretation in the EU law context”, is “compatible with an empirically pluralist reality in which the Court of Justice operates and which allows a certain kind of judicial minimalism to play a role, even in preliminary rulings”.

In conclusion, it is submitted that the ontology of the EU legal system of norms affects the legal reasoning of the ECJ in many ways. First, it illustrates the different ideologies of judicial decision-making present in the sequential use of legal arguments. Second, it situates the decision-making of the ECJ in a dialogue with its surroundings. Third, it ties the legal reasoning to the specific legal framework of the European Union. Fourth, it clarifies the nature and operational mechanics of the principles and policies in EU public procurement law. Finally, it helps us to find similarities and differences in the different types of legal arguments.

447 Ibid. 230-231.
448 Sankari. 2013. 20.
In the previous Chapter it has been held that the sequentialist approach to the use of arguments is a reasonable approach in legal reasoning. Let us look more closely at the relationship between systemic and teleological arguments or justification.

Many scholars specialised in issues of legal reasoning of the European Court of Justice have argued that the use of linguistic or semantic reasoning has significant problems in the context of EU law. Paunio has argued that terms such as direct effect, effective judicial protection or legitimate expectations might not convey the same meaning or same effects in different legal systems if no shared theory exists on these concepts. According to her, “not only the inherent indeterminacy of natural languages topped with problems of translation in the EU context but also the contextuality of language and adjudication implies that the meaning of legal texts is ‘potentially ever-changing’”.449 Lindroos-Hovinheimo has referred to the problem of literal meaning being quite hollow in itself. 450 Sankari has argued that when the meaning of text is problematised, the use of semiotic criteria of interpretation alone will not provide an interpretive solution.451 The approach in this works takes as its starting point the view by Sankari that “arguing that semiotic criteria will not solve interpretive questions in hard cases is not the same as arguing that law is wholly indeterminate or that the wording of the law does not matter”. Sankari presents the doctrine of indirect effect of EU law as an example. Guided by the principle of indirect effect of EU law, the wording of national law must be interpreted in a way that produces an outcome compatible with EU law. This duty is only exhausted when compliance with EU law would require a contra legem interpretation of national law. In these situations, the primacy of EU law takes over “as indirect effect is no longer expected to resolve the conflict between national and EU law, which means that the decision-making process regresses a step back from interpretation to the choice of major premise”.452

Even though the amount of text of the EU Public Procurement Directives has increased exponentially during the last 20 years both in terms of procedural rules and the rules on the scope of application, the rules which form the very basis of the scope of application are very scarce and minimalistic. Both

449 Paunio. 2013. 15.
451 Sankari. 2013. 90.
452 Ibid. 90-91.
the definitions of procurement and of public and concession contracts leave much room for interpretation as to what types of arrangements are covered in the procurement directives. Consequently, it is suggested here that linguistic arguments do not by themselves usually provide much justificatory power to solving questions regarding the scope of procurement legislation in the decision-making of the European Court of Justice. They can, however, act as reasons in tackling some of the simpler questions and clarifying the premises of the reasoning.

The tendency in the academic works where problems have been analysed at the level of linguistic arguments is that these problems have been utilized as arguments for emphasizing teleological arguments. Systemic arguments have either not been addressed in detail or they have been coupled with teleological arguments as one group. Many scholars, such as Bengoetxea, Sankari, Beck, Lasser and Itzcovic see systemic and teleological arguments intertwined.453 Beck has actually used the problems in making strict distinctions between systemic arguments and purposive or teleological arguments as a key critique over the sequentialist approach.454 Itzcovitch has suggested that teleological interpretation could be regarded as a kind of systemic interpretation, if the goal that it takes into consideration has been explicitly established by the legislator, or if the goal is part of the system constructed by the legal doctrine.455 Maduro and Lasser have attempted to decrease the confusion with dividing teleological arguments to teleological, drawing from the objective of a provision, and meta-teleological, drawing from the objectives of the legal context. The former would be situated within the systemic interpretation.456

It is submitted, however, that there are good reasons for making a distinction between systemic and teleological arguments. First, the interlocking of systemic and teleological arguments seems to tie the building blocks of coherence (in the legal system) to values or at least to consequentialism, a property of the theory of Dworkin which was criticised by Raz for undermining the authority of the law.

Conway has suggested that the fuzziness of legal language cannot be utilised in promoting the interpretative freedom of the ECJ:

“A one-sided view on legal indeterminacy has the notable effect of empowering the judiciary: while the judiciary are not bound in a specific way to give effect to democratic intention because of generalised legal indeterminacy (in the sense of the indeterminacy of constitutional or legislative texts), ordinary citizens are bound quite specifically to the courts’ own determinations in the form of legal texts (i.e. judgments) and

454 Beck. 2012. 279.
455 Itzcovitch. 2009. 555.
legislatures are similarly bound by judicial interpretation of constitutions."457

Second, the coupling of systemic and teleological arguments does not take into the account the existence of value (or in this case, consequence-related) pluralism: there might be significant problems in achieving consistency and acceptability if the number of desirable consequences or values is very high. Finally, the distinction between systemic and teleological arguments is also beneficial in order to efficiently present the benefits of systemic arguments over teleological arguments in EU public procurement law.

As presented above, there is a notable amount of academic writing which would seem to give precedence to teleological arguments in the models of justification of the ECJ. Some studies pair the systemic and teleological arguments together in the highest step of the podium while others, such as Paunio’s study, emphasize the strong independent role of teleological arguments.458

There are problems relating to the emphasized use of teleological arguments. First of all, as stated above, the study by Sankari would seem to suggest that, at least in the field of EU citizenship law, the second-order criteria for interpretation would not give precedence to teleological or dynamic arguments over linguistic or systemic arguments. The primacy of teleological interpretation would also seem to override the principle by MacCormick and Summers of the principle of economy of the interpretative effort and the sequential characteristic of legal reasoning, which is assumed as the basis of legal reasoning in the ECJ.

Second, the fragmentation and ambiguity are not problems only with regards multi-lingual legislation of the EU. In terms of the purpose of the law, there is also fragmentation and ambiguity, consequence plurality.459 Even the Maastricht Treaty was frowned upon by the ordoliberals for the increase of its goals and decreased role of the economic constitution.460 Raitio has also argued that a specific characteristic of the European Union is the vastness and fragmentariness of its aims and goals.461 EU public procurement law also has many objectives which have become more numerous from year to year. The main objectives of the procurement directives have been addressed above and can be listed as follows:

1) the efficient use of public funds;
2) prevention of corruption;
3) the efficiency of the internal market and the fundamental freedoms;

457 Conway. 2013. 132.
4) public procurement as an instrument for other political goals (usually referred to as secondary or horizontal policies in procurement).\textsuperscript{462}

The multiplicity of the goals of EU public procurement law brings forth questions on their background and interrelationship. The goal of efficient use of money is a distinctively national one: it is an instrument of efficient finance politics. The prevention of corruption and the efficiency of the internal market reveal the EU-wide point of view. According to Arrowsmith and Kunzlik, the goal of the public procurement directives or the fundamental freedoms is not to ensure that the Member States use their funds as effectively as possible.\textsuperscript{463} The confusion regarding the objectives of the procurement directives has been eloquently summarized by Arrowsmith: “the directives’ functions have now become clouded in misunderstandings: there is no clear or consistent vision of these functions amongst regulators and stakeholders, nor a clear understanding of how their functions fit with the goals and tools of national regulation”.\textsuperscript{464} According to her, this has contributed to an uncertain legal environment and inhibited the sound and coherent development of the EU regime.\textsuperscript{465}

Here we can also remind ourselves of Tuori’s study on the different constitutions of Europe and their relationship.\textsuperscript{466} The microeconomic constitution and the social dimension of the EU constitution are in a tension-filled relationship consisting of conflicts between transnational economic rights and national social rights and between transnational access justice and national solidaristic justice. Translated into the realm of teleological arguments this tension seems decrease the formality, coherence and rationality of using teleological arguments based on rights-based principles.

András has split teleological arguments in constitutional interpretation or reasoning into two groups: objective teleological arguments and subjective teleological arguments. The former arguments stem from provisions themselves and the latter arguments are based on the intention of the lawmaker.\textsuperscript{467} According to András, the most frequent objections to objective teleological arguments are that, firstly, the same text can have several purposes, which may lead to interpretations contradicting each other (and the choice amongst them being unclear). Secondly, even a clear ratio legis

\textsuperscript{462} See recitals 1-3 in Directive 2014/24/EU and the Commission green paper on public procurement COM (2011) 15 final. 3-6. In Commission communication from 2004 public procurement is also seen as an instrument for increasing the cohesion between new and old Member States. COM (2004) 101 final. 15. See also Graells. 2015. 101-114.

\textsuperscript{463} Arrowsmith – Kunzlik. 2008. 31-33.

\textsuperscript{464} Arrowsmith. 2012b. 2.

\textsuperscript{465} Ibid.

\textsuperscript{466} Tuori. 2015. 22-26.

\textsuperscript{467} András. 2016. 45-46. András himself questions, however, whether texts themselves can have intention.
sometimes fails to show which interpretation could support it best as to its consequences. Criticism towards subjective teleological arguments, are similar in nature in that they point to the facts that law-maker’s intention may be manifold and that the intention of the law-maker in old legislation (such as constitutions) is quite difficult to reconstruct later or to modernize.

Finally, the teleological interpretation supported by Paunio seems quite interlocked to the context-bound quality of decision-making by the ECJ. This can lead, as Raitio has suggested, to arbitrariness, ‘the Casanova method’ and the hampering of the coherence of the legal system. Paunio has suggested that legal certainty could be found best at the level of teleological reasoning which keeps the indeterminacy at the linguistic level on a tight rein. In the context of EU public procurement law, however, it can be argued that the EU public procurement legislation, with its complexity and multitude of objectives (and problems of indeterminacy at the linguistic level) requires the use of systemic arguments, because the nature of the legislation as procedural (auction-based tendering procedure) and as regulating a certain type of relationship between public authorities and the market (instead of other types) requires the legislation and the procedure that it regulates to keep consistently and coherently operationalizable.

The arguments suggested above also apply to the relationship between systemic arguments and the other types of arguments listed within the concept of dynamic criteria of interpretation by Bengoetxea, namely functional and consequentialist interpretation. Functional interpretation assumes that in case of doubt legal provision must be interpreted in a way, which warrants its effectiveness (effet utile) and its capability of functioning in an efficient and effectual way. Consequentialist interpretation assumes that in case of doubt a legal provision must be interpreted by taking into consideration the foreseeable consequences of the interpretative decision.

Itzcovich has presented reasons for distinguishing between systemic criteria of interpretation and the entirety of dynamic criteria of interpretation:

“The systemic criteria bind the interpreter to a given set of norms: a ‘static’ system, as it has been fixed by the legislator, by the doctrine, by the settled case-law. On the contrary, the dynamic criteria charge the interpreter with the burden of contributing to the evolution of Community law. They attribute to the judge a sort of legislative function and responsibility: the responsibility of creating new norms exceeding the literal wording, the original intention of the legislator and the well-established system.”

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468 Ibid. 46-49.
469 Ibid. 47-51.
471 Ibid. 194-195.
In the light of what has been presented above, it is suggested that especially in the context of EU procurement legislation, the excessive use of teleological arguments can create problems in the coherence of the legislation and consequently, legal certainty as well. As linguistic arguments also have their problems of fuzziness, systemic arguments can present added value in legal reasoning of procurement cases.
The systemic arguments come to the help of the law-applying official, as they provide consistent and coherent normative propositions. Even though the linguistics or the purposes of EU procurement legislation might be feasible, the procurement legislation forms a structure whose rules can be viewed as providing support to legal argumentation and justification.

According to Bengoetxea, the main idea of context-establishing arguments (such as systemic arguments) is that a legal provision is properly understood only when it is placed in a wider context whence one obtains the sedes materiae criterion. Other systemic criteria resort to systemic arguments that draw inferences from norms (for example a fortiori, lex specialis, lex superior, etc.) and which are resorted to mainly, but not exclusively, in the situations of gap or antimony. The requirements of consistency and coherence can be seen as regulative principles in the justification from systemic-contextual criteria. Other systemic criteria resort to systemic arguments that draw inferences from norms (for example a fortiori, lex specialis, lex superior, etc.) and which are resorted to mainly, but not exclusively, in the situations of gap or antimony. The requirements of consistency and coherence can be seen as regulative principles in the justification from systemic-contextual criteria.474 Lenaerts and Gutierrez-Fons have argued that systemic (or systematic as the writers call this approach) interpretation is based on the premise that the legislator is a rational actor and that the authors of the Treaties have established a legal order that is consistent and complete. This means, inter alia, that each provision of EU law must be interpreted in a way that guarantees that there is no conflict between the individual provision and the general scheme of which it is part.475

Systemic arguments from within the EU procurement legislation itself promotes consistency and coherence which are needed because of the nature of procurement legislation as procedural (auction-based tendering procedure where the actions of the parties have a plethora of direct and indirect effects in different stages of the procedure). Systemic arguments from the relationship between procurement legislation and other fields of EU law improve consistency and coherence in the questions of finding out which types of public actions are covered by tendering obligations. The use of systemic arguments can also promote the coherence of reasoning, because they help the interpreter to identify, connect and separate (where needed) different premises and reasons, forming stronger cumulation-chains and cumulation-nets.476

Lenaerts and Gutierrez-Fons have suggested that the systemic interpretation of EU law pursues two objectives. First, the systemic interpretation seeks to define a scope of application that is specific and exclusive to the EU law provision in question. Consequently, systemic

475 Lenaerts – Gutierrez-Fons. 2014. 17.
interpretation aims to “avoid duplication of other provision contained in the same normative text”. Second, systemic interpretation seeks to interpret the EU law provision in question “in harmony with the general scheme in which it is placed”. These two functions of systemic arguments provide the added value of connecting but also separating provisions. As the objectives of different pieces of EU legislation multiply and become more and more unified, the use of systemic arguments prevents the application of the provisions, principles or objectives of multiple overlapping pieces of legislation in an individual case.

Aarnio has written about the relationship between interpretation and systematisation. Systematisation is cognitive activity “by means of which the elements of the legal order (norms) have been put in a certain relation with each other”. On one hand, the basic function of legal interpretation, i.e. the identification of the normative and factual dimensions of the juridical problem, takes place within the cognitive context provided by the adopted systematisation. On the other hand, interpretation itself is the “knowledge manufacturing” process needed in the systematisation of legal norms.

According to Aarnio, the product of the joint activity of systematisation and interpretation is a legal system, i.e. a systematized conception about legal order. Every change of legal systematisations also changes our view of legal order, because legal order exists as the process of systematisation presents it. The process of systematisation does not, however, modify the system but merely provides us with a “new mode of presentation of the system”. Aarnio suggest that behind legislative acts is a multi-faceted group of various elements, such as previous pre-systematised legislation and normative and axiological assumptions or ideologies, which form the pre-theory of law. This pre-theory of law combined with the legal order of norms forms a basic system, a legal pragmatic construction which is a way of intervening in and systematising society. Doctrinal systematisation or a “systematizing theory” is the “scientific” formulation of the basic system, a “network of theoretical concepts” by means of which the norms of the legal order can be interpreted and rearranged: “the dogmatic systematization is the theoretical basis making, first, the interpretation possible, and second, giving the substance to law”.

477 Lenaerts – Gutierrez-Fons. 2014. 59.
478 It has to be stated that in the work by Aarnio, the process of systematization and in fact the whole legal system are handled as the sole property of the doctrinal study of law or legal dogmatics and not the judicial actions of the courts. Aarnio. 2011. 177.
482 Ibid. 136-140.
483 Aarnio. 2011. 182.
place. The basic system of praxis, acts as a test to the doctrinal systematization and in situations of failure demands for its replacement with another more capable of solving the practical and societal needs of the basic system.484

Although the model of systematization by Aarnio is restricted to the field of legal dogmatics, it can be used in analysing the role of systemic arguments in judicial legal reasoning. Used as justification grounds, systemic arguments help legal science or other legal practitioners in formulating more precisely and expressively the structure of the basic system. They also give better feedback to the current doctrinal systematization of the legal order and can ultimately influence, through pre-theory of law, the structure of future legislation and legal order. By influencing the reformulation of a legal system, the use of systemic arguments also effectively reformulates the framework of future interpretation. It could be argued that this type of systematization through reasoning is also a way in which the judiciary participates in a dialogue with its audience (legal community), improving the certainty of the expectations of the community. 485

485 See the concept of circular legal certainty by Paunio. 2013. 195.
8 THE CONTENT AND RELATIONSHIP BETWEEN SYSTEMIC ARGUMENTS

According to Bengoetxea, contextual criteria make use of the *sedes materiae* argument. The text under consideration (*material*) can be a paragraph or a sentence of an article of an EU legal document, in which case its nearest wider context (*sedes*) is the rest of the article. The problem text can be a whole article, in which case its nearest wider context will be the section of the chapter in which it is placed, then the whole chapter, the title, the whole Treaty, or item of European Union legislation (regulations, directives, decisions etc.). Thus, *material* and *sedes* can have different levels of generality. The context can further be extended to all sources of EU law dealing with a similar subject, for example reference to the legal acts that regulate the Common Agricultural Policy *en bloc* when interpreting a provision of a regulation of a given agricultural market.486

According to Bengoetxea, systemic criteria provide guidance for the process of reasoning from legal norms, i.e. for drawing inferences from legal norms. They provide criteria to draw arguments from the provisions which are selected from the context or *sedes* of the provision which is being interpreted. Bengoetxea has sorted out nine types of arguments which follow systemic criteria:

1) *a fortiori* argument (based on the ratio of a norm – a line of reasoning which holds for the more general case also holds for the particular instance of that general case); 2) argument from analogy (argument which extends the ratio of a norm to a situation which is relevantly similar to the protasis of that norm); Bengoetxea states that, since arguments from analogy depend on the fuzzy notion of “relevant similarity”, it is not possible to determine beforehand when the ECJ will accept an argument from analogy and when it will not; 3) comparative arguments (where legal orders other than the one being applied or interpreted are looked at with a view to finding out how they regulate the situation the Court is facing); this criteria is only rarely found in the ECJ judgments according to Bengoetxea; 4) conceptual arguments and arguments about relations between norms; 5) *a contrario* argument (any hypothesis is rejected which is seen as diverging from the solution expressly provided in the norm); 6) *lex specialis* argument (ascripting one of the conflicting norms the value of a principle and the other norm the value of an exception); 7) *lex superior* argument (norms of a fundamental importance takes precedence between norms of the same legal order); 8) criteria for the distribution of competences between Member States and the EU; and 9) arguments for resolving conflicts

between EU legal norms and norms of legal orders other than those of the EU or of the Member States.487

Bengoetxea has built his list on systemic arguments on the work by Summers and MacCormick, whose classification is as follows: 1) The argument from contextual-harmonization. If a statutory provision belongs within a larger scheme, it ought to be interpreted in the light of the whole statute in which it appears, or more particularly in the light of closely related provisions of the statute or other statutes in pari materia and that what is “ordinary” meaning ought to be interpreted in that light; 2) the argument from precedent: if a statutory provision has previously been subjected to judicial interpretation, it ought to be interpreted in conformity with the interpretation given to it by other courts; the argument has to be constructed to the doctrine of judicial precedent prevalent in the legal system under consideration; 3) the argument from analogy: if a statutory provision is significantly analogous with similar provisions of other statutes, or a code, or another part of the code in which it appears, then, even if this involves a significant extension of or departure from ordinary meaning, it may properly be interpreted so as to secure similarity of sense with the analogous provisions either considered in themselves or considered in the light of prior judicial interpretations of them; 4) logical-conceptual argument: if any recognized and doctrinally elaborated general legal concept is used in the formulation of a statutory provision, it ought to be interpreted so as to maintain a consistent use of the concept throughout the system as a whole, or relevant branch or branches of it; 5) the argument from general principles of law: if any general principle or principles of law are applicable to the subject matter of a statutory provision, one ought to favour that interpretation of the statutory provision which is most in conformity with the general principle or principles, giving appropriate weight to the principle(s) in the light of their decree of importance to both generally and in the field of the law in question; 6) the argument from history: if a statute or a group of statutes has over time come to be interpreted in accordance with a historically evolved understanding of the point and purpose of the statute or group of statutes taken as a whole, or a historically evolved understanding of the conceptions of rightness it embodies, then any provision of the statute or group of statutes ought to be interpreted so that its application in concrete cases is compatible with this historically evolved understanding of point and purpose or of rightness.488

Can we obtain a system hierarchy within the different systemic arguments presented by Bengoetxea, Summers and MacCormick or are they applied randomly in relation to one another? First of all, one could say that arguments from concepts should be utilized only after using systemic arguments concerning rules. According to Niemi, legal concepts are weak and cannot have

487 Ibid. 244–250.
priority over particular rules or decisions. The concepts are founded (through interpretation) on rules, not the other way around.\textsuperscript{489} The sedes materiae – method suggested by Bengoetxea would seem to give precedence to systemic arguments regarding the nearest wider context to the provision in question, which would give a (generally) lower hierarchical status to comparative arguments (between legal orders), arguments from international law and arguments from general principles of law. The relationship with the lex specialis – argument and lex superior – argument is of particular interest in EU law. On one hand, primary EU law should be given precedence over secondary EU law (such as directives). On the other hand, according to the Tedeschi principle, rules of primary law can apply only in the absence of a more specific secondary law.\textsuperscript{490} There are, however, still a large number of different types of systemic arguments regarding which it seems very difficult or impossible to create a hierarchical order. According to Siltala, different arguments are intertwined in a particular situation of legal interpretation in a way which cannot be defined beforehand in a detailed fashion or standardized in terms of method.\textsuperscript{491} Here, as in sources of law, the arguments can also be characterized as dynamic.

The sedes materiae – method can also be utilized within a particular type of systemic argument. For instance, arguments from analogy from a rule closer to the interpreted rule should be used before arguments from analogy concerning rules farther away. This hierarchy can also be applied when using arguments from concepts.

Perhaps there is more to gain from looking at the mechanism of systemic arguments more than the hierarchy of the different types of systemic arguments. The sedes materiae – method or the nearest wider context – model would seem to operate in numerous different contexts. First of all, it operates in the context of legal sources (provisions within the same statute before provisions between statutes). In addition, it operates in the context of the tension between specificity and generality (linguistic over axiological, lex specialis, lex superior, the Tedeschi principle). In addition, similarity as shared systemic links and goals would seem to have a role (nearness of different goals).

One of the key aims of this study is to show how systemic arguments can be utilized to create coherence and more information on the public procurement law. The sedes materiae – method is of great importance here, as it presents possibilities in understanding and interpreting many of the difficult or even fuzzy provision in EU public procurement law. It also provides restrictions for going too far in utilizing rules, concepts and principles from primary EU law or other fields of law.

\textsuperscript{489} Niemi. 2010. 483.
\textsuperscript{490} Case 5/77, Tedeschi.
\textsuperscript{491} Siltala. 2003. 332.
In Conway’s treatise on the legal reasoning of the ECJ, systemic argument is understood as primarily involving lex specialis, i.e. the principle of applying (the ordinary meaning) of the most specific relevant legal provision or source. Failure to apply lex specialis can open up legal reasoning to a subjective approach, since abstract and general provisions can be interpreted at a sufficiently high level of generality to in effect give judges great leeway and a de facto discretion. Lex specialis rule also has a heuristic function because it must be decided what texts are to be considered applicable before they are interpreted fully or in depth. According to Conway, the ECJ has tended to implicitly reject lex specialis, emphasizing instead the need to interpret every provision of Union law in light of Union law in general. Conway argues that the sequentialist model by MacCormick where systemic arguments form the second step in using legal arguments “tends to gloss over the potential manipulation of levels of generality”. The rationale of the lex specialis rule consists of at least three aspects. First, it reflects a rational principle that whatever is most specifically stipulated is more wished for by the lawmaker. Second, it contributes to the efficacy of law by removing the need for more ad hoc exceptions to the general rule of State responsibility and allowing for greater precision. Thirdly, in transnational law, it is an expression of State sovereignty because it permits States to adopt their own agreed rules for responsibility between them. According to Conway, lex specialis interacts with other modalities of legal reasoning such as the lex posterior rule and the hierarchical system of the sources of law (i.e. lex superior). The internal logic of systemic arguments, based on sedes materiae argument depicted by Bengoetxea or lex specialis rule by Conway, seems thus to be of the priority of the specific over the general.

In the theory of legal argumentation by Alexy, the different elements listed above have been classified by a different standard. According to Alexy, the use of definitions of “genuine legal concepts” as well as definitions of “other concepts” have been considered to belong in the group of “propositions of legal dogmatics”. He suggests that legal science, in the “narrow and proper sense”, is a mixture of describing the law in force, subjecting it to conceptual and systematic analysis and working out proposals about the proper solutions to legal problems. The application of such arguments is “necessary and rational in conjunction with other arguments, in particular those of general practical reasoning”. Alexy presents three functions of using arguments from legal dogmatics. First, the utilisation of arguments from legal dogmatics has a stabilizing function, as solutions to practical questions can in this way be retained and reproduced. Secondly, the use of dogmatic propositions has a

493 Ibid. 153-154.
495 Ibid. 251.
496 Ibid. 254.
developmental function, as it makes possible the developmental progress in
dogmatics. Thirdly, the use also entails a burden-reducing function, as it
reduces the burden on the justificatory process “to the extent that in the
absence of some special ground fresh testing is unnecessary. Fourth, the
technical function of dogmatic arguments means that they perform an
informational function, enunching the law’s “teachability” and “learnability”.
The control function of using arguments from dogmatics illuminates the
possibility of controlling the logical compatibility of the propositions of
dogmatics and determining if they are justifiable. Finally, the heuristic
function of using such arguments contains the benefit of having access to a
wide range of problem-solving models, distinctions and viewpoints.

In the model by Alexy, the closest manifestation of the use of arguments
from analogy can be found in the concept of a systematic argument, which,
according to Alexy, is “an expression, used as a reference both to the position
of a norm in a legal text, and to the logical or teleological relation of a norm to
other norms, goals, and principles”. When teleological relations come to play
it is a case of a systematic-teleological argument. These systematic arguments
belong in “the Canons of Interpretation”, which act as justifications for
internal justification and are of importance in the justification of non-positive
norms and other legal statements. On the other hand, the use of precedent
in legal reasoning is considered by Alexy an autonomous “form of external
justification” and not part of the Canons of Interpretation or dogmatic
arguments.

The theory of legal argumentation by Alexy is of interest here, because
it illustrates that there are other possible ways of classifying legal arguments
than what is utilized in this work. Second, and more importantly, it illustrates
that systemic arguments (in the sense of the theory by MacCormic and
Summers or by Bengoetxea) possess great independent value in terms of their
functions, justificatory power and their relationship to legal science.

In the purposes of the present work, there is a specific emphasis on certain
systemic arguments, mainly arguments from concepts, analogy and
precedents. This is because they have been most frequently used by the
European Court of Justice in its case law on the scope of law on EU public
procurement legislation.

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497 Ibid. 266-269.
499 Ibid. 234-240.
500 Ibid. 231, 274-279.
8.1 ON THE ROLE OF CONCEPTS

According to Tuori, legal language relies on ordinary language, but the expressions of ordinary language may be given a specific legal sense (for example “contract”). Legal concepts act as the law’s vocabulary. They can be roughly divided into three groups:

1. Concepts summarising the law’s normative contents.
2. Concepts referring to interaction between legal norms and their regulatory objects.
3. Concepts relating to legal norms’ regulatory objects.

The first group consists of concepts such as “negligence” whose contents can be presented as legal norms and do not enter into the field of their regulatory object. The second group consists of concepts such as “marriage” which act as bridges between legal normativity and social factivity (legal-institutional facts). Concepts which belong to the third group aim to structure the regulatory object of legal norms, while relegating the normative content of the legal order into the background. Here the primary role of legal concepts is seen in their heuristic function in legal problem-solving. They are not intended to classify the normative content of law or to combine norms and social facts, but instead to articulate factual situations calling for legal judgment, and to assist legal actors in identifying the legally relevant features of social relationships and processes.\(^{501}\)

According to Tuori, the dominant view in modern doctrinal research is to treat legal concepts as *cluster concepts*. Legal concepts constitute clusters, with their internal cross-references and inter-relationships or conceptual networks. The meaning contents of concepts belonging to the same cluster are interdependent. Their relationships cannot be organised through formal logic. Typically, the conceptual field of a body of law is organised around a particular focal concept, which indicates the starting point from which the inter-relationships of the conceptual network can be unravelled. Examples include “administrative act” in administrative law or “contract” in the law of obligations. In some branches of law there are more focal concepts than in others, and doctrinal changes are often reflected in the change of focal concepts.\(^{502}\)

Tuori suggests that concepts perform a dual function in legal problem-solving: in their heuristic task, they facilitate formulation of legal questions, while in their argumentative task they provide guidance in answering these questions. In their heuristic task, legal concepts play a crucial role in translating social problems into legal questions. Through this translation, social issues can also be restricted: “we can ask just those questions which our conceptual apparatus permits us to ask”. The pace of law does not always

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\(^{501}\) Tuori. 2010. 177–180.

\(^{502}\) Ibid. 181–182.
coincide with the pace of the society it regulates. Thus, on one hand legal concepts may lag behind social development, or on the other hand social developments can lead to the falling of previously existed boundaries between branches of law. In their argumentative task, legal concepts or principles can be used in the context of EU law as grounds for contesting a particular measure’s legality under Articles 264 or 267 TFEU; and they can also support a claim for damages. Although concepts and principles seem very similar when used as arguments in legal reasoning, tagging concepts as principles seem to emphasize the close relationship of systemic arguments to axiological or teleological arguments.

According to Tuori, late modern society is coloured by de-nationalisation in both European and global dimension. Concepts which have been elaborated with a view to the national legal order are not directly transferable to EU law. The ECJ has asserted EU law’s autonomy in its concepts. Usually the ECJ has preferred an autonomous EU law meaning of concepts. Nonetheless, the concepts in the nation-state context are often the only available starting-point for analysing the EU. According to Niemi has analysed the role of legal concepts in formal and substantive reasoning. He starts by casting out the distinction between form and substance based on legal formalism and traditional legal positivism. With references to Aarnio, Peczenik and Dworkin, he concludes that there are always choices included in legal interpretation and adjudication. All choices have to be justified and, all legal interpretation and reasoning involves both formal (internal justification) and substantive (external justification) reasons. The function and significance of legal concepts seems to differ both from the use of typical formal and substantive reasons. Concepts in the legal system, apart from statutes and precedents, do not have any formal position. On the other hand, unlike principles, there is no direct or uncomplicated connection between concepts and justice (within a global notion of coherence). According to Niemi, “instead of democracy and self-government of the people, the source of concepts is the structure of a legal system”.

According to Niemi, concepts are necessary parts of legal reasoning even though there has been no obvious role for them in studies of contemporary legal reasoning. References to concepts appear as systematic reasons and justification. The function of concepts is that they unite some things in order to treat them in the same way, and separate others which are not to be treated equally. According to Niemi, legal questions and relations are identified by concepts. For instance, basic concepts such as a “right” and “duty” are necessary in order to understand property law. Legal issues can be outlined...
only with the help of concepts. The law as a normative and conceptual issue consists of concepts in this sense. 507

More importantly, the scope of application of legal rules is often determined by concepts. Certain rules are united with a concept, whether in a statute or in a judicial decision. The rules are applied when the concept is recognized and applied. For instance, the rights of the owner and those of the leaseholder of a piece of real estate can be established only by determining the concept of ownership. Rules are, in fact, often determined by concepts. In addition, we can recognize certain rules and exceptions with the help of concepts. 508 This makes arguments from concepts of particular interest when studying the scope of application of public procurement legislation.

According to Niemi, concepts resemble principles, because they cannot be the premises of deductions. Concepts are limited because they are constituted using typical cases, and judges can deviate from them in atypical cases: “Concepts provide us with a direction so that we can move towards a solution but on their own they cannot show us the final decision”. Additional reasons are needed. 509 Niemi suggests that the use of legal concepts is included in formal justification when they appear as parts of the vocabulary of the texts of statutes and precedents. On the other hand, their influence on legal interpretation seems to be similar to substantive reasons when used consciously.

Leczykiewicz has assessed the heuristic and argumentative tasks of concepts in the context of the ECJ. She starts by assessing the general benefits of using concepts in judicial decision-making. In their heuristic task, legal concepts perform primarily a descriptive and classificatory function and “describe some fragment of reality to establish the scope of the application of rule”. In their argumentative task, they give the judgment conformity with law and guarantee the requirement of universability. Used in interpretation, legal concepts offer judges the possibility to express the values they think the legal system should promote in a given situation: whether they will decide to refer to concepts which connote individual or general interest, for instance. The use of legal concepts, compared to regulation, also ensures that the norm which has been created in judicial decision-making is flexible and can be further developed in the future. 510

In connection with the ECJ, the use of concepts entails even more benefits, according to Leczykiewicz. First, in order to conform to the limits of jurisdictions set in Articles 226, 227, 230 and 234 EC (Articles 258, 259, 263 and 267 of TFEU) the ECJ should not take the role of a national court but instead direct their focus on the question of interpretation of EU law. By using legal concepts, the ECJ is able to avoid direct references to facts of an

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507 Ibid. 489.
508 Ibid. 489–490.
individual case and justify that they are not overstepping their powers. In addition, the use of legal vocabulary keeps the role of the ECJ firmly in the legal and judicial realm as an institutional actor. Moreover, by using legal concepts originated in the Treaties of the EU the ECJ can tie its jurisprudence into the “absolute reasons of authority” of the Treaties and gain support from national courts. Thus, concepts act as tools for the dialogue between the ECJ and national courts. 511

According to Leczykiewicz, the Court’s use of concepts helps to maintain a strong doctrine of precedent in that the concepts make the case law easier to organise, systematise and apply in national courts. The relatively high level of discretion in choosing and using concepts helps the Court to strike a balance between the effectiveness of its case law and good relationships between Member States and other EU institutions. Leczykiewicz argues that the most significant reason for the need of legal concepts by the ECJ is that they act as building blocks for a coherent legal order of the EU, strengthening its systemic validity and (rational) acceptability. 512

Bovis has argued that the jurisprudence of the Court of Justice has influenced, in particular, the interpretation of public procurement legal concepts such as contracting authorities. 513 It is a suggestion of this study that issues regarding the scope of application of EU Public Procurement legislation can be systematized and, in the context of legal reasoning, resolved through interpretation, with the help of concepts such as “public contract”. The interpretatory role of systemic arguments from EU competition law can on the other hand be kept on leash with the concept of “economic activity” and its role in procurement legislation.

Beck has argued, based on a theory of ‘essentially contested concepts’ that it is impossible to conclusively define key appraisive abstract concepts such as ‘justice’, ‘democracy’, ‘art’, ‘moral goodness’ and ‘duty’, although it is possible and rational to discuss one’s justifications for holding one interpretation over competing ones. This lends itself to the problem of linguistic vagueness of legal language. 514 It is however, the view of this study that the contestedness of the most abstract concepts of law does not remove the benefits of using systemic arguments based on less-contested and more clear-cut concepts such as “contract” or “economic activity”. Ehrenberg has suggested that even if the general concepts such as “law” meet some criteria of essential contestation, this finding is not useful if it does not help to illuminate its properties and uses. 515

The use of concepts in interpretation and legal reasoning could also be tagged as Begriffsjurisprudenz, which has held negative connotations.

511 Ibid. 776–779, 782.
512 Ibid. 782-785.
515 Ehrenberg 2011.
According to András, the original nineteenth-century form of *Begriffsjurisprudenz* was “out of touch with everyday life, not (only) in this sense (since this is true essential for all traditional kinds of legal conceptual analysis), but also in that in many cases it did not even try to translate the extra-legal arguments into legal ones but neglected these *tout court*. Analytical legal scholarship has criticized *Begriffsjurisprudenz* of the quasi-logical method of inducting or deducting norms from legal concepts and has itself generally utilised concepts more as tools for systematising, i.e. reorganising law conceptually. Tuori has argued, however, that concepts could be approached as clusters, linked together by their non-deductive reciprocal dependencies. This way, concepts hold many similarities to principles. According to Tuori, “interpretation principles are resorted to in order to warrant the construction of a norm proposition from written sources of law”.  

### 8.2 ARGUMENTS FROM ANALOGY

Arguments from *analogy* have been a cornerstone of legal reasoning in Common Law Systems for a relatively long time. According to Farrar, the method of analogy in Common Law Systems involves, in its simplest form, comparison: do the similarities between two cases outweigh the dissimilarities. If they do, the earlier case is followed. If not, the earlier case is distinguished. After going through a plethora of theories on reasoning by analogy, Farrar argues that a number of writers recognise that reasoning by analogy is more a question of justification than of logical process. Conceptions of adequate justification have often been expressed in terms of *material resemblance*. *Resemblance* relates to the fact relationships between cases as well as to the consequences of treating them the same. The criteria of *materiality* are determined by principle and policy (interests, values and a combination of practical factors promoting efficiency). Farrar argues that “what is a resemblance is determined by the subject matter but what resemblances are to be regarded as material is determined by principle and policy in the light of the actual issue...Resemblances are concerned with fact; materiality with value and policy in a particular context.”

Another way of looking at the studies on reasoning by analogy is to distinguish theories which emphasize the resemblance of cases from theories which focus on the materiality of that resemblance. According to Schauer and Spellman, the traditional view of reasoning by analogy (represented in the theories of Levi and Weinreb, for instance) holds a core position according to which the first move in the analogical process is the recognition of a relevant

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516 András. 2016. 64-66.
518 Farrar. 1997. 3.
519 Ibid. 172-175.
similarity between some previous set of facts and the set of facts that call for
decision. After identifying or retrieving these past decisions or set of facts as
the source, the legal decision-makers use the outcome produced for that
source to justify the outcome of the present case in the process known as
mapping. 520

The challengers of the traditional view of reasoning by analogy (for instance Posner, Dworkin, Alexander and Sherwin) claim that determinations of
resemblance require some metric enabling the analogizer to assess which
similarities are important and which are not. This weighing of importance is a
normative operation containing policy judgments which is seldom expressed
in the judgments. These challengers also argue that there is no important
difference between the application of a rule and the alleged discovery of an
analogy. 521

According to Schauer and Spellman, attempts have been made at
reconciling the two approaches depicted above. The theory of Sunstein is of
great interest here. Sunstein argues that in law, analogical reasoning has four
different but overlapping features: principled consistency, a focus on
particulars, incompletely theorized judgments, and principles operating at a
low or intermediate level of abstraction. The first feature holds a normative
requirement according to which judgments about specific cases must be made
consistent with each other. The focus on particulars means that analogical
reasoning is a version of “bottom-up” thinking in which the focus is on the
particulars of an individual case and where “ideas are developed from the
details”. The judgments that underlie convictions about the relevant case are
incompletely theorized as they are unaccompanied by a full apparatus to
explain the basis for those judgments. Rather than making a policy-oriented
jump from the source to the outcome, the analogical argument “operates
without a comprehensive theory” using small steps. Finally, analogical
reasoning usually operates without express reliance on any general principles
or rules about the right or the good. 522 This approach, influenced by Sunstein’s
views on judicial minimalism seems to hold some similarities with the theory
of modest notion of coherence by Moral Soriano where supportive structures
to a legal proposition is built from small parts, chained and netted together. 523

In this study, the role of analogy in legal reasoning has the minimalist
function of the theory by Sunstein which emphasizes modesty in coherence-
building, a relatively high level of formalism (or low level of abstraction by
Sunstein) and the (positive) effects of systematising the law (consistency by
Sunstein). Here, once again, the steps of hierarchy run from the nearest to the

– Shwerwin. 2008. 88
furthest, playing to the tunes of *sedes materiae* and the sequentialist approach to legal argumentation.

*Sherwin* has encapsulated the benefits from analogical reasoning as follows:

“In my view, the virtue of analogical reasoning lies in a variety of indirect benefits that are likely to result when judges adopt it as a practice and consider themselves obliged to explain new decisions in terms of their relation to past cases. First, a diligent process of studying and comparing prior decisions produces a wealth of data for decisionmaking. Second, the rules and principles that result from analogical reasoning represent the collaborative efforts of a number of judges over time. Third, analogical reasoning tends to correct biases that might otherwise lead judges to discount the likelihood or importance of reliance on prior decisions. Fourth, analogical reasoning exerts a conservative force on law: by holding the development of law to a gradual pace, it limits the scope of error and contributes to public acceptance of law as a standard of conduct.”

Although we have previously rooted for the distinction and separation of systemic arguments from teleological arguments, there are some arguments from analogy which have a closer relationship to teleological arguments than other systemic arguments. Here we must once more refer to the theory of legal argumentation by *Alexy*, where *systematic arguments* were presented as part of the “Canons of Interpretation” and thus part of external justification of judicial decisions. According to *Alexy*, such arguments refer to both *logical* and *teleological* relation of a norm to other norms, goals, and principles. In the latter case, one could make the case that systemic arguments are quite close to teleological arguments. It is, however, suggested that the line is not crossed all the way to the side of teleological arguments, as the assessment of the *resemblance* of the objectives of two types of fields of law, for instance, is only the pre-condition of proceeding in the sequences of the logic of *sedes materiae*: if a provision in another field of law or directive *shares the same (or most of the)* objectives with the law in which the applicable provision is situated, then this can be used as a systemic argument for choosing that provision in the process of reasoning from analogy. However, the logic of *sedes materiae* once again reminds us that we should first try to use arguments which refer to the *logical* relation of norms before proceeding into the teleological relation.

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8.3 ARGUMENTS FROM PRECEDENTS

*Jacob* has shed light into the “attraction of precedent” and has divided the arguments concerning the benefits of precedents into two groups: *substantive* and *systemic*. According to the substantive argument, precedent is a function of the fundamental principle of equality in EU law, by treating like cases alike. Use of precedents can also be said to promote legal certainty, predictability and previsibility. Systemic arguments for precedents emphasize efficiency and time saving as precedents are used as “shorthand, polished phrases or ready-made building blocks in later reasoning process”. Besides efficiency, precedents can be used as tools to increase the external persuasiveness (external justification) of an argument.\(^{526}\)

*Jacob* has argued that the Court’s practice of referring to prior cases is quite varied and case-dependent, even to a degree that it questions the traditional approaches to precedents. Although the ECJ frequently refers to its own case law in deciding cases, these references most often take the form of string citations, instead of substantive citations. In the use of string citations, references to the context of the case are not discussed. Instead, the string itself, picking word-for-word citation-blocks and lifting them to a more general systemic level, affirms the precedent’s correctness and applicability.\(^{527}\) *Jacob* argues that the reasons for such a preference lie in the institutional role of the Court and the practical necessities of working as the general interpreter of EU law: “...the findings sustain the hypothesis that the ECJ’s precedent technique is not so much rooted in methodological conviction or theoretical reflection. Rather, it is a function of inbound contextual constraints and outbound contextual demands”.\(^{528}\) This is reflected in the use of precedents in the case law of the ECJ. The popular use of precedents in stating the content of the law, asserting facts and affirming conclusions in judgments all give weigh to legitimacy, acceptance and previsibility or coherence of the judicial actions of the Court.\(^{529}\) The effect of *systematizing* law is apparent when using precedents in interpreting the law: “...case-based reasoning can make law more detailed in due course by successively increasing the potential for linking different nodes in an ever more complex network of precedents: a network with \(n\) nodes has a maximum of \(n(n – 1) / 2\) connecting lines. In other word, the more cases there are, the greater the number of possible cross-references”.\(^{530}\)

According to *Beck*, there is considerable uncertainty and vagueness in precedents. First, precedents are subject to vagueness the same way that he

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\(^{526}\) Jacob. 2014. 13–14.

\(^{527}\) Jacob. 2014. 92–113. Based on the study data, 97 per cent of precedent invocations were referential string citations.

\(^{528}\) Jacob. 2014. 126.

\(^{529}\) Ibid. 96. 126.

\(^{530}\) Ibid. 118. See also Barcelo. 1997. 425-426.
claims other legal rules are. Secondly, there is vagueness in the evolution of case law as well as the wording in these cases. Precedents are “broadly defined sets of considerations which are reflected in judicial decision-making and the precise significance of each one of them in each individual case varies according to the strength of all other factors, the clarity of the provision, the values and personality of the judge(s) concerned, and the comparative status and normative force of the relevant topoi which best lend themselves to the expression of one ‘steadying’ consideration or another”.

Arguments from precedents are important in this work because it is submitted that using references to previous case law has been extremely prominent in public procurement cases of the ECJ. As Hage has argued, arguments from precedents (or case-based reasoning) also utilise analogy. A typical example of this is the case law on in house procurement which is nearly bursting with references to previous precedents of the ECJ. The ECJ seems to rely on references to its earlier case law in a substantive way. The problem of utilizing arguments from precedents stem from the fact that, first, the context of the precedents referred to might be substantially different from the case in which the reference is included and, second, cumulative references might form a chain novel of sorts, which ultimately leads to reasons which do not amount to very much. The ECJ case law on in house procurement is again a valuable example here: a great number of later ECJ case law references to the first and most famous case regarding in-house procurement. When finally reading the case, the interpreter might be surprised to find out that the weight of the references themselves outweigh the reasons utilized in the first case.

8.4 COHERENCE, CONTEXT AND SYSTEMIC REASONING

The mechanism of advancing from one type of topoi into the next involves the assessment of whether the arguments given have presented sufficient justificatory power to make the judgment valid, i.e. justifiable both internally and externally. It is suggested in this work that in EU public procurement legislation the deep justification of a model running from linguistic to systemic to teleological is also supported by the normative-critical argument that coherence, consistency and legal certainty as well as the institutional actor thesis (which requires a degree of taking into account the division and sharing of powers of different EU institutions) support it.

As rationality forms a substantial portion of the rational acceptability or validity of a judgment in this work (and the mechanism of sequentialist approach), the issue of coherence must once again be addressed in the specific context of systemic arguments. In the Three C’s in Legal Reasoning by

MacCormick and as formed by Siltala the “pursuit of principled, analogy-aligned coherence” is connected to the use of legal principles. In the global account of coherence by MacCormick or Dworkin, the coherence connected the values hovering over the law all the way to the most minute provisions in that law. In terms of normative coherence, this work takes its approach from Raz, who argued that the global notion of coherence allows for a deviation from the law. In addition, and specific to the issue of systemic arguments where coherence and the use of principles have been held to possess weight, the global account of coherence would not seem to support the logic of sedes materiae, i.e., the use of the nearest wider context. This is also supported by the model of analogy by Sunstein. On the other hand, a too restrictive approach to normative coherence would block the rational and justifiable use of systemic arguments in particular. Here, the logic of sedes materiae could be held to possess the same logic that in the sequentialist approach to reasoning: if the argument from the nearest wider context provides sufficient justificatory power and forms a coherent whole within that perspective, it is not necessary to proceed to the next wider context.

The issue of coherence is also connected to the issue of legal reasoning in context. Paunio has suggested that the internal coherence of a given judgment cannot be fully separated from the external coherence. According to Paunio, judicial decisions are read in context as the Court’s audience situates its judgments in the context of the EU legal system. This is also connected to the concept of legal certainty. According to Aarnio, legal certainty possesses both formal and material characteristics: predictability and acceptability. Paunio has suggested that legal certainty is a compromise between predictability of legal decisions and their acceptability in individual cases. It is suggested here that formal legal certainty (i.e. predictability) of EU public procurement legislation is hampered with the excessive use of teleological or consequentialist arguments. Paunio has argued that this kind of formal legal certainty is a “necessary fiction” in multilingual EU law, and consequently remains relative. What Paunio has suggested, instead, is substantive and circular legal certainty, where judicial decisions of the ECJ are accepted by EU legal community as both rationally and substantively acceptable. She argues that this discourse helps to stabilize expectations about EU law. To function, the model requires, however, that underlying values and policies guiding judicial decision-making are expressed in reasoning. If these values and policies or objectives have already been deliberated and expressed by the EU legislator, one can ask, however, if the acceptability of a judicial decision (from

533 Siltala. 2011. 112.
536 Aarnio. 1987. 44.
537 Paunio. 2013. 52.
538 Ibid. 194-195.
the viewpoint of EU legal community) requires the expression of these objectives in each individual case, especially if these expressions of objectives may have the effect of potentially leading to propositions in conflict with the provisions imposed by the legislator or at least expanding the applicability of these provisions to unforeseen instances. The acceptability of decisions should not only entail consensus between the judiciary and the legal community at the general levels of values and objectives, but also at the level of provisions, concepts and principles.

Sankari has argued that studying the case law of the European Court of Justice in context means taking into consideration several aspects relevant for understanding how a body of case law has come about, developed, and what it means, to be able to evaluate how the Court of Justice has acted. Sankari has referred to Maduro and Loïc Azoulai who have suggested that a rule only makes sense in its context, meaning the context of the legal system to which it belongs but also to the economic, social and political context.539 This type of approach seems to lean more to the side of a descriptive approach to the legal reasoning of the ECJ. It is suggested that the sequentialist approach to legal reasoning can be applied universally, in all kinds of fields of law and contexts, but that in some contexts the linguistic and/or systemic arguments do not provide sufficient justificatory power to make the judgment valid. Therefore, the context-dependency seems to exist more at the level of the justifiability of a judicial decision than at the level of the levels of reasoning themselves. In some cases or fields of EU law, the premises or the structure of the law is such that internal or external justification is not achieved with as little interpretative effort as in other cases.

In terms of coherence within a decision and coming back to the theory of Moral Soriano on coherence in legal reasoning, supportive structures and cumulation-netting of reasons, the different properties of cumulation chains can be applied beneficially in systemic interpretation. As mentioned above, a particular property of cumulation-chains was the number of supportive relations between reasons. The more connected the reasons are, the stronger the supportive structure is in legal reasoning. It is the view of this study that the number of supportive relations between reasons in a judicial decision is usually higher the closer the rules, principles, policies or concepts used in these reasons are to each other. For example, the concept of a “public contract” derived from the text of EU Public Procurement Directive in a case by the ECJ possesses usually more supportive relations between the reasons which utilize this concept than the concept of a “public contract” within the meaning of national legislation or other fields of EU law. In addition, arguments (from provisions of law or precedents) stemming from the Treaty provisions on internal market law (to which the EU public procurement legislation is considered to be primarily connected here), usually possess more connections to reasons from the text of the EU Public Procurement Directive than

arguments from EU Competition Law. The steps of reasoning by analogy reach EU competition law before environmental or employment law, as they are more closely connected through their parallel purposes.

Through the next chapters a number of ECJ cases concerning the scope of application of public procurement rules are analysed in terms of their reasoning and their use of arguments. A particular focus will be on the question of whether they reflect a sequentialist approach or whether there can be found a particularly heavy emphasis on a certain type of argument which bypasses the sequentialist order. A special focus will be given to the use of systemic arguments, or the lack thereof, and the effects of this on the coherence, consistency and legal certainty of EU public procurement legislation. Where systemic arguments can be found to possess benefits (in accordance with the sequentialist approach) not utilised in those cases, a critical normative evaluation is directed to the judgments.
9 CASE LAW ON THE SCOPE OF APPLICATION IN PUBLIC PROCUREMENT LAW

9.1 OUTLINING RELEVANT CASES

The case law of the European Court of Justice concerning the scope of application of public procurement law is quite vast. It is not possible or even fruitful to go through every single one of the rulings of the Court in this work. The relevant cases have been chosen because, first, based on string citations and substantive citations, the rulings presented in Part II have been frequently referred to in the Court’s own case law. Second, the aim has been to choose those judgments which have been influential in the evolution building up to specific provisions in the public procurement directives. Third, cases which have represented a considerable change of direction compared to previous case law have been emphasized.

The analysis in Part II is based on evaluating the reasoning in the chosen cases from the viewpoint of sequentialist approach to legal reasoning and, when necessary, pointing out alternative lines of reasoning which would have been, arguably, better suited to the sequentialist approach and the promotion of coherence and legal certainty. The reactions of legal scholars are also taken into account, where they provide additional insight into the reasoning or its shortages. Some cases, which have been considered more important, based on the reasoning depicted above, are examined in more detail than others.

Cases concerning specific exclusion grounds in the procurement directives (such as the acquisition of land or existing buildings or financial services) are not covered, as the case law is quite minimal on these issues and the case law has not much changed the provisions in the directives. For these reasons, cases concerning the relationship between classical sector procurement directive and utilities sector procurement directive are not covered either.

As a general observation, it must be stated that in nearly all the cases depicted below, the Court of Justice has utilised arguments from its precedents (either as string citations or as substantive citations). This naturally emphasizes the fact that the ECJ does take into account, to a degree, the coherence of its case law. As these references have been very common in the cases, they are not, as a rule, brought expressly into the assessment in the Chapters below, unless there has been an apparent departure from existing case law or other special circumstances in the use of such arguments from precedents.
9.2 WHAT IS A PUBLIC PROCUREMENT CONTRACT?

The starting point in assessing the scope of application of EU public procurement legislation and especially the secondary legislation on the matter is the concept of a public contract as the object of the requirement of tendering. This has also been the starting point in most of the ECJ case law on the matter.\textsuperscript{540} It is important to notice, however, that in some case the Court has held that even arrangements which fall outside the definition of a public contract can be subject to the treaty rules on internal market and the tendering obligation derived from them.\textsuperscript{541}

According to Article 1 (2) of the directive on public procurement 2014/24/EU, procurement within the meaning of the directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose. In Article 5 of the directive we can find the definition of public contracts. It means "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services". Although the definition of procurement was introduced in the 2014 directives, the definition of public contracts has remained largely unchanged from the directive on public procurement from the 1990s.\textsuperscript{542}

In recitals 4 of the Directive we can find some more information on the concept of a public procurement contract:

"The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms."

\textsuperscript{540} For example, Cases C-107/98, Tecal, C-399/98, La Scala, C-451/08, Helmut Müller and C-480/06, Commission v Germany just to name a few.

\textsuperscript{541} See for example Case C-324/98, Telaustria.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).

It is submitted that the elements of the concept of a public contract can be divided into two sub-elements of consideration and the parties of the contract. In its simplest form, the consideration is formed of the payment and of the reciprocal compensation of the supply of products or goods, the provision of services and the execution of works. The sub-element relating to the parties of the contract determines if we are at all talking about public procurement (with the buyer being a contracting authority) and whether the purchase is being conducted utilizing the market (in other words, from another legal person).

The concept of public contract is important in terms of the sequentialist approach to legal reasoning because it grounds the reasoning in questions of the scope of application of the Directives into the linguistic argument built from the definition of a public contract in Article 5, and – when the linguistic arguments do not provide enough justificatory power - to the systemic arguments built from the concept of public contract as well as the sedes materiae –mechanism of leaning into the nearest wider context – a concept defined in the Directive itself.

It is of great importance to take into account that the definition of a public contract in the directives on public procurement is autonomous in the EU and may be met even in cases where the arrangement in question is not a contract in national law. In Jean Auroux, the Court held that the classification of an arrangement as contractual or otherwise under domestic law was irrelevant for determining the scope of the directive.543 Here we can see the use of a systemic argument based on the consistent use of a concept throughout the legal system of EU public procurement law.

One of the first cases in which the sub-element of consideration was assessed was, La Scala. The case concerned a piece of Italian urban development legislation, according to which the holder of a building permit or of an approved development plan could execute infrastructure works directly,

543 Case C-220/05, Jean Auroux. Para 50.
by way of total or partial set-off against the contribution payable in respect of the grant of such permission. The Court assessed whether the direct execution of infrastructure works in question constituted a public works contract within the meaning of the Directive on public works contracts. The Court held that the arrangement constituted a public works contract where the consideration was formed from the municipal authorities waving their right for monetary recovery for an infrastructure contribution. The ECJ also ruled that the fact that the development agreement was governed by public law and was concluded in the exercise of public power did not preclude the existence of a public works contract. In this case the Court’s reasoning was largely built on the linguistic arguments derived from the definition of a public works contract in the directive without specific references to systemic or teleological arguments. This is probably due to the fact that the linguistic arguments were held to provide enough justificatory power for the validity of the ruling. In addition, at that time the ECJ had not generated case law on the issue of a public contract which would have been available as a reference. Thus, it seems that the reasoning of the Court in the case followed the principle of economy of interpretative effort.

In an interesting side note, the Advocate General, in his opinion on the case, referred to the objectives of the public works directive: “We have seen that the aim of the Directive is to eliminate discriminatory practices on the part of contracting authorities...Economic operators are motivated by the prospect of obtaining some economic benefit from contracts. Discrimination in awarding contracts is unacceptable because awards of contracts entail payment to the contractors who are selected. It would be difficult, where no finance was provided for a contract by the contracting authority, to imagine any kind of favouritism which could benefit the operator chosen. If anything done free of charge or financed by the party carrying out the work offends against the principle of competition, that is because it is damaging to that party’s interests and not because it gives him any advantage over his competitors. “ These arguments were not, however, included in the ruling of the Court itself.

In Jean Auroux, a local authority in France signed a public development agreement with another public body which provided for the construction of a new leisure centre and other works. The latter entity would acquire land, organise an architectural competition, manage construction and procure funding for the project. The ECJ held that the development agreement constituted a public works contract under the EU Procurement Directives. According to the ruling, it made no difference that the first authority would not acquire ownership of the leisure centre, or that the developer entity would not execute the works itself but would have them carried out by subcontractors. It did not matter that the second entity would itself apply the

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544 Case C-399/98. Paras 76-86.
545 Opinion in Case C-399/98. Para 94.
directive when awarding the sub-contracts for works.\textsuperscript{546} Here, the reasoning of the Court followed closely to that of the previous La Scala-case and its logic of sequentialist logic where the concepts of contract and consideration were of importance. In Jean Auroux, the coherence of the procurement legislation thus did not seem to be at peril.\textsuperscript{547}

In a later case Helmut Müller, the Court assessed an arrangement where a city was selling a piece of its property to an economic operator. In the same arrangement, the city ratified the plan attached to the arrangement and concluded an agreement regarding the execution of the arrangement. The award of the contract was based on the fact that the arrangement was seen as having potential in increasing the appeal of the city. A company which did not win the award appealed to a national court and claimed that the arrangement constituted a concessions contract regarding works.\textsuperscript{548}

According to the ruling, a service regarding public works, by its nature and in view of the scheme and objectives of Directive on public procurement, must be of direct economic benefit to the contracting authority. That economic benefit is clearly established where it is provided that the public authority is to become owner of the works or work which is the subject of the contract. According to the ruling, such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public. The economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure.\textsuperscript{549}

According to the Court, it followed” from the foregoing” that the concept of “public works contracts” within the meaning of the directive on public procurement 2004/18 required that the works which are the subject of the contract be carried out for the contracting authority’s immediate economic benefit; it was not, however, necessary that the service should take the form of the acquisition of a material or physical object.\textsuperscript{550}

The Court referred to the wording in Article 1(2)(b) of Directive 2004/18 which provided that the objective of public works contracts is the realisation of a “work corresponding to the requirements specified by the contracting authority”. According to the Court, in order for it to be possible to establish that a contracting authority has specified its requirements within the meaning

\textsuperscript{546} Case C-220/05, Jean Auroux.

\textsuperscript{547} Bovis has argued that the ruling in Jean Auroux did, however, leave open the issue of double tendering, because the Court did not address the issue of consecutive procurement of prime public contracts and subsequent sub-contracts. Bovis. 2012. 262.

\textsuperscript{548} Case C-451/08.

\textsuperscript{549} Case C-451/08 Paras 48-52.

\textsuperscript{550} Case C-451/08. Para 54.
of that provision, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. The mere fact that a public authority, in the exercise of its urban-planning powers, examined certain building plans presented to it, or took a decision applying its powers in that sphere, did not satisfy the obligation that there be ‘requirements specified by the contracting authority’, within the meaning of that provision.551

It would seem that the introduction of the element of immediate economic benefit was drawn from, first, the nature of the concept of public works based on its definition and wording in the Directive. Second, it was derived from the objectives of the Directive. Thus, all of the different types of arguments (linguistic, systemic – based on the assessment of the concept of public works - and teleological) were put to harmonious use in the ruling in Helmut Müller in a way in which the arguments formed a supportive structure. The reasoning would seem to follow the sequentialist logic, and the coherence of procurement legislation in terms of its coverage was not hampered.

In the opinion of the Advocate General, a more general requirement of “a strong and direct link” between the public authority and the works was suggested. According to the opinion, the initiative taken by the authority leading to the execution of the works would also constitute a strong direct link along with the element of immediate economic benefit.552 The initiative of the procedure was not included in the ruling of the Court, however. This omission seems logical because the content of a public contract could be very heavily influenced by a contracting authority even if it did not initiate the procedure or the negotiations leading up to the contract.

Adrian Brown has suggested that the tests of measures taken to define the type of the work and the contracting authority having a decisive influence over its design are rather vague and leave plenty of scope for differing interpretations and future clarification. According to him, the ruling in Helmut Müller reflects comments made by the Advocate General in the case that an exclusively functional interpretation of the directive on public procurement, appealing its underlying purpose, cannot be used to extend its scope indefinitely, but rather to identify with some precision the limits of the directive’s provision.553 Thus, we could make the argument that in Helmut Müller, the sequentialist approach to legal reasoning was used to limit the excesses of teleological arguments.554

551 Case C-451/08. Para 57.
552 Opinion in Case C-451/08. Para 52.
553 Brown. 2010b. NA125-NA130.
554 Eleftheriadis has pointed out problems in the ruling in Helmut Müller, especially concerning the statement of the ruling that it was not the purpose of “the mere exercise of urban-planning powers” to “obtain a contractual service or immediate economic benefit for the contracting authority”. According to him, in many cases of development agreements the planning policy intention is combined with other things, including economic benefits, which come to influence the decision-maker. These cases do not
When assessing the element of immediate economic benefit, few scholars have taken notice of role of the contractual terms. According to the ruling in Helmut Müller, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. Consequently, one could use, as a general interpretive tool for distinguishing between public contracts and other types of arrangements not covered by EU procurement legislation, the nature and number of contractual terms which affect, in works contracts, the type or design of the work, and in other types of contracts, the design and content of the service or product. As a general tool, it is submitted that the more contractual terms there are influencing the object of the contract and the more detailed these terms are, the more likely it is that the element of immediate economic benefit exists for the contracting authority. In terms of the concept of a public contract, this means that the concept contains contractual terms which reflect the interest of the contracting authority and the immediate economic benefit connected to this interest.

In Libert, the Court faced a question whether the development of social housing units which were subsequently to be sold at capped prices to a public social housing institution was covered by the concept of public works contract. National legislation required that in order to receive planning permissions land developers had to build a number of social housing units within larger land development projects and, among other options, to sell them to a social housing organisation. The Court stated first that public works contracts result where four criteria are fulfilled: they are contracts for pecuniary interest, concluded in writing, between an economic operator and a contracting authority, which must have as their object either the execution, or both the design and execution, of works. The Court then referred to its ruling in La Scala and found that the fact that the development of social housing units is imposed directly by national legislation did not preclude the existence of a contractual relationship between the authorities and the developer. The Court then proceeded to conclude that while there was a national piece of legislation which required an administration agreement to be concluded between the developer and the social housing organisation, that legislation did not, in principle, regulate the relationship between the contracting authority and the economic operator concerned. Additionally, such an agreement did not “appear to concern the development of social housing units, but only the next stage which entails placing them on the market”. Otherwise, the Court mainly left the matter of application of the criteria of a public contract to the referring

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Note: 555 On the issue of pecuniary interest, see also Case C-536/07.
national court, because the ECJ did not have sufficient information to verify if the criteria were met.\footnote{Joined Cases C-197/11 and C-203/11. Paras 108-119.} The reasoning in \textit{Libert} is interesting because it would seem to narrow down the meaning content of “requirements specified by the contracting authority”, used in the \textit{Helmut Müller} ruling to requirements solely concerning the \textit{object} of the contract (design of a building). Consequently, requirements regarding the \textit{transfer of ownership} or the \textit{acquisition} of the object would not have to result in a public contract. This seems the complete opposite of what was stated in \textit{Helmut Müller}, because in that ruling the Court held that \textit{in addition to the acquisition} of a physical object, the concept of a public contract could \textit{also} entail other arrangements as well. \textit{Caranta} has held that the ruling in \textit{Libert} remains problematic in terms of the criterion of acquisition in Article 1(2) of the procurement directive 2014/24 concerning the definition of public contracts, because in \textit{Libert} the land developers were more or less forced to deliver affordable homes “thus implementing a policy in the general interest designed by the public authority granting the building permission”.\footnote{Caranta. 2015. 435-436.} It is suggested that through the introduction of the element of \textit{acquisition} to the definitions of public contracts in the procurement directives from 2014, the legacy of the reasoning in \textit{Libert} will not be substantial.

\textit{Caranta} has also referred to the ruling of the ECJ in \textit{Commission v Spain} where the Court introduced its doctrine on \textit{mixed contracts} (i.e. contracts involving, \textit{inter alia}, both public contracts and other arrangements not covered by the procurement directives) to the issue of defining a public contract.\footnote{Ibid. 436. Case C-306/08.} In the case the Commission argued that urban development contracts in question had to be classified as public works contracts because these contracts contributed to a great degree to programme whose main object was a work of urban development leading to the construction of highway access by a paved road, the distribution of drinking water and electricity, the evacuation of waste water from gutters and public lighting. The Court held that it had not been established by the Commission that the works consisting of the connection and integration of the plots to the existing infrastructure, energy, communications and public services networks constituted the \textit{main object} of the contracts concluded between the community and the developer. The Court also stated that the actions of the developers included activities which could not be classified as works within the meaning of the procurement directives, such as the preparation of the development plan, the proposal and managements of the corresponding land consolidation project, obtaining for the administration free of charge plots for public ownership and for the community’s public land bank, management of the legal conversion of the plots concerned and the equitable division of the costs and profits between the

\begin{itemize}
\item \footnote{Joined Cases C-197/11 and C-203/11. Paras 108-119.}
\item \footnote{Caranta. 2015. 435-436.}
\item \footnote{Ibid. 436. Case C-306/08.}
\end{itemize}
parties concerned. Caranta has argued that the outcome of the ruling in La Scala (and Jean Auroux) would have been different if the later doctrine of mixed contracts had been taken into account in the reasoning, because in La Scala the building in question was only a small facet of a larger redevelopment project. According to Caranta, this demonstrates the difficulty in developing procurement law through the cases of the ECJ. For the purposes of this work, the ruling in Commission v Spain illustrates that by using systemic arguments from precedents and from the evolution of the case law in general, the Court can improve the coherence of its case law and consequently the EU law on public procurement. While this also means that through time, older rulings by the ECJ might lose some of their relevance as precedents, this does not make them completely useless. This characteristic of using arguments from precedents (where evolution of the case law changes the importance of cases) only stresses the importance of taking account of context of the precedent in question.

In conclusion, it is submitted that the Court’s reasoning regarding the question of what is a public contract has mainly followed the sequential logic and that systemic arguments from the conceptual analysis of a public contract has improved the coherence and clarity of EU public procurement legislation.

9.3 ISSUES REGARDING CONCESSIONS CONTRACTS

At the same time that the ECJ was addressing the issue of consideration in a public contract in La Scala, it was facing another challenge regarding the scope of application in the form of public concessions contracts. In Telaustria, a question was raised concerning the application of the public procurement directive to a contract concluded between a publicly owned undertaking responsible for operating a telecommunications service and a private undertaking, where the first undertaking entrusts the second with the production and publication of printed and electronically accessible telephone directories. According to the Court, the directive on procurement of goods, refers to contracts for pecuniary interest concluded in writing and “provides only indications about the contracting parties and about the object of the contract, defining them in particular in the light of the method of remunerating the service provider” and “without drawing any distinction between contracts in which the consideration is fixed and those in which the consideration consists in a right of exploitation”. The Court also referred to the fact that the directive did not make express reference to public service concessions. Here we can see clear use of linguistic arguments based on the wording of the directive. Although the Court did not go deep into the definition

559 Case C-306/08. Paras 87-96.
560 Caranta. 2015. 436.
561 Case C-324/98. Para 43.
of a concession contract, it seems that obtaining the right to exploit a service as consideration was considered a key element, distinguishing concessions from public contracts.\textsuperscript{562}

Next, the Court entered into reasoning in light of the history of the relevant procurement directives, as both the contracting entity in the case and several Member States and the Commission had referred to the history of the legislation. The Commission pointed out that although it had proposed including service concession contracts into the directive on public services and on the utilities directive from the beginning of 1990s\textsuperscript{563}, the Council had eliminated all references to service concessions in the final directives, and therefore it did not propose the inclusion of concessions service in its proposal which subsequently led to the adoption of directive 93/38 on utilities procurement which was applied to the case at hand. According to the ruling “It follows that the Community legislature decided not to include such concessions within the scope of Directive 93/38. If it had wished to, it would have done so expressly, as it did when adopting Directive 93/37”.\textsuperscript{564} This type of argumentation could be classified, using the classification suggested by Summers and MacCormick, as the argument from history situated in the more general category of systemic arguments.\textsuperscript{565} In light of what was stated next in the ruling, this reasoning did not, however, end up having much weight in the case.

The next step of reasoning in the Telaustria case has had significant ramifications in the public procurement legislation of the EU. The Court held that, although service concessions did not meet the definition of a public contract and thus fell outside the scope of application of the directive on utilities procurement 93/38, “the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular”.\textsuperscript{566} Because the principle of non-discrimination implies an obligation of transparency, the Court held that due to the obligation of transparency there must be a degree of advertising “sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.\textsuperscript{567} Here the Court opened up the relevant sources of law to the EU Treaty and its principles in a way which has since influenced the scope of application in many of the Member States’

\textsuperscript{562} Case C-324/98. Para 58. See also Neergaard. 2007. 387-409.
\textsuperscript{563} Directives 92/50 and 90/531.
\textsuperscript{564} Case C-324/98. Paras 45-56.
\textsuperscript{566} Case C-324/98. Para 60.
\textsuperscript{567} Case C-324/98. Paras 61-62.
national legislation\textsuperscript{568} and later in the directives on public procurement from 2014.

How can we assess the nature of the argument used by the ECJ in opening the rules and principles of the Treaty to service concession contracts? One could suggest that it was simply a case of applying the direct meaning of the law, as the treaty establishing the European Community did include specific (formalised) provisions on non-discrimination (Article 12 in the EC treaty and Article 6 EEC). A better view suggested by this work would be that it was a question of using arguments from general principles of law\textsuperscript{569} or the argument from contextual-harmonisation\textsuperscript{570}, which have been categorised as (teleo-)systemic criteria by Summers and MacCormick.\textsuperscript{571} In a situation where the linguistic arguments from the directive on utilities procurement did not give an answer sufficient enough to “help the national court”, as the ECJ put it in the Telaustria-ruling (because the contract fell outside the scope of application), the systemic logic of the nearest wider context in terms of the hierarchy of sources of law in EU would include the treaties and the principles contained therein.\textsuperscript{572} This would seem to follow, once again, the sequentialist approach to using legal arguments in justification. The reasoning is not, however, devoid of problems, particularly from the viewpoint of coherence and consistency. The problem of this reasoning is that it has discarded the systemic argument from the principle of lex specialis and the fact that the EU legislator, as an institutional actor had specifically wished that concessions would not be covered by the legislation specifically developed for the tendering obligations of contracts made by public authorities. By extending the tendering requirement to contracts not covered by the procurement directives, the case law by the ECJ has undermined the role and value of the provisions and concepts which were put in place to differentiate the contracts covered by tendering requirements from those not covered.

In a later judgment in Parking Brixen, the Court had to give an answer to the question whether the award of the management of public pay car parks by a contracting authority to another legal person involves a public service contract or a public service concession. According to the ruling, the arrangement referred to by the national court in its preliminary questions

\textsuperscript{568} For instance, in the Finnish Act on public contracts from 2007 (348/2007), the scope of application on tendering rules was extended to service concessions mainly due to the Telaustria-case and the subsequent similar case law of the ECJ. In the recent public procurement directive package, we can see the new directive on concession contracts (2014/23/EU).

\textsuperscript{569} Tdridimas has categorised the principle of equality as a general principle of EU law. Tridimas. 2007.

\textsuperscript{570} One could also refer to the a fortiori argument referred to by Bengoetxea, where a line of reasoning which holds for the more general case also holds for the particular instance of that general case. Bengoetxea. 1993. 242.

\textsuperscript{571} Summers – MacCormick. 1991. 513-514.

\textsuperscript{572} Case C-324/98. Para 59.
differed from a public service contract due to the fact that the service provider’s remuneration did not come from the public authority concerned, but from sums paid by third parties for the use of the car park in question. That method of remuneration meant that the provider took the risk of operating the services in question and was thus characteristic of a public service concession. Therefore, the Court held that in this type of situation, it was not a case of a public service contract, but of a public service concession.573

In the reasoning of the judgment in Parking Brixen, we can see that the element of remuneration from third parties and the element of risk574 in the business logic of the arrangement were used as operative tools for distinguishing concessions contracts from public contracts where the consideration is paid directly by the contracting authority to the service provider. The element of remuneration from third parties illustrates the fact that in concessions contract the two sub-elements of the concept of a public contract, i.e. the consideration and the parties of the contract are not aligned. The argument from risk reveals another aspect derived from this misalignment: public contracts do not, as a rule, expose the contracting party of the public authority to the vagaries of the market formed of these third parties.575 Instead, the contracting parties remain the “masters” of the consideration and remuneration in a public contract. This is a great example of the concept of public contract being used to identify (and clarify) relations as Niemi has suggested.576 Here we can also see a justifiable approach based on the principle of economy of interpretative effort with the Court advancing, in a sequentialist fashion, from linguistic arguments to the operationalisation of the concept of a public contract. The reasoning itself also seems coherent, as reasons were netted to form quite strong supportive links.

In Eurawasser, the Court looked at the element of a risk more closely.577 The Court was faced with question whether a contract, where the consideration is received from third parties, must be categorised as a service concession in a situation where the supplier assumes all, or at least to a predominant extent, the risk which the contracting authority runs in operating the service. An additional peculiarity of that contract was that the risk concerning the contract was significantly limited from the outset on account of the rules of public law governing the service.578 Next the Court advanced in explaining the concepts of “the right to exploit” and “consideration for the provision of services”. According to the ruling, if the contracting authority continues to bear all of the risk by not exposing the supplier to the vagaries of the market, the awarding of the right to operate the service requires that the

573 Case C-458/03. Para 40.
574 More on the nature of the risk, see González. 2016. 56-59.
575 A term utilised in later ECJ case law on concessions.
576 Niemi. 2010. 489.
577 Case C-206/08.
578 Case-206/08. Para 46.
formalities provided for in the public procurement directive, with a view to safeguarding transparency and competition have to be applied. Here we can see the Court using a teleological argument to the effect that the absence of a risk would somehow give more reasons to safeguard transparency and competition than the existence of that risk in an arrangement. Here we can see a “jump” to the use of teleological arguments where it is argued that the sequentialist approach would have produced more coherence and consistency than the references to safeguarding transparency and competition. First, it is suggested that the systemic arguments based on the concept of a public contract and the element of risk within it would have been sufficient in justifying the proposition that the absence of risk also means that the arrangement cannot be considered a public contract. Second, the fact that in Telaustria (and in subsequent case law) the treaty-based principles of equal treatment and transparency, which share the same objectives as the public procurement directive, were held to apply even outside the scope of application of public procurement directives in cases of risk-based arrangements, thins out the argumentative power of a claim that the view of safeguarding transparency and competition would be exclusive to the public contracts defined in the public procurement directive. This approach to reasoning is not considered to improve or even protect the coherence of EU public procurement legislation in terms of its coverage.

The Court moved on to state that the absolute amount of the risk attached to the concession was irrelevant in terms of the definition of a concessions contract, if the contracting authority has no influence on the amount, because of legislation governing the service. Nevertheless, if the risk run by the contracting authority was very limited, it was necessary that the contracting authority transferred to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist.579

Despite stating that the concept of the “right to exploit” had to be explained, the Court did not actually shed much light on this particular concept in its reasoning, as much as it focused on the objectives of the public procurement directive and the separate question of the portion of risk transferred from the contracting authority to the service provider. The right to exploit remains, still today, a somewhat unspecified concept in the issues regarding concessions. From a critical-normative viewpoint, it could be argued that by elaborating on the concept of a public contract and that of a concessions contract, i.e. combining and comparing the concept of a right to exploit, on one hand, and the concept of risk, on the other, the consideration in public concessions contracts could have been explained in a more coherent and consistent manner. This is because the right to exploit, combined to the element of risk, means that the service provider is usually awarded an exclusive right, which

579 Case C-206/08. Para 77. In terms of risk, see also Case C-269/14, Kansaneläkelaitos, and Brown. 2015. NA189-NA191.
holds pecuniary interest. The degree of the risk included in a concessions contract is greater than in a public contract, where there is no risk. On the other hand, the degree of the risk transferred in a concessions contract is lesser than in situations where the service provider would operate on the market without any right to exploit. This approach, based on systemic arguments, would have, in the view of this work, provided a better explanation of the concept of the “right to exploit”, than the references to the objectives of the public procurement directives and the portion of the risk transferred to the service provider.

Kotsonis has argued that the Court’s conclusions should be welcomed as the outcome of a pragmatic and proportionate approach to the issues of the transfer or risk in concessions. He suggests that if the Court were to have accepted that a prerequisite for the existence of a services concession was the assumption of a “significant risk”, this might have led to legal uncertainty in what constitutes a “significant risk”. In addition, requiring the assumption of a “significant risk” by the service provider would have arguably led to the reclassification of a significant number of contracts which have traditionally been considered to constitute exempt services concession contracts as potentially fully regulated services contracts, for instance contracts involving the operation of a port or the running of a bus route.

On the other hand, Kotsonis has argued that the Court’s judgment may be open to criticism with regards to the conclusion that the fact that the service provider assumed a “very limited” risk was not relevant in determining whether the arrangements constituted a services concession. He suggests that none of the arguments utilized by the ECJ arguably explains why the level of risk is not relevant in determining the existence of a concession contract. For example, although it might be true that the regulation of a particular service may facilitate its supervision and ensure transparency and competition, it is not immediately clear why this factor should have a bearing on the classification of a contract for the provision of such a service, for the purposes of the public procurement rules. Similarly, classifying the specific arrangement as a services contract instead of a services concession contract affects the procurement regulation of those arrangements but does not affect their substance. The argument that such reclassification would remove the option for contracting authorities to enter into such arrangements seems incorrect to Kotsonis.

The concept of risk was better elaborated in Hans & Christophorus Oymanns, where the Court compared the concept of a service concession and a framework agreement (latter which was in the scope of application of the previous public procurement directive). The Court stated that a concessionaire enjoys a certain economic freedom to determine the conditions under which that right is exercised since, in parallel, the concessionary is, to a large extent,
exposed to the risks involved in the operation of the service. On the other hand, the distinguishing characteristic of a framework agreement is that the activity of the trader who has concluded the agreement is restricted in the sense that all contracts concluded by that trader during a given period must comply with the conditions laid down in the agreement. The Court held that in this case the service provider did not bear the principal burden of the risk connected with the carrying on of the activities in question, which was the factor which distinguishes the situation of a concessionaire in the context of a service concession. In this case the Court introduced additional characteristics to the concept of a service concession, mainly the economic freedoms which formed the counter-balance to the risk involved in the operation of a service. This reflects the assessment of the concept of a concession contract, using systemic arguments.

Kotsonis has pointed out a contradiction between the judgments in Eurawasser and Hans & Christopher Oymanns. He argues that the fact that there were no references between the cases suggest that the Court did not exclude entirely the possibility that in certain circumstances and under certain conditions—perhaps, when the lack of a significant risk is not due to public law rules governing the activity in question—whether there has been a transfer of a significant risk might be the appropriate test to apply in determining whether an arrangement constitutes a concession. 583

It was suggested above that the references to the objectives of the public procurement directives and the portion of the risk transferred to the service provider have not been very effective in contributing to the coherence of the relationship between concessions and public contracts. Farley and Pourbaix have argued that the lack of clarity in the Court’s case law on concessions has had a measurable effect to the extent to which concessions have been put out to tender but also to the way in which Member States have labelled concessions in their national measures implementing the public procurement directives. 584 They have presented the following examples: First, the fact that Member States have used different labelling for concessions and the lack of transparency of their award have made systematic and precise measuring of their economic and social importance difficult. 585 Second, according to an online consultation from 2011, 37 per cent of all respondents said that they were aware of the direct award of concession contracts without any kind of transparency. 586 Third, where rules exist for the award of concession contracts, they are used a lot by public authorities. In Spain, 6169 concessions

582 Case C-300/07.
583 Kotsonis. 2010. NA 11.
584 Farley – Pourbaix. 2015. 17.
585 Ibid. 17.
were advertised in the Spanish Official Journal between 2006 and 2010. Consequently, it can be argued that the excessive use of teleological arguments has led to concrete practical problems in question relating to concession contracts.

9.4 AUTHORISATIONS

Although concessions usually include elements of special or exclusive rights, they are still contracts including, inter alia, consideration, economic interest of the contracting authority and obligations based on contractual terms. Sometimes public authorities make other kinds of decisions concerning the access to the exercise of economic activity. While these arrangements do not constitute contracts, the European Court of Justice has regardless imposed tendering obligations on them, based on reasoning quite similar to the case law on concession contracts.

According to Wolswinkel, a service authorisation is a decision of a public authority concerning the access to or the exercise of a service activity. Authorisations can be called limited if available authorisations are limited in advance to a maximum number. Authorisations are not covered only by the Treaties. EU Services Directive 2006/123 includes provisions imposing restrictions on Member States concerning authorisation schemes and provisions setting conditions for the granting of authorisation.

In Sporting Exchange, the Court assessed whether the case law of the Court on concessions was applicable to the procedure for the grant of a licence to a single operator in games of chance. The Court interestingly did not enter deep into the assessment of the differences (or similarities) between the concepts of concessions and limited authorisations. It mainly depicted the national system of exclusive licences and pointed out that the referring national Court had itself classified the arrangement as the granting of a single license. The Court then stated that the single licence constituted an intervention by public authorities in the purpose of regulating the pursuit of economic activity. According to the ruling, “the fact that the issue of a single licence is not the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC, in particular the principle of equal treatment and the obligation of transparency, when granting an administrative licence such as that at issue in the main proceedings”. Consequently, the Court held that the principles of equal treatment and transparency were, in principle, to be applied in the granting of such exclusive licences.

587 Farley – Pourbaix. 2015. 17.
589 Case C-203/08. Paras 38-55.
In *Belgacom*, the Court was presented with a question whether the transfer of an exclusive right to operate cable networks could be considered a service concession. The Court held first that, in so far as the arrangement obliged the transferee to pursue cable network operations, it constituted a public contract, apart from the remuneration method, as the consideration of the television services consisted in the right to operate the activity in question. Because of this and the fact that the risk of operation was also considered to have passed to the transferee, the Court held that the arrangement in question was a service concession. The Court then proceeded to state that EU law imposed the same tendering requirements on the concession-granting authority where the agreement in question did not oblige the tenderer to engage in the transferred activity, with the result that the agreement then conferred authorisation to engage in an economic activity. According to the ruling, “such an authorisation is no different from a service concession in terms of the obligation to comply with the fundamental rules of the Treaty and the principles flowing therefrom”.

The Court’s case law on authorisations and their relationship to concession contracts has strengthened the conceptual analysis of contract as the centre of EU public procurement legislation. According to Wolswinkel, the distinction between concessions and public contracts versus authorisations is to be found in the element of a contract. The exact dividing line has, however, been drawn in different ways in different rulings: on one hand, in emphasizing “contracting powers” versus “public order powers” in *Sporting Exchange*, and, on the other hand, the issue whether the economic operator is obliged to pursue the activity in question in *Belgacom*.\(^5\) Wolswinkel argues that the case law has been ambiguous and unclear, especially in *Commission v Italy*, where the Court has classified Italian gambling licences as concessions instead of authorisations.\(^6\) In that ruling, the Court argued that the licences were to be considered service concessions because the Italian government had not denied this classification and that the classification was also accepted by the Court in a previous case, *Planica*.\(^7\)

In conclusion, while the case law of the Court has in some ways deepened the understanding of the differences and similarities of concepts such as a public contract, concession or authorisation, the Court has not put much work in analysing conceptual differences in detail. On the contrary, the Court has in many of the rulings depicted above leaned on the *general applicability* of general principles derived from the Treaties to all kinds of public interventions to the market and consequently disregarded the task of actually comparing the different concepts. As public contracts, concessions and authorisations all have their own legal regimes, one cannot help to wonder whether the

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\(^5\) Wolswinkel. 2015. 142. Case C-203/08. C-399/98. C-221/12.


\(^7\) Case C-260/04. Para 29.
strengthened use of systemic arguments assessing these concepts could have improved the coherence and legal certainty of EU law in these matters.

9.5 THE ROLE OF DISCRETION AND CHOICE

In *Asemfo*, the ECJ held that legal limitations on the parties to negotiate the prices and other aspects of an arrangement and the existence of an obligation on the provider to supply, may be relevant to indicate that an arrangement is not a contract. In the case a publicly owned company was required by law to undertake work assigned to it by public bodies and could not negotiate a price for its operations, as the price was fixed in a tariff. The Court held that if the company had no choice as to accepting a particular work (demand) or a price, there would be no contract for the purpose of the directives on public procurement. The reasoning in the case is interesting because the main focus on the ruling was on the application of the so-called in-house requirements to the arrangement at hand. From the context of the reasoning, it is quite difficult to determine, whether the arguments concerning the lack of negotiating power of a company were presented as a part of the supportive structure to arguments concerning the in-house rules and the lack of separation between the contracting authority and its contracting party or as an independent argument supporting the outcome that the arrangement did not meet the definition of a public contract. It is suggested that the former is the correct interpretation, because this argument was situated in a larger assessment of whether the company in question could be seen separate from the contracting authority; a logic which was prominent in the rulings of in-house procurement at that time. In any case, the coherence within the reasoning in *Asemfo* was not very high in this ruling.

In a later case in *Correos*, the issue of the limited freedom to negotiate was brought to the surface as an independent issue, outside the question of in-house requirements. The Court stated that the limited freedom to negotiate is not in itself sufficient to make the conclusion that there is no public contract. The Court held that this case differed from *Asemfo*, as the contracting party of the contracting authority was the required supplier for anyone wishing to use the postal service and that arrangements could only be considered as not being public contracts if the terms of supply were different from the normal commercial terms of the company in question. The Court continued: “the mere fact that that company has no choice as to the acceptance of a demand made by the Ministerio or as to the tariff for its services cannot automatically entail that no contract was concluded between the two entities”. The Court went on to state that only if the agreement were in actual fact a unilateral administrative measure solely creating obligations for the service provider –

593 Case C-295/05.
594 Case C-220/06. Para 51-53.
and as such a measure departing significantly from the normal conditions of a commercial offer made by that company, that it would have to be held that there is no contract. 595

Arrowsmith has agreed with the ruling on Correos and stated that factors such as the absence of freedom to negotiate on terms or the absence of agreement by the provider on whether to supply have no relevance for the directive’s objective of controlling selection of the provider by the contracting authority. However, exclusion from the public procurement directive of an arrangement that requires a provider to undertake work on specific terms that arises from law and not by negotiation, which is specifically for the benefit of the administration, and which involves award without competition, might be warranted because that approach may provide a better method than the market of ensuring that needs of the administration are met on the best possible terms.596 On the other hand, Arrowsmith has argued that it is not clear why the kinds of supply arrangements such as in Correos and Asemfo, should be immune from scrutiny merely because they are concerned only with supply to the public sector rather than the market as a whole.597

Here the line of reasoning is very much built on the issue of room of discretion of the contracting parties and the source of the contractual obligations. In the reasoning in Correos and to a lesser degree in Asemfo, the reciprocative nature of a public contract, as defined in the procurement directives, was held to affect the fact that the contracting party of the contracting authority enjoys a degree of freedom in making its offer and drafting the “normal commercial conditions” within. This means that the lack of freedom in drafting these normal conditions leads to the conclusion that the definition of a public contract has not been met. Thus, this line of argumentation seems to point to the use of systemic arguments in (re)defining the concept of a public contract by highlighting the element of freedom of economic operators to draft their offers in a commercial manner. It is suggested, however, that a better systemic reasoning would have been to emphasize the origin of the obligation to provide services: when the source of an obligation to provide services lay in provisions of law or in the unilateral administrative decisions of public authorities and not in contract clauses, there can be no public contract at hand. This is supported by the argument in Helmut Müller, where the ECJ stated that “since the obligations under the contract are legally binding, their execution must be legally enforceable.” 598

The enforceability of a contract clause is different from the enforceability of a provision in law or that of an administrative decision.

Another way of looking at the question of negotiating freedoms is to focus on the freedoms of the contracting authority to negotiate the terms of a public

595 Case C-220/06. Para 54.
596 Arrowsmith. 2014. 392.
597 Ibid. 392.
598 Case C-451/08. Para 62.
contract. If the obligation and terms of providing construction services, for example, is based on law, it is not the contracting authority who has “taken measures to define the type of the work” or who has “had a decisive influence on its design”.\(^{599}\) This would mean that in the concept of a public contract there would be an additional criterion or sub-element of choice in the part of the contracting authority.

The issue of choice was addressed in *Falk Pharma*, where the ECJ was requested to consider whether an authorisation system concerning the acquisition of pharmaceutical products was covered by the EU public procurement rules. Under German law, “in the case of the supply of a medicinal product which has been prescribed by indicating its active ingredient and whose replacement by a medicinal product with an equivalent active ingredient is not excluded by the prescribing doctor, pharmacists must replace the medicinal product prescribed with another medicinal product with an equivalent active ingredient in respect of which a rebate contract has been concluded”.\(^{600}\) The ECJ stated first that such a scheme leads to the conclusion of contracts for a pecuniary interest between a public entity, which could be a contracting authority within the meaning of Directive 2004/18, and economic operators whose objective is to supply goods, which corresponds to the definition of "public contracts". It then went on to conclude that

“where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators.

It is therefore apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive.

That finding is supported by Article 43, first paragraph, (e) of Directive 2004/18, which provides that for every contract, framework agreement, and every establishment of a dynamic purchasing system, the contracting authorities are to draw up a written report which is to include the name of the successful tenderer and the reasons why his tender was selected.

It must, moreover, be pointed out that that principle is expressly set out in the definition of the concept of ‘procurement’,

\(^{599}\) Case C-451/08. Para
\(^{600}\) Case C-410/14. Para 11.
now set out in Article 1(2) of Directive 2014/24, in respect of which one aspect is the choice by the contracting authority of the economic operator from whom it will acquire by means of a public contract the works, supplies or services which are the subject matter of that contract."601

Graells has criticized the Court’s reasoning in Falk Pharma for not understanding the mechanics of the supply chain involved in an authorisation scheme or rebate contracts and that this has led to an improper assessment of the risk of favouritism or protectionism of certain economic operators. In his view, the creation of the rebate scheme still clearly has potential protectionistic effects in that it favours pharmaceutical companies already established and active in Germany over potential suppliers that would need to enter the pharmacy distribution channels in order to take part in the scheme. This is due to the fact that in the scheme the provider has to conclude the rebate contract with the authorities managing the statutory health insurance system and have its products available in German pharmacies. This is why, according to Graells “a scheme formally open to any willing supplier is actually skewed in favour of pharmaceutical companies already active in Germany”.602

It is suggested that the criticism by Graells depicted above is justifiable, not only because of the details of the German authorisation scheme in the case, but because choice is not only included in the selection of the successful tender but in other phases of the procurement procedure as well. The contracting authority can greatly influence the number of potential economic operators to be chosen by, inter alia, setting the selection criteria a too high or defining the technical specifications or the object of the purchase so that only few economic operators can participate in the scheme. Graells, has also pointed out that this type of narrow definition of a public contract can be circumvented by formally transferring the choice-making to another legal or natural person or persons such as end users or other third parties. The issue of other types of choices has been addressed by the Court in the Tirkkonen.603

On the other hand, the present work does not agree with Graells on his criticism about the Court going too far in assessing the arrangement from the goals of the EU procurement legislation and not limiting “itself to declare the authorisation scheme covered by EU public procurement rules.604 We can see that the ECJ has utilised in Falk Pharma both linguistic (wording in Article 1(2) of public procurement directive), systemic (analogy from Article 43 of the procurement directive 2004/18 and from the concept of a public contract in a later procurement directive 2014/24) and teleological (stemming from the objectives of the public procurement directives) arguments. Based on this line of teleological reasoning, there is no need to control the choice made by a

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602 Ibid. Paras 37-38.
603 Case C-9/17. See also the opinion of the Advocate General in C-9/17.
604 Ibid.
contracting authority or entity if it does not have discretion in choosing its contractual party and thus no power to favour national operators. It is suggested that in *Falk Pharma* the utilisation of teleological arguments was justified and consistent with the principle of economy of interpretative effort, because the linguistic or systemic arguments from the definition of a public contract, analogy or precedents would not have given the reasoning sufficient justificatory power in terms of coherence and consistency. The wording or the analysis of the concept of a public contract, even though analogy was available from Article 43 of the relevant procurement directive and from the definition of procurement in the new public procurement directive, would not have made it clear or coherent enough to lift the element of the power to choose to the focus, as the introduction of the phrase “chosen by those contracting authorities” in the new directive was not emphasized as a relevant change in the legislative material and because Article 43 (concerning the obligation to draw a written report of the procedure) is situated very much in the procedural side of procurement rules (as opposed to rules concerning the scope of application).

The emphasis on the element of choice is of significant importance, because different arrangements including *service vouchers*, *customer choice* are on the rise in Europe at the moment. An arrangement like a customer choice system, where the contracting authority does not introduce obstacles to the access to provide services in an authorisation scheme and where there are no other elements within the scheme which would thwart the participation of economic operators, could be greatly damaged by the administrative burden laid by the procurement legislation, even though there is no need to use this legislation as a controlling tool for the decision making of the contracting authority. This also illuminates the “idea of a man” behind the internal market law-based rules on public procurement: a public authority or a contracting entity is at risk of being influenced by corruption or nationalist sentiments in its purchasing activities while private persons (homo economicus) operate as rational and self-interested agents who pursue their ends optimally. This idea has been written in the recitals of the new public procurement directive:

“Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple

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605 This has been pointed out by Graells. Graells. How To Crack a Nut -blog. 6.6.2016. Graells refers to the fact that the element of choice of economic operator was not controversial and did not attract any relevant attention in the legislative process—as evidenced, for instance, by the fact that the provision is not dealt with in any detail in relevant scholarship such as De Koninck - Ronse – Timmermans. 2015.

606 Making claims about the concept of public contract or the scope of application of the procurement legislation from the procedural requirements of that directive can lead to a circular argument where arrangements are held to be subject to procedural rules of public procurement because of these procedural rules.
authorisation schemes (for instance licences for medicines or medical services).”

In conclusion, the case law of the European Court of Justice in cases regarding the question of public contracts and concession contracts has much revolved around the assessment of these concepts and their elements, such as consideration or risk. It is argued that this type of approach, with emphasis on systemic arguments, has improved the coherence, consistency and legal certainty in matters concerning the coverage of EU public procurement legislation. This case law has been instrumental in helping to identify and clarify the relationship between public authorities and the market in terms of purchasing activities. It is, however, suggested that the use of teleological arguments in concession cases, with the outcome of extending tendering requirements outside the scope of the procurement directives from 1990s, has done little to improve coherence of legal certainty or the institutional relationship between the EU legislator and the ECJ. It also seems to be at odds with the systemic argument from the *lex specialis* rule, pertaining that reciprocal transactions of public authorities should be primarily covered by the EU public procurement directives and that the decision to leave a type of transaction outside the scope of application of the directives was not meant to shove the issue of concession contracts into the lap of the internal market law rules in the treaty. Similarly, the fact that an exclusion from the scope of the utilities directive (2014/25/EU) applies to a utilities contract, does not mean that this contract would then fall into the scope of the classical sector procurement directive (2014/24/EU), or that when the monetary thresholds of the *lex specialis* Regulation No 1370/2007 are not met, that the more general rules of the procurement directives would then have to be applied.

### 9.6 IN-HOUSE PROCUREMENT

The rules regarding the exclusion from the scope of application of the directives on public procurement on in house procurement have formed one of the most influential ways in which the European Court of Justice has affected the application of procurement rules in the Member States. History shows us that many Member States reacted to the case law on in house procurement long before it was codified in the 2014 public procurement directives. Not unlike the ruling in *Telaustria*, the case law concerning in house procurement includes generating rules on the scope of tendering.

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607 Recital 4 of the directive 2014/24/EU.
608 Case C-292/15.
requirements from outside the secondary legislation on public procurement. It also forms an excellent object of an analysis of the reasoning of the ECJ.\textsuperscript{610}

The history of the rules on in house procurement starts with a ruling in \textit{Teckal}.\textsuperscript{611} In that case, the Court assessed whether the directive on public procurement was applied in purchases of fuel by an Italian municipality from a company which it owned. From the viewpoint of an analysis of reasoning, the grounds for that judgment are strikingly scarce. The assessment started from the question whether the relationship between the municipality and its company met the conditions, which directive 93/36 laid down for public supply contract. According to the Court, the national court must, in order to conclude whether there is a contract, determine whether there has been an agreement between two legally separate and distinct persons. The Court ruled that “the position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities”.\textsuperscript{612} Much more was not said in the ruling.

It seems like the requirements for an arrangement not to be a supply contract were thus built on the sub-criteria of the concept of public contract concerning the parties of the contract and the particular issue of \textit{separating} those parties from one another. This was also emphasized by the opinion of the Advocate General in the case:

“...the party entering into the contract with the contracting authority, namely the supplier, must have real third-party status vis-à-vis that authority, that is to say the supplier must be a separate person from the contracting authority. This element, likewise, is an essential characteristic for the conclusion of supply contracts falling within the scope of Directive 93/36...In addition, as is made clear by the national court, the situation is one which involves two formally separate persons operating in the market. This element is important because a situation where a municipality, in the interests of improved internal organisation of its services, entrusted supply to one of its units would constitute a form of internal delegation that remained within its own administrative ambit. In those circumstances, the relationship between the Municipality of Viano and AGAC could not be regarded as a public contract within the meaning of Directive 93/36.”\textsuperscript{613}


\textsuperscript{611} Case C-107/98. \textit{See also} Caranta. 2010. 14-16.

\textsuperscript{612} Case C-107/98. Paras 49-50.

\textsuperscript{613} Opinion in Case 107/98. Para 59.
Consequently, in the *Teckal*-ruling the application of the Court-made requirements concerning in-house arrangements were built on the issue of the relationship between contracting parties (namely, the question whether there are two distinct legal persons). It can, however, be criticized of being overly scarce, with few or no arguments at all presented as a justification for the requirements of an in-house–relationship set out in the ruling. There seems to be a considerable “jump” in reasoning from the premises concerning the definition of a supply contract and the separation of legal persons to the detailed requirements of control and the carrying out of activities.

A way in which this “jump” could have been covered through argumentation (or looking at the ratio of those rules) is through the utilization of the objectives of public procurement legislation and the consequences affecting the markets of an in-house arrangement. One of the primary objects of EU public procurement legislation is to ensure that all economic operators have equal opportunities to take part and compete in a public tendering procedure. As the Commission has stated in its green paper on the modernization of EU public procurement policy, “safeguards are put in place to compensate for the potential lack of commercial discipline in public purchasing, as well as to guard against costly preferential treatment in favour of national or local economic operators.”\(^{614}\) Following this trail of thought, there is no need for legal safeguards from the procurement legislation if the consideration from contracting authority within a public contract does not have any effect on the market because of the limited market activities of an in-house–unit.\(^{615}\) It must, however, be kept in mind that the “lack of commercial discipline in public purchasing” is not the same as the market activities of the entity which has been awarded a public contract.

It could be argued that the use of teleological arguments from the objectives of EU public procurement legislation as well as consequentialist arguments from the effects of the requirements were justified in *Teckal* from the viewpoint of the principle of economy of interpretative effort or consequentialism. Based on this approach, it could be suggested that because, at the time of the *Teckal* ruling, the rules in public procurement directives did not give much argumentative support to tackle complex issues relating to in-house relationships, there were grounds for advancing in the next sequences. As the operationalization of the concept of a public contract could not by itself prevent harmful effects to the market by the in-house entity and because no precedent was available at that time, the use of teleological arguments could

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615 See also Graells who argues that “the sole fact that the controlling entities within the public house are directly awarding contracts to the in-house entity without having to comply with the procurement rules suffices to exclude a consideration that those entities are actually exposed to the vagaries of the market because they have a captive demand from the controlling entities. Graells. How to Crack a Nut Blog. 19.10.2017.
have been justified from the viewpoint of the principle of economy of interpretative actions. Here we could see the context of the case entering into the picture. This market-based consequential logic did not, however, enter into the reasoning of the ECJ expressively until the ruling in Carbotermo, where the ECJ stated:

“The conditions laid down in Teckal...are aimed precisely at preventing distortions of competition...The requirement that the person in question must carry out the essential part of its activities with the controlling authority or authorities is aimed precisely at ensuring that Directive 93/36 remains applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings.”\(^{616}\)

This teleological approach to reasoning was elaborated in Undiz Servizi, where the Court held that

“an undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling municipal authority or authorities, if it can still carry out a large part of its economic activities with other operators. By contrast, where that undertaking’s services are mostly intended for that authority or those authorities alone, it seems justified that that undertaking should not be subject to the restrictions of Directive 2004/18, since they are in place to preserve a state of competition which, in that case, no longer has any raison d’être.”\(^{617}\)

From another viewpoint it can, however, be argued that there was no need to proceed to teleological or consequentialist arguments in the rulings depicted above, because the objectives of preventing harmful effects to the market could have been more efficiently achieved based on EU competition law and state aid law instruments. The use of conceptual analysis of a public contract with its sub-element of the relationship between the contracting parties was consequently enough to justify the extension in a procurement law context of an exemption to purchases from “formally independent but in substance dependent bodies” and thus not from the market.\(^{618}\) It is suggested that this approach is more in justifiable in terms of coherence and consistency in EU public procurement legislation. In EU competition law cases, we usually find a much heavier emphasis on the efficiency of the competition in the market in general than in public procurement law, where the concerns are usually restricted to the consequences of the actions of contracting authorities within a specific tendering procedure (or at the most to the access to the

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\(^{616}\) Case C-340/04, Carbotermo. Paras 59-60. See also Arrowsmith. 2014. 510.

\(^{617}\) Case C-553/15. Para 33.

\(^{618}\) Avarkioti. 2007. 33.
tendering procedure). Therefore, it could be suggested that it is not for the Court in procurement cases to take into account or to be concerned of the consequences of in-house procurement to the market in general. This kind of argumentation has been used by the Court of Justice in its other cases, where the principle of division of tasks between different fields of EU law or the lex specialis rule have been taken into consideration.

It must be admitted that in-house procurement can have effects on the competition in the market. Ølykke and Andersen have, in fact, suggested that the in-house provisions in the 2014 directives, which give the possibility of having market activities up to 20% of the activities of an in-house unit, could lead to problems in EU state aid law:

“However, the strict boundaries erected by the CJEU in its case-by-case approach to in-house provision had the purpose of preventing the grant of State aid and thereby distortion of competition both between private undertakings and by in-house entities on competitive markets. This purpose has either not been realized by the negotiators, or has been ignored. Now, when the Member States have achieved the holy grail of wide flexibility in inter alia construction of in-house arrangements, they must take upon themselves the responsibility of preventing serious distortion of competition in (local) markets.

This type of concern does not, however, take into account the division of tasks between different fields of EU law. As Al-Tabbaa has subscribed, “it is not entirely clear whether it is in all events desirable for the procurement rules to be used as a form of indirect State aid control, or indeed, what role broader competition concerns should play in procurement law analysis”.

It is argued that in the case law of the ECJ on in-house procurement, the systemic argument from lex specialis rule, that EU procurement legislation and competition law have a division of tasks, has mostly been disregarded, which has led to problems in the coherence of procurement legislation. In terms of coherence within the reasoning of the Court, the case law is also problematic in that it has disregarded the priority orders between reasons. According to Moral Soriano, priority orders establish that some reasons have priority over others and thus produce categories which can be used in future cases. If the cumulation-netting of reasons in a particular judgment extends to all kinds of fields of law or their (possibly or partly shared) objectives,

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620 More on these cases and the relationship between the EU procurement legislation and the competition in the market in Chapter 8.10.

621 Emphasis added.

622 Ølykke – Andersen. 2015. 14-15. See also Ølykke. 197-212.

623 Al-Tabbaa. 2016. 175.

there is no end to the net or reasons that may be created and the strong supportive links between premises begin to erode.\textsuperscript{625} This type of approach also presents the question if the Court is doing a much better job than the EU legislator in improving the coherence or legal certainty at the level of objectives of the procurement legislation.

The division of tasks between EU procurement and competition law has, however, been blurred with the numerous judgments by the ECJ, describing as objectives of the EU procurement legislation a multitude of different desirable states of competition such as \textit{free, undistorted, effective, genuine} and \textit{healthy}.\textsuperscript{626} In addition, it is hard not to notice that the procurement directives from 2014 include in their provisions on principles of procurement a reference to competition.\textsuperscript{627} It is, however, suggested in this work that the objectives or principles regarding competition within EU public procurement legislation do not require the law-applying officials to focus on preventing distortions of competition between undertakings (who are not contracting entities or authorities). Although such emphasis on efficiency is supported by some statements in the case law of the ECJ\textsuperscript{628}, the principle of competition within EU procurement legislation is seen in this work in the lines of Kunzlik, who argues that the concept of competition within procurement legislation is a \textit{structure of competition} concept which only requires that the contracting authorities ensure equality of opportunity for potential tenderers and a structure of competition for public contracts that allows sufficient opportunities for EU-wide competition.\textsuperscript{629} In other words, the EU public procurement legislation is focused on the competition within a procurement procedure and the open access to that procedure, but not in the effects of awarding a public or concession contract to a specific economic operator in the competition between this operator and others. This is due to the fact that, in procurement legislation, the public authority is first and foremost a purchaser\textsuperscript{630} and the fact that rights of the economic operators conferred to them by the legislation are \textit{procedural} in nature. If EU procurement legislation would contain a principle of competition stretching to the competition between economic operators in the market in general, then surely those economic operators affected negatively by the purchasing actions of contracting authorities but not having an interest in being awarded that specific contract would have a \textit{locus standi} in public procurement cases. However, as it is written in the remedies directives concerning public procurement, review procedures have to be available only to “any person

\begin{footnotesize}
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  \item \textsuperscript{625} Ibid. 311-319.
  \item \textsuperscript{626} Graells. 2015. 199-200 including references to the case law.
  \item \textsuperscript{627} Article 18 (1) of the directive 2014/24, which is discussed in more length in later Chapters.
  \item \textsuperscript{628} For instance, Opinion C-250/07. Paras 11 and 17.
  \item \textsuperscript{629} Kunzlik. 2013. 327-335. See also Arrowsmith. 2012b. 1-47.
  \item \textsuperscript{630} Arrowsmith – Kunzlik. 2008. 23.
\end{itemize}
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having or having had an interest in obtaining a particular contract and who
has been or risks being harmed by an alleged infringement”.631

There are also difficulties in conducting a meticulous assessment of the
actual effects of an in-house arrangement to the market. Ølykke has pointed
out that the ECJ has not elaborated on how competition could be distorted
between private undertakings as a result of in-house arrangements. Neither
has the Court or the directives from 2014 elaborated on the potential distortion
of competition in markets where the in-house entity competes with private
undertakings. According to Ølykke, “the potential distortion of competition is
only mentioned, not exemplified”.632 According to Al-Tabbaa, one of the
difficulties in the assessment of distortion of competition of in-house
arrangements is that there is no causal link between the relative proportion of
work undertaken by the controlled entity for someone other than its
controlling authority and the probability of any distortion of competition
actually occurring.633 He continues:

“In order for market distortion to occur in this situation two
requirements must be fulfilled at the same time. First, there must
be evidence of overcompensation paid to the controlled entity in
return of the goods and/or services provided. This must be
demonstrated to be the case on the facts. It cannot be assumed
from the simple fact that the contract was not concluded on arm’s
length terms, as the authority may well have benchmarked the
compensation payable against what is typically paid for similar
goods and services purchased from the private sector. Second,
there must also be evidence that any excess profits generated by
the controlled entity have actually been applied to cross-subsidise
the controlled entity’s private sector-related work. Again, this
must be demonstrated on the facts, and it cannot simply be
assumed that the controlled entity does not observe any form of
accounting separation between its public and private-sector
facing activities.”634

In Stadt Halle, we can see an interesting case of balancing arguments from
conceptual analysis of a public contract and the use of teleological and
consequentialist arguments.635 A question was presented to the Court of
Justice on whether a contracting authority is obliged to apply the EU public
procurement rules, where it intends to conclude a contract with a company in
which it has a majority capital holding but where a private company also has a

Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review
procedures concerning the award of public contracts.

632 Ølykke - Andersen. 2015. 1.

633 Al-Tabbaa. 2016. 174

634 Al-Tabbaa. 2016. 174-175.

635 Case C-26/03. EU:C:2005:5. See also 2005. NA71-NA73.
minority holding. The ruling in *Stadt Halle* was given at a time when the Court still considered the in-house requirements as elements in the concept of a public contract. This can be seen from the fact that the in-house requirements are compared to or presented in conjunction with a statement that “a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments” and that “in such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority”.

The Court then proceeded to state that “the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind.” This argument can be seen to follow the logic of the ruling in *Teckal*, where it is assessed, from the conceptual analysis of a public contract, whether the arrangement can be considered to extend too much outside the contours of a contracting authority (including the legal person of the contracting authority and the legal persons which it controls and which are its subordinates).

A more teleological and consequentialist emphasis can be seen in the subsequent statement of the Court in *Stadt Halle* that “the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned...in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors.” Here we can see a transformation from the conceptual analysis (systemic arguments) to ensuring the restricted negative effects to the competition in the market. The interesting characteristic of this line of argumentation is that the competition of the market is not distorted through the consideration in a directly awarded public contract (an argument used in other in-house judgments such as *Datsenlosen*) but through the presence of capital (return from capital) in the in-house entity. Here the speculative nature of the negative consequences of in-house procurement is even greater, because it entails the assumption that the in-house entity thrives in the market through directly awarded contracts from the (partly) controlling contracting authority and that this thriving is manifested in the return of the capital significant enough to put the economic operator with even a minority holding to an advantageous position in its own

636 Case C-26/03. Paras 48-49. See also Graells. 2015. 265-272.
637 Case C-26/03. Para 50.
638 Case C-26/03. Para 51. See also the comments by Caranta on the case. Caranta. 2010. 19-22.
639 Case C-15/13.
market. But what if the minority shareholder does not operate in a competitive market, itself? Will the direct award to the controlled entity still affect the competition in the market? Based on the argumentation in *Stadt Halle*, this, unlike the activities of the controlled entity, would not seem to make a difference. Consequently, it is suggested that there was no need (at least in terms of coherence and consistency) for such consequentialist argument.

The Court’s case law on the control requirement of the in-house rules has evolved through time from simply assessing ownership or shares of capital to an increasingly detailed assessment of the *activities* of the in-house entity.640 A few particularly interesting rulings in terms of their reasoning must be addressed. In *Coditel*, the Court held that one of the key question was whether the entity in question had become market-oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it. The Court then stated that under law and the entity’s statutes, the object of the entity was “the pursuit of the municipal interest – that being the raison d’être for its creation – and that it does not pursue any interest which is distinct from that of the public authorities affiliated to it”.641

In *Sea*, the Court looked at whether EU rules on public procurement were to be applied to an arrangement between a contracting authority and an entity it controlled, concerning a service of collecting, transporting and disposing of urban waste.642 The Court, once again, began its reasoning by a reference to the key case law on the matter (for instance *Teckal*, *Stadt Halle* and *Parking Brixen*).643 The Court then proceeded to refer to the case law concerning the control requirement of in-house procurement.644 First, it presented, as the starting point, the principle stated in *Commission v Austria*, that when the shares in the contracting company, owned by the contracting authority, are transferred to a private undertaking shortly after the contract at issue has been awarded to that company artificially, even events occurred after the award may have to be taken into consideration.645 The Court held, however, that “to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of *legal certainty*”.646 Thus, the opening of the company’s capital to private investors could not be taken

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640 For example, Cases C-340/04 and C-553/15.
642 Case C-573/07. The Court pointed out as a defect in the question from the national court the fact that it did not contain information on whether the contract in question was public contract or a concession contract, but the Court stated that this question did not "influence the reply to be given by the Court of Justice to the question referred for a preliminary ruling". Paras 32-35. See also Case C-410/04.
643 Case C-573/07. Paras 36-40. Case C-107/98, C-26/03 and C-458/03.
644 Case C-573/07. Paras 45-47.
645 Case C-573/07. Para 48. Case C-29/04.
646 Case C-573/07. Para 49. Emphasis here.
into consideration unless there exists, at that time, a real prospect in the short term of such an opening. The Court then proceeded to look at the activities of the entity in question. According to the ruling, it was appropriate to consider, among other things, whether the company concerned was market orientated. As the company’s statutes provided that the geographical scope of the activities of the company did not extend beyond the territory of the shareholder municipalities and that that company’s object was to manage public services for those municipalities alone, the Court was ready to conclude that the company’s main object would be the management of public services, as long as the power of the company to provide services to private economic operators was merely incidental to its core activity.647

The evolution of the control requirement of the in-house rules extending to the assessment of the activities of the possible in-house entity is problematic, because it overlaps with the other requirement of the in-house rules regarding the market activities. As Arrowsmith has stated:

“However, it is arguable that this factor is not per se relevant to assessing control but is merely indicative of cases which control of decision-making is often absent; it is logically merely a circumstance that leads to the conferral of freedom in decision-making and thus often coincides with such freedom.”648

Even if there is scarcity of the material displaying the control of the contracting authority over the possible in-house entity, it is not justifiable to take into account when applying the requirement of control, the market activities of the entity, as this is evaluated in the context of the requirement of restricted market access. The focus in the assessment of the control requirement of in-house rules should not be on the degree in which the entity operates in the market, but on the degree of the strength of the control by the contracting authority which restricts the entities independence to make the decision to set its sights on market activities. Here we once again see the importance of the systemic principle of the division of tasks between different provisions and rules.

The evolution of the in-house rules has changed their status in legal reasoning and their degree of formality as sources of law. They are less and less considered as requirements or elements of the concept of a public contract (or the parties to that contract) as they were in Teckal, but instead as specific exclusions to the application of the public procurement directives. This is of course very much due to the fact that they have been codified as provisions in the 2014 public procurement directives, but this evolution has been evident also in the structure of reasoning in the case law of the ECJ.649

There seems to be two types of emphasis that the ECJ has laid in its case law on in-house procurement. One approach focuses on the relationship (and

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647 Case C-573/070. Para 79. See also Bovis. 2012. 256-257.
648 Arrowsmith. 2014. 508.
the lack of separation) between the contracting parties (Teckal), where the other approach has focused on the requirement of restricted market activities of the in-house unit.

In Datsenlosen, the Court emphasized the logic based on which the raison d’etre of the in-house exception is due to the in-house unit being more or less a part of the contracting authority:

“The exception to the application of that principle, recognised by the Court in relation to in-house awards, is justified by the consideration that a public authority which is a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it... In such a situation, the contracting authority can be regarded as employing its own resources.”650

One could make the case that this type of reasoning is more in line with the sequentialist approach to legal reasoning, as it emphasizes the linguistic and systemic arguments based on the concept of public contract (requiring two sufficiently separate legal persons as parties) and the concept of contracting authority (drawing the outlines of that authority), as they are written in the directives on public procurement. Additional argumentative support has been drawn from the systemic arguments based on case law or precedents of the ECJ in the matter. In this approach, linguistic and systemic arguments are considered to hold sufficient argumentative power to make the ruling acceptable or normatively coherent without the larger need to advance to the use of teleological or consequentialist arguments. One does have to keep in mind, however, that even in the cases which have focused on the relationship between the contracting parties, the ECJ has referred to the objectives of the EU rules on public procurement.651 These objectives just have not been operationalized as much as in the cases where the emphasis has been on the arrangement’s consequences to the competition in the market.

As stated above, the other approach in the case law to in-house procurement has been to focus on the market activities of the contracting party and its consequences to the competition. In its ruling in Asemfo, the Court assessed whether a publicly owned Spanish company should have been considered an in-house unit. The Spanish government owned 99% of its capital while the last one per cent was owned by four autonomous local

650 Case C-15/13, Datsenlosen. Para 25.
651 For instance, in Case C-15/13. Para. 22 and Case C-295/05. Para 61.
authorities. The Court held that the requirements of an in-house relationship were met in the case, because, first, the company performed nearly 35 per cent of its activities with the government and over 55 per cent of its activities with the local authorities. Second, the requirement concerning the restricted market activities of the in-house unit was held to be met in combination of the activities towards the government and the local authorities. 652 These types of judgments emphasize the consequentialist approach to legal reasoning, where the focus is on how the in-house arrangement affects the competition in the markets.

New public procurement directives from 2014 have changed this situation because the consequentialist considerations and restrictions to the market activities of the in-house unit have been expressively codified. Thus, their application is now possible simply by following the direct meaning of the Articles and it no longer requires invoking the objectives of the EU public procurement rules. In addition, the ample ECJ case law on in-house procurement has brought arguments concerning the consequences to the attainment of the objectives of public procurement legislation nearer to systemic arguments from precedents.

An interesting aspect of the restrictions to the market activities of an in-house unit, concerns the issue of what can be considered a market activity. It is of course clear that when a unit performs activities directly and distinctly towards one or more contracting authorities which hold authority and control over it, we are talking about non-market activities. In the same vein, it is clear that when that unit performs activities towards legal persons who do not hold authority or control over it, this activity is restricted by the rules on in-house.

In some cases, however, the relevant parties in terms of the economic activities of the in-house unit are not possible to identify this clearly. How should one for instance assess situation where the in-house unit of a municipality or the state provides services to citizens or inhabitants. What if the contracting authority provides remuneration or orders the in-house unit to provide services to outside companies. These questions are of great importance, because if these would be considered to be a part of the restricted activities, the limits from the legislation would be greatly outreached in many cases.

The answer to the questions posed above could be found in the elements of the concept of a public contract between a contracting authority and its (possible) in house unit. If the activities which are directed towards other parties than the controlling contracting authorities are performed based on a clause in a contract made between the contracting authority and the (possible) in house unit, one could argue that these activities are performed towards the controlling contracting authority.

652 Case C-295/05. Paras 63-65.

653 Similar focus has been laid in Case C-553/15, Undis Servizi. Paras 34-38.
In the ruling in *Carbotermo*, a similar approach was adopted by the ECJ. In the ruling the Court held that:

As to the issue of whether it is necessary to take into account in that context only the turnover achieved with the supervisory authority or that achieved within its territory, it should be held that the decisive turnover is that which the undertaking in question achieves pursuant to decisions to award contracts taken by the supervisory authority, including the turnover achieved with users in the implementation of such decisions.

The activities of a successful undertaking which must be taken into account are all those activities which that undertaking carries out as part of a contract awarded by the contracting authority, regardless of who the beneficiary is: the contracting authority itself or the user of the services.

It is also irrelevant who pays the undertaking in question, whether it be the controlling authority or third-party users of the services provided under concessions or other legal relationships established by that authority. The issue of in which territory those services are provided is also irrelevant.654

Consequently, the Court of Justice introduced a qualitative assessment of the market activities of a possible in-house entity.655 Such qualitative assessment can, however, be conducted in excess. In *Carbotermo*, the Advocate General argued that two qualitative factors in particular should be taken into account in assessing the essential part of a supplier's activities: first, whether a market exists for the services in question and, second, whether the entity's other activities involve offering the services for other persons than the controlling authority. She then stated that the fact that a service or a product is in demand from only public bodies does not mean that there is no market and that one should, “fully in keeping with the competitive objectives of the procurement legislation”, assess the supplier's economic position on the market.656 This approach seems quite consequentialist and teleological, especially in the sense that the objectives of the procurement legislation are considered to be focused on competition. *Arrowsmith* has suggested that such a qualitative approach creates considerable uncertainty and has in fact been rejected in the 2014 procurement directive.657

Compared to the *Carbotermo* judgment, the ruling in *Undis Servizi* held less explanatory power. In that case, the Court held that “it is essential that the contractor's activity be principally devoted to the controlling authority or authorities”. According to the ruling, the relevant turnover is the turnover that that contractor achieves pursuant to the award decisions taken by that or those

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655 Case C-340/04. Para 64.
657 Arrowsmith. 2014. 512.
controlling authorities. It can be argued that the use of the additional concept of the object of devotion does not bring much clarity or additional justificatory power to the contract-based test brought forward in the Carbotermo case.

In conclusion, it is argued that in the case law of the European Court of Justice in matters regarding in-house procurement the approach by the Court has quickly evolved from assessing the in-house relationship in terms of the concept of a public contract (and whether the in-house entity could be considered to be somehow included within the boundaries of contracting authorities) to the teleological or consequential approach of evaluating the consequences of awarding contracts without tendering to a possible market operator. Even though this type of approach could be considered to be in line with the sequential use of arguments, because negative effects of the market activities of the in-house entity could not otherwise be prevented, it is suggested that these types of considerations should, primarily, be taken into account in EU competition law, not in EU procurement legislation. Consequently, we can see that the use of systemic arguments such as the lex specialis rule could be used as an instrument for curbing the excessive use of teleological arguments, especially in issues where two or more fields of EU law share some general objectives but where these different fields of EU law still have their own emphasis and own tasks in terms of these objectives. The issue of the division of tasks between different fields of EU law will be covered in more detail below.

9.7 COOPERATION BETWEEN PUBLIC AUTHORITIES

Just as the Court’s case law on in-house procurement seemed to settle to familiar territory, a new challenge was facing its application. As the usage of in-house structures became more or less an established practice in Member States, it began to look like the in-house entities were not used only as servants of the contracting authorities but as instruments of cooperation between such public authorities. As one of the key requirements and elements of the in-house case law regarded the control by the contracting authority to its in-house entity, the reasoning of in-house procurement did not provide a clear answer to a structure where there was no relationship based on control.

The first ruling to address the issue of horizontal cooperation (i.e cooperation without a controlled entity) concerned an arrangement between the city of Hamburg and four local authorities called Landkreise.658 In the Hamburg case, the city of Hamburg reserved in the arrangement an annual capacity of its soon-to-be-built waste management facility for the waste management of the Landkreise. The case was brought before the Court of Justice by the Commission who argued that this arrangement should have been tendered out. The Court held first that the requirements from its case law

658 Case C-480/06. See also Haussmann – Queisner. 2013. 231-237
on in-house procurement were not met, because of the absence of the relationship base on control between the contracting parties in question. The Court then, in an interesting line of reasoning, focused on the ultimate objective of the arrangement, which was held to be enabling Hamburg to build and operate a waste treatment facility “under the most favourable economic conditions owing to the waste contributions from the neighbouring Landkreise” and which was contingent upon the cooperation of the Landkreise.\textsuperscript{659} Here we see a reference to the effectivity of public management, a consideration also referred to in the Court’s case law on public-private cooperation (depicted below). The Court also stated that the contract at issue also provided for “commitments on the part of the contracting local districts that are directly related to the public service objective”, namely to make available landfill capacity for the quantities of slag unable to utilize in the incineration of the waste. It is unclear of the wording whether the public service objective was held to be the management or incineration of waste or the efficient management of waste. The Court also referred to the commitment of the Landkreise to restrict their right of access to the incineration facility in certain circumstances. This was held to constitute assistance between the contracting parties. Lastly, the Court pointed out that the contract between the public authorities did not include any financial transfers outside the reimbursement of charges paid by the city of Hamburg to the waste management operator.

After referring to its ruling in Coditel Brabant, the Court held that EU law does not require public authorities to use any particular form when they carry out jointly their public service tasks.\textsuperscript{660} The Court also held that such cooperation did not undermine the “principle objective of the Community rules on public procurement”, namely the free movement of services and the opening-up of undistorted competition, where here implementation of that cooperation is governed “solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, so that no private undertaking is placed in a position of advantage vis-à-vis competitors. The last statement was coupled with a reference to the Court’s judgment in Stadt Halle. Thus, even though the requirements concerning control and market activities of the controlled entity were to be discarded, a fraction of the requirements from in-house case law was possible to maintain in the Hamburg ruling. The arguments from the background of a cooperation in the carrying out of public service obligation and the objectives in the public interest could, however, be seen to reflect the same logic that the Court first introduced in its Teckal ruling, namely that of drawing the outlines of public authorities in their contractual relationships. In the Hamburg ruling, these arguments could be seen to demarcate the public authorities from the competitive market, in

\textsuperscript{659} Case C-480/06. Para 38.

\textsuperscript{660} Case C-324/07.
terms of the relationship between contractual parties as an element of the concept of a public contract. As the legal status of the cooperating parties could not be used in bringing about sufficient justificatory power, the next closest context would be the similarity of the tasks of the parties and the objectives of their tasks. The Court did, however see a need to make, in addition, a reference to the objectives of the EU legislation on public procurement and the fact that these objectives were not harmed by such cooperation.

It could be argued, that sufficient justificatory power could have been drawn simply from the unity of the tasks of the cooperating public authorities and that there was no need to invoke teleological or consequentialist arguments from the objectives of EU public procurement legislation, in particular when another objective was referred to in passing, namely the objective of effective public management. Perhaps it was the Court’s aim to show that these objectives were not in contrast with each other. One cannot help to question, however, whether they indeed were: it definitely was not the view of the Commission, when it brought the case before the ECJ, that such an arrangement made without a tendering procedure would not “undermine” the principle of free movement of services or opening-up of undistorted competition. As the ECJ referred to so many of the different elements and objectives of the arrangement, it is quite difficult to assess which references were used in the support of which requirements and if there was an act of weighing and balancing objectives related to (effective) public management and the key principles of EU public procurement law. In terms of the coherence within the reasoning, the judgment in the Hamburg case does not seem to hold a very cohesive or tightly knit supportive structure of reasons.

In Lecce, the element of cooperation was assessed in more detail. The Court was faced with a question whether the requirements of horizontal cooperation from the Hamburg ruling could be applied to an arrangement between a regional authority and a university concerning the study and evaluation of seismic vulnerability of hospital structure. The Court held that the contract contained in significant part activities “usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research”. Here we can see once again the attempt to demarcate, in the conceptual analysis of a public contract, the public authority from the market by emphasizing the differences of the tasks between the contracting parties. As the Court put it, the public task which is the subject-matter of the cooperation between the public entities established by the contract did “not appear to ensure the implementation of a

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661 In Stadt Halle, it was stated that EU public procurement rules are also applicable where the contracting party of the contracting authority is itself also a contracting authority. C-26/03. Para 47.
663 Case C-159/11. EU:C:2012:817.
public task which the ASL and the University both have to perform”. Perhaps one could see a shift here from assessing the overall (public or non-public) characteristics of the cooperating parties in the Hamburg case to the question if the public tasks on which the cooperation is based were mutual or similar.

In Lecce, the Advocate General presented a very interesting argument from the conceptual analysis of cooperation in comparison to a contract for consideration. According to his opinion,

“It must also be required that the cooperation serves to perform a common public task. It is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other’s role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract. This seems understandable if we consider the etymological meaning of the word ‘cooperation’; the essence of such cooperation consists precisely in a common strategy between partners which is based on the exchange and the coordination of their respective interests. The unilateral pursuit of one participant’s own interests cannot really be described as ‘cooperation’ in the above sense.”

The Advocate General went on to state that the relationship between the parties to a contract is distinguished by the recognition of reciprocal rights and duties. Whereas in the Hamburg case, the parties to the contract were committed to mutual assistance and mutual consideration. According to the opinion of the Advocate General, the ruling in the Hamburg case was thus based on ”a relationship of exchange which goes beyond the provision of services for consideration”. In Lecce we can see the use of conceptual tools in assessing what was meant by the concept of cooperation by comparing (although not expressively) this concept to that of a public contract with consideration. Where the concept of a public contract includes consideration, which reflects the economic interests of the contracting parties (such as presented in the Helmut Müller ruling) as the motivating force behind the arrangement, the concept of cooperation entails the element of coordination of existing tasks as the motivating force behind cooperation. Such a systemic approach to reasoning is suggested to improve coherence and consistency of the case law on the cooperation between public authorities.

664 Case C-159/11. Para 37.
665 This was actually emphasised by the Advocate General in Lecce, who stated that ”it is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other’s role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract.” Opinion in Case C-159/11. Para 75.
666 Opinion in Case C-159/11. Para 75.
667 Opinion in Case C-159/11. Para 76.
Graells has conceptualized the Court’s case law on public cooperation between public authorities as allowing it only where the cooperation was conducted outside the market and was not led by economic reasons. Consequently, parallels could be drawn between public-public cooperation and the decision by the contracting authorities between make-or-buy. Graells has reformulated this decision in the context of public-public cooperation as “cooperate-or-buy”. In terms of the concept of public contract this would mean that the elements of consideration as the motivating force and the distinctive characteristics of the contracting partners (public and private parties with different tasks) highlight the connection of the arrangement to the market and the economic reasons in public contracts. As regards the concept of public cooperation, the lack of consideration as the motivating force and the similarity of the tasks of the participants place the cooperation outside the market and the economic reasons for transactions therein. Thus, even though the reasoning behind such cooperation might be economic in the sense that collaboration brings about economic benefits, it is not based on market efficiency (at least if one does not consider transactions between public authorities as a market or a quasi-market).

In Piepenbrock, the Court was asked to analyze whether a contract where one public entity assigns to another public entity the task of cleaning certain buildings in return for financial compensation corresponding the costs incurred in the performance of cleaning, constituted a public contract within the meaning of public procurement directive from 2004. Here the Court only presented a short reference (substantive citation) to the previous case law in the matter. The Court stated then that it followed from the findings of the referring court that the aim of the draft contract at issue in the main proceedings did not appear to be to establish cooperation between the two contracting public entities with a view to carrying out a public task that both of them have to perform. Here we can see a reference to the findings of the national court being used as a part of the internal syllogistic justification chain of the ruling and, perhaps, an illustrative example of judicial dialogue, whether looked at from the viewpoint of dialogical pluralism or legal realism, between national referring courts and the Court of Justice being used in the reasoning of the latter. In terms of classifying such a reference as an argument, one could

668 Graells. 2015. 253.

669 Arrowsmith has elaborated on the reasoning behind cooperation between public authorities: “There may be good reasons for keeping the delivery of services within the government rather than contracting them out, and there are often advantages in collaborating with other parts of the administration...political or strategic reasons for keeping the service provision within the administration cannot always be sufficiently taken into account in a tendering process and, indeed, for such reasons contracting out may not be an appropriate option at all. To require tendering as a condition of collaborative provision may result in a decision to supply solely from within the procuring entity when administrative collaboration would be more efficient. Arrowsmith. 2014. 499-500.

670 Case C-386/11.
make the case that it could be considered a systemic argument of taking into account the context of the case and the reasoning already provided by the national court. The Court then added that because the contract in question authorised the use of the services of a third party for the accomplishment of that task, the requirement based on consequential arguments in the Hamburg case was not met.

In the case law of the Court on the issue of cooperation between contracting authorities we can see, on one hand, the utilization of systemic arguments, as the court has analysed the concept of cooperation. It is suggested that this has improved the coherency and consistency of the rules concerning the scope of tendering requirement. On the other hand, we find that teleological or consequential arguments have also been quite prevalent, as the issue of (not) affecting the relationships between undertakings has been introduced in the requirements of exclusion ground concerning public-public cooperation. It could be asked why such a restriction was introduced in a public procurement case, especially as the cooperating public authorities must, in any case, tender out any contracts which they wish to award to undertakings.

9.8 COOPERATION BETWEEN PUBLIC AND PRIVATE OPERATORS

There is no definition of cooperation between public and private operators in the EU public procurement directives. In its case law, the European Court of Justice has, however, brought forward specific characteristics typical of some of the cooperation arrangements between public and private bodies as arguments supporting the non-application of the public procurement rules.

The focus here is on the institutional partnership arrangements. In the institutional partnership arrangements, the cooperation between public and private bodies is usually exercised through a unit which is controlled jointly. These arrangements cover, for instance, PFI projects (Private Finance Initiative), PPP arrangements (public-private partnerships) or alliance contracting.

The European Commission has presented typical characteristics of a public-private partnership in its green paper on those arrangements:

- The relatively long duration of the relationship, involving cooperation between the public partner and the private partner on different aspects of a planned project.

- The method of funding the project, in part from the private sector, sometimes by means of complex arrangements between the various players. Nonetheless public funds – in some cases rather substantial – may be added to the private funds.

- The important role of the economic operator, who participates at different stages in the project (design, completion, implementation, funding). The public partner concentrates primarily on defining the
objectives to be attained in terms of public interest, quality of services provided and pricing policy, and it takes responsibility for monitoring compliance with these objectives.

- The distribution of risks between the public partner and the private partner, to whom the risks generally borne by the private sector are transferred. However, a public private partnership does not necessarily mean that the private partner assumes all the risks, or even the major risks linked to the project. The precise distribution of risk is determined case by case, according to the respective ability of the parties concerned to assess, control and cope with this risk.671

It seems that the relevant elements governing the application of EU public procurement rules to partnership arrangements between public and private operators are built from the element of consideration as key part in the concept of a public contract. In these arrangements, both the public and the private operators provide monetary remuneration in the arrangement. It is also of great importance to take into account the relationship element of a public contract, because in these arrangements the relevant parties might have both horizontal and vertical relations to one another.

According to the Commission interpretative communication on the application of Community law on public procurement and concessions to the institutionalized public-private partnerships, the arrangement is usually set up in two ways: first, by founding a new company, the capital of which is held jointly by the contracting entity and the private partner – or, in certain cases, by several contracting entities and/or several private partners – and awarding a public contract or a concession to this newly founded public-private entity, and second, by the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions “in-house” in the past.672

In these situations where the partners use a jointly-controlled company in the partnership, it is of use, in order to better understand the different aspects of such arrangements vis-à-vis the concept of a public contract, to separate three different actions. First, the selection of the private partner by the contracting entity. Second, the founding of a new company or the enlargement of the capital of an existing company, and third, the purchases by the contracting entity from the controlled company.

In the Commission communication, only two phases are covered: the selection of a private partner and the purchase by the contracting entity from the controlled company. According to the communication, the principles of transparency, equal treatment and non-discrimination must be followed in


672 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP). 12.4.2008. 2008/C 91/02. 4-5.
selecting the private party, whether it be based on the directives on public procurement or the principles of the treaties. However, the Commission did not “consider a double tendering procedure – one for selecting the private partner to the IPPP and another one for awarding public contracts or concessions to the public-private entity – to be practical”.  

The approach of the Commission concerning the unpracticality of a double tendering procedure (in both selecting the private partner and the purchase from the jointly controlled company) was supported by the Court’s ruling in Acoset, where the Court had to evaluate an arrangement where a local authority decided to found a company along with private operators. The private partners were selected through an open tendering procedure. The question posed to the Court was whether the controlling contracting authority could, by direct award, purchase services through a concession contract from this “semi-public” company under the Treaty rules applicable to concession contracts. The Court stated first, with reference to its ruling in Stadt Halle, that the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, in that such a procedure would offer a private undertaking with a capital holding in that company an advantage over its competitors. The Court then went on to hold that “it is difficult to reconcile the use of a double competitive tendering procedure with the aim of reducing procedural formalities which underlies institutionalised public-private partnerships, such as that at issue in the main proceedings, whose establishment involves the use of the same procedure both to select the private economic participant and to award concessions to the public-private entity to be formed for that sole purpose”.  

The Court then stated that “while the absence of a competitive tendering procedure in connection with the award of services would appear to be irreconcilable with Articles 43 EC and 49 EC and with the principles of equal treatment and non-discrimination, that situation may be rectified by selecting the private participant” in accordance with the principles of equal treatment, non-discrimination and transparency. According to the ruling, because the participant is entrusted with the operation of the service in question and thus the management of the service, “the selection of the concessionaire can be regarded as an indirect result of the selection” of the partner, so that “a second competitive tendering procedure for the selection of the concessionaire is unnecessary”. A double tendering procedure “would be liable to deter private entities and public authorities from forming institutionalised public-private partnerships”.

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673 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP). 12.4.2008. 2008/C 91/02. 5.
674 Case C-196/08. Para 56. Case C-26/03, Stadt Halle. Para 51.
675 Case C-196/08. Para 58. Emphasis here.
676 Case C-196/08. Para 59. Emphasis here.
677 Case C-196/08. Para 60.
private partnerships” because the length of time involved in implementing such procedures and the legal uncertainty attaching to the award of the concession to the previously selected private participant.678 The Court did, however, stress that a company with mixed public and private ownership must retain the same corporate purpose throughout the duration of concession. If there is any material amendment to the contract, it would be necessary to launch a new competitive tendering procedure.679

Here we find the Court utilizing teleological and consequentialist arguments. It is of interest to take into account that the objective referred to by the Court was not an objective expressly stated in the EU public procurement directives or in the EU treaties or in the previous case law of the Court. Here the reference was pointed to the objective of the public-private partnerships, such as the one which was addressed in the case. Not only were there no specific mentions of this objective in the EU public procurement legislation, there were no mentions or definitions of such partnerships in the legislation. Only available legal material at that time were the green paper and the communication from the European Commission, latter of which was referred to in the judgment.680

In the opinion of the Advocate General, the issue of defining the concept of public-private partnership is much more clearly visible. There is even a subheading titled: “Towards an autonomous definition of public-private partnership”. The Advocate General starts from the observation that “the traditional embodiment of public service was left behind in the race to the finishing line since, nowadays, the degree of openness between the authorities and individuals means that their reciprocal duties cannot be sealed into airtight compartments” and that there are many methods of satisfying the requirement of directing the efforts of the authorities at the general interest. One of the more “particularly striking” methods are those which foster cooperation between public and private parties. According to the opinion “where a private undertaking assumes responsibility for providing a service and, motivated by profit, places its assets at risk in order to ensure that the service is provided properly and operates well, a close link is forged with the public finances. It is private capital which acts as an intermediary between the body responsible for the work or services and its beneficiaries. Thus, in order to identify the public-private partnership as an “autonomous category” it was necessary to create the term. The Advocate General then proceeds to refer to the Commission Interpretative Communication from 2008 and the Green Paper, but acknowledges that “the absence of Community harmonization precludes the emancipation of PPPs as true contracts, but that does not preclude the recognition of the fact that these neophyte instruments

678 Ibid. Para 61.
679 Ibid. Para 62.
680 Case C-196/08. Para 57.
of cooperation include certain clauses which are contractual in nature or which resemble the characteristics of a concession”.\textsuperscript{681}

The Advocate General distinguished two types of public-private partnerships: one where the partnership is based solely on contractual links (contractual PPPs) and another type of partnership which comes into being through an entity (institutionalized PPPs). He then referred to the Commissions view of a double tendering procedure to be unpractical and states that “it is not appropriate to make pragmatism, a logical aspiration of any legal system, the exclusive basis of a legal argument”. He did, however, agree with the Commission’s view and stated that the use of a double tendering procedure was not compatible with the reduction of procedural formalities which underlies institutional public-private partnerships. He then resorted to “strict talk”\textsuperscript{682} and argued that “it is not possible for efficiency to be at odds with the principle of legality, since legality implies efficiency, which means that it is enough to argue that inefficient management is unlawful”.\textsuperscript{683} This is a striking argument in connection with EU public procurement legislation which has specifically been criticized of the character that it puts efficiency of public management behind the strict interpretation of the requirements of equal treatment, non-discrimination and transparency. There is, for instance, a case to be made against the public management efficiency of extending the tendering requirement outside the scope of application of the EU public procurement directives or against restricting the possibilities of contracting authorities to clarify errors or complete defective tenders.\textsuperscript{684} Arrowsmith, for one, has criticized the EU public procurement legislation of going against the \textit{value for money} – considerations.\textsuperscript{685}

The Advocate General finally argued that the selection of the contractor or concession holder is affected indirectly through the selection of the industrial participant, from which it followed that its activity was extremely important. Through his reasoning, the undertaking which became the participant in the new entity effectively acted as a contractor or as a concession holder when it assumed responsibility for providing the service. This act of assuming the responsibility is evident, according to the opinion, because in the arrangement in question, one of the selection criteria of the partner concerned its ability to provide the service.\textsuperscript{686}

In addition to referring to a teleological or consequentialist argument on the efficiency of public management, not referred to in the EU public procurement or internal market law, the opinion of the Advocate General seems to be slightly at odds with the concept of a public contract. If the

\textsuperscript{681} Opinion in Case C-196/08. Paras 42-62.

\textsuperscript{682} "strictly speaking”. Opinion in Case C-196/08, para 86.

\textsuperscript{683} Opinion in Case C-196/08. Paras 83-86.

\textsuperscript{684} Cases C-324/98, C-507/03, C-336/12, C-599/10.

\textsuperscript{685} Arrowsmith. 2012. 36-40.

\textsuperscript{686} Opinion C-196/08. Paras 88, 89, 109 and 110.
remuneration in a public contract or a concession contract is transferred to the
operator which is jointly controlled by the public and private operators, it is
unclear as to why it is of importance that the contracting authority acquires
through a competitive procedure the partner, which, in practice, is not the
contractual party in the case or necessarily the exclusive provider of the
services in question. Here the horizontal and the vertical relations are at risk
to get mixed up. It does not seem to follow a watertight logic that because the
contracting entity has set up requirements concerning the ability of the private
counterparty to provide the service and because the private partner is providing
some or most of the services, this investor would be the contracting party
without any autonomous contribution from the semi-public company;
otherwise there would be no need to found the semi-public company because
the service could be purchased directly from the private investor. The facts of
the case concerning the share of responsibilities between the private investor
and the co-owned company were somewhat vague. In the ruling, it was first
stated that the semi-public company was “to operate the integrated water
service”. Then it was stated that a contract notice was published for the
selection of the undertaking which would be entrusted, as private minority
shareholder, with the operation of the integrated water service and the
execution of the works relating to the exclusive management of the service.
These propositions seem to be in contradiction with each other. Then, in the
formulation of the question by the national court it is stated that the service in
question is awarded directly to the semi-public company and that the private
participant in the company is “industrial” and “operational”.

It has to be admitted that the consequentialist concern from Stadt Halle
that the private owners of the jointly controlled company may receive
potentially competition distorting benefits from holding its capital can be
prevented through a tendering procedure. It is submitted, however, that the
strict, consequentialist restrictions from the Court’s case law regarding in-
house procurement (namely Stadt Halle) have formed one of the key reasons
why the in-house exclusion has not been able to be applied to the
arrangements concerning institutional public-private partnerships. If there
were no restrictions as to the holding of the capital of the semi-public
company, there would not be any reason to look for supporting arguments
from the efficiency of public management.

Pedersen and Olsson have suggested in their comments on the ECJ ruling
in the Hamburg case that the cooperation between contracting authorities
had improved the parties’ negotiating stance against outside operators and
thus made the arrangement commercial in nature. One could then make

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687 Case C-196/08. Para 18.
688 Ibid. Para 19. What it means to “operate” or “manage” a service “as a minority shareholder” seems
quite fuzzy.
689 Case C-196/08. Para 28.
690 Pedersen – Olsson. 2010. 41.
the case that the economic benefits from the holding of the capital of a jointly owned company could be even considered to be the consideration or remuneration between the contracting entity and its partner. The commercial nature of the arrangement can, however, be hard to reconcile with the provisions in EU public procurement law or the concept of a public contract (or a concession contract). It is also extremely difficult to monetize or quantify such a commercial element in the relationship between the owners or to link it to the immediate economic interest of the contracting authority.

In a way, the issue of the ability of the partner of the contracting entity to provide the service could be held to be comparable to the in-house requirement of control: the private partner must possess some kind of power or at least possibility to influence the services which the co-owned company provides. The in-house requirement of restricted market activities could be seen to be reflected in the requirement in Acoset that a company with mixed public and private ownership must retain the same corporate purpose throughout the duration of the contract. Even though the Court referred to the Pressetext case on contractual changes in this context, one could make the argument that by requiring keeping the corporate purpose unchanged, the co-owned company would remain solely as the instrument of its owners (in much the same way that an in-house entity does).

The Court’s ruling in Acoset has been considered in scholarly discussions as a strikingly pragmatic stance. From the viewpoint of this work, the ruling in Acoset seems to illustrate a change in reasoning of the ECJ from using the concept of a public contract or a concession contract as the starting point of analysis to regarding the tendering procedure in one relation as an instrument in relieving the obligation to tender in another ancillary relation. This approach, utilized more in State aid cases such as Altmark, emphasizes the teleological and consequential nature of the reasoning and makes it harder to build a cohesive whole from the different approaches in the case law.

A different approach to institutionalized public-private partnerships was adopted by the Court in Mehiläinen. Here the key question presented to the Court was whether the directive on public procurement should be applied to a contract concerning occupational health care and welfare services between a contracting authority and a private company which it owns along with private operators as a joint venture. The Court held, first, that the arrangement in question constituted a public service contract, partly covered by the EU public procurement directive. Next the Court reminded its public on the fact that cooperation between contracting authorities is possible under certain conditions laid in the Hamburg case and that in the Commission Communication on institutionalized public-private partnerships, public

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691 Case C-196/08. Para 62. Case C-454/06.
692 Brown. 2010a. NA49.
693 Case C-280/00.
694 Case C-215/09.
authorities are considered free to pursue economic activities in the form of public-private partnerships. A reference to the case law of the Court on in-house procurement was also added to the mix. In other words, the Court presented three different possible ways of excluding an arrangement of cooperation from the EU public procurement rules. These possibilities were not further examined, however, as the Court went on to conclude that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by the public procurement directive. This is a striking finding compared to the ruling in Acoset, where the competitive tendering of the private partner was considered very significant element in relieving the contracting authority from the burden of tendering out the contract from the jointly owned company. This reasoning once again strengthens the notion that in Acoset, the tendering procedure was disconnected from the issue of the scope of public procurement legislation (including the concept of a public contract) and was used simply as an instrument in consequentialist argumentation.

The conclusion in Mehiläinen that the creation of a joint venture by contracting authority and a private operator is not covered by the directive on public procurement is closer to a sequentialist approach to reasoning, because it starts from the question (derived from the language of the provisions in the public procurement directive) of whether a public contract can be considered to exist between the co-owners. The Court might have emphasized this starting point by expressively giving reasons to why this was the case, instead of referring to the Commission Green Paper, where the reasoning can be found. The reference to Commission documents is a rare occurrence in ECJ case law on the scope of application in EU public procurement rules, but an interesting illustration of the use of this type of source of law. Given the lower level of formality and institutional support of Commission texts compared to EU legislation, this type of reference could even be seen as an instance of the use of a systemic argument (a sort of an analogy).

The judgment in Mehiläinen includes an interpretative summary of the previous Acoset case (argument from precedent). In Mehiläinen, the Court referred to Acoset and stated that “the fact that a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to observe the provisions on public procurement when awarding such a contract to that private entity or to that mixed capital entity”. Here the ruling in Acoset is narrowed to its premises and nowhere can there be seen the instrumentalist value of tendering out such a cooperation.

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696 Case C-215/09. Para 33. Commission Green Paper on public-private partnerships. Point 66, where it is stated that “Community law on public contracts is not as such intended to apply to transactions involving simple capital injections by an investor in an enterprise, whether this latter be in the public or the private sector.”
697 Case C-215/09. Para 34.
The Court then proceeded to refer to its ruling in *Club Hotel Loutraki*, concerning a *mixed contract*. In that case, the Court held that if the various aspects of a mixed contract are inseparably linked and thus form an indivisible whole, that contract must be examined as a whole for the purposes of its legal classification in the light of the rules on public contracts, and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract.698 This argument from precedent influenced the framing of the main question of the Court in *Mehiläinen*: can the public service contract concerning health care services be severed from the mixed contract including, in addition, the creation of a joint venture. The Court held that the contract concerning health care services was, in fact, severable from the whole, and thus it was subject to the EU directive on public procurement.699

The reasoning in *Mehiläinen* is interesting, because the mixed contract in question was not only mixed in terms of its *content* (providing services, paying for them and founding the joint venture) but also in terms of its contractual *relations*. In terms of providing health care services, the contracting parties were the contracting authority and the joint venture company, whereas in the arrangement of founding the joint venture, the contracting party of the public authority was the private investor. The fact that the arrangements within the mixed contract were different in terms of contractual parties played a part in the reasoning of the Court: “the abovementioned findings fail to demonstrate objectively the need to conclude that mixed contract with a single partner”700

The judgment in *Mehiläinen* is can be considered a step back towards reasoning based on linguistic (definitions of contracting authority and public contract in the EU public procurement directive) and systemic arguments (references to previous case law). The arguments from *Club Hotel Loutraki* concerning the severability of a mixed contract and the main object of that contract could be classified as systemic arguments because they deal with the concept of a public contract and the structure of its contents.701

It is argued that the ruling in *Mehiläinen* was more aligned with the sequentialist approach to reasoning than the *Acoset* ruling, because it was more heavily grounded in the concept of a public contract. By bringing up multiple objectives of the procurement legislation (efficiency of public management and the protection of fundamental freedoms) and the instrumental value of tendering procedure in preventing harmful effects to the

700 Case C-215/09. Para 45.
701 Club Hotel Loutraki includes a reference to a long line of string citations from the Court’s case law. In this case law, teleological or consequentialist arguments have not been used in addressing the issue of mixed contracts. Instead these cases have usually included a short statement of the main purpose of the contract being of importance. Joined Cases C-145/08 and C-149/08. Para 48.
market in Acoset the Court has made it increasingly difficult to draw instructions as to the lawful conduct in the future in these matters.

9.9 OBSERVATIONS ON THE CONCEPTS OF CONTRACTING AUTHORITY AND ENTITY

According to Bovis, the European Court of Justice has been pivotal in developing the rules on contracting authorities. He argues that the Court has interpreted the concept of contracting authorities in broad and functional terms in order to bring within the concept a range of undertakings connected with the pursuit of public interest.702

In Beentjes, the Court had to assess whether a Belgian local land consolidation committee was to be considered as “authorities awarding contracts”, pursuant to Article 1 (b) of the directive on public works procurement. The Court stated first that for the purposes of the provision in question, the term “the State” had to be interpreted in functional terms, i.e. from the viewpoint of the objectives of the procurement legislation. The Court then held that “the aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration”.703 The Court finally stated that body such as the local land consolidation committee, “whose composition and functions are laid down by legislation and which depends on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts which it its task to award, must be regarded as falling within the notion of the State for the purpose of the abovementioned provision, even though it is not part of the State administration in formal terms”.704

It could be argued that such a teleological or consequentialist argumentation was necessary, because the directive from 1971 did not entail a detailed definition of the state or for other bodies listed as “authorities awarding contracts”. On the other hand, it is striking that the Court completely bypassed the concept and the definition of a body governed by public law in Annex I of the directive. If it was the objective of the EU legislator to create “a functional” concept of the State as an awarding authority in directive 71/305, why would it then include the concept of a body governed by public law with the specific list in Annex I of the directive covering only some of quasi-

703 Case 31/87. Para 11. See also Case C-306/97.
704 Case 31/87. Para 12.
governmental entities? This type of interpretational approach would seem to strip the legislative of the possibility to decide on a key aspect of the coverage of public procurement rules, an important part of trade negotiations in the WTO-GPA level. Consequently, this type of teleological argumentation could lead to very vast coverage in the part of the European Union in international trade negotiations, if it is used as a basis for the EU approach.

As the key original objectives of EU public procurement legislation was to prevent political considerations or corruption to unduly influence the decision-making of public authorities in their purchases, these public authorities have been the original main focus of the legislation. Through the modernization trend of public management that started in the 1980s, many Member States have transferred tasks from public authorities to a divergent range of private operators. As these private operators begun to operate on a level of political considerations and to use public funds, the EU legislator responded by enlarging the scope of contracting authorities and entities to cover these entities as well. In the 2004 public procurement directive, one could find as contracting authorities, inter alia, funds, companies, insurance operators and cooperatives.

Because so the form or legal personality could no longer distinguish a contracting authority from purely private operators not covered by the procurement rules, a need had arisen for a legal instrument through which the tendering obligations of the procurement legislation could be pointed towards the relevant parties from the viewpoint of the objectives of the legislation (and no further). The legislation governs, as its name states, public procurement. Such an instrument of distinction was provided by the legislator in the form of a body governed by public law.

In the first directives on public procurement, the concept of a body governed by public law was defined simply by a reference to an annex in the directives, containing a list of individual operators, such as universities or church authorities in different Member States. In the first directive on service procurement 92/50, the concept was first coupled with a more detailed definition, virtually unchanged during legislative updates:

Body governed by public law means any body:
- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and
- having legal personality and
- financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management

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706 Annex III of directive on public procurement 2004/18/EC. The most recent procurement directives do not include annexes containing lists of contracting authorities or entities in different Member States.
supervision by these bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.\(^{708}\)

In *Mannessman*, the Court of Justice was presented with a question whether an independent economic entity entrusted with the production for the federal administration of printed matter requiring secrecy or security measures, should be regarded as a body governed by public law. The requirement of control in the concept of a body governed by public law was held to be met in a somewhat simple syllogistic line of argumentation from the wording of the directive: the Director-General of the entity was appointed by a body consisting mainly of members appointed by the Federal Chancellery or various ministries. Furthermore, it was subject to scrutiny by the Court of Auditors and other forms of state control. Finally, the majority of the shares in the entity were still held by the Austrian State.\(^{709}\) The Austrian and Netherlands governments objected that it was not possible to disregard the fact that the overall activity of the entity in question was dominated by activities pursued in order to meet needs having an industrial or commercial character. The Court first held that in the wording of the Article in question, no distinction was made between contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which were unrelated to that task. According to the ruling, the lack of such distinction was “explained by the aim” of the directive which was to “avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities”.\(^{710}\) Next, the Court invoked the principle of legal certainty and stated that the approach would vary according to the relative proportion of the activities of a body governed by public law for the purpose of meeting needs not having an industrial or commercial character would be contrary to the principle of legal certainty.\(^{711}\)

Is it suggested that the justificatory power of invoking linguistic and systemic arguments and especially the argument from the principle of legal certainty would have been sufficient in *Mannesmann*. It is questionable if the invocation of teleological arguments in *Mannesman* had much more effect than bringing to the table one more conception on what the objective of the EU public procurement legislation is. The requirement of control (through financing or supervision) in the concept of a body governed by public law is of interest in terms of systemic

\(^{708}\) Article 1 (b) of directive 92/50.

\(^{709}\) Case C-44/96. Para 28.

\(^{710}\) Case C-44/96. Paras 30-32.

\(^{711}\) Case C-44/96. Para 34. On the issue of “dual capacity” of contracting authorities, Bovis. 2013. 295. *See also* Clarke. 2012. 60.
arguments, because a similar requirement can be found in the Court’s case law on in-house procurement (depicted in Chapter 8.6). Are these requirements similar in terms of their content and objectives and has the Court cross-referenced them or otherwise used them outside their original context? This will be assessed next. In addition, it will be shown how the Court has utilized the elements in the concept of a (public) contract as an instrument in evaluating the criterion of control.

In University of Cambridge, the Court began its reasoning on the control element of a body governed by public law by referring to the objectives of the procurement directives, one of which was to prevent bodies governed by public law from being “guided by considerations other than economic ones”. The Court then stated that although the way in which a particular body is financed may reveal whether it is closely dependent on another contracting authority, that criterion is “not an absolute one”. This means that not all payments made by a contracting authority have the effect of “creating or reinforcing a specific relationship of subordination or dependency”. According to the Court, only payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as public financing. The Court then proceeded to evaluate the differences of arrangements with and without consideration. Payments in the form of awards or grants for the support of research work could be regarded as financing by a contracting authority, because there is no contractual consideration for those payments. On the other hand, payments which constituted consideration for actual services such as research work or organization of seminars, could not be considered as financing, because the contracting authority had “in fact an economic interest in providing the service”. Here we find an argument similar to the Court’s later reasoning in Helmut Müller, which was about the nature of a public contract. The use of such arguments from the nature of (public) contracts can be seen as an example of systemic reasoning within different provisions within the procurement directives. In a way, it could be said that the consideration in financing a body governed by public law is the control that the contracting authority assumes to such a body. Consequently, in awarding contracts to different operators the contracting authority can negatively affect the internal market freedoms which has to be curbed by tendering requirements, but in giving financial aid or support without consideration the contracting authority attaches other legal persons close to it in a way that may extend (if the other requirements of a body governed by public law are met) the requirement of tendering to these bodies.

In Bayerischer Rundfunk, the Court extended its functional approach to the interpretation of the requirement of financing by the contracting authority,

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712 Case C-380/98. Para 17.
713 Case C-380/98. Para 21.
714 Case C-380/98. Paras 22-23.
stating that the financing of public broadcasting bodies in question should be assessed in light of the objectives of the procurement directives. 716 According to the ruling, financing, which was brought into being by a measure of the State, was guaranteed by State and was secured by methods of charging and collection which fall within public authority powers, met the condition of financing by the State. No contractual consideration was held to be linked to payments from customers to the broadcaster, since neither the liability to pay the broadcasting fee nor its amount was the result of any agreement between the public broadcasting bodies and the customers. Customers were obliged to pay the fee provided only that they possess a receiver, irrespective of whether they use the service offered by those bodies. 717 The absence of consideration and freedom of action in the part of the customers of broadcasting services was thus considered to be of key importance. This is where the reasoning deviates from the one in the University of Cambridge, where the point of view was connected to the contracting authority and its contractual party. The way in which the freedoms of the customers were restricted was mainly by means of law. Turned the other way around, one could make the (systemic) argument from Bayerischer Rundfunk, that restrictions to the powers to influence the content of a service by means of legislation could be used as justification grounds to a conclusion that such a type of providing services could not be considered as constituting a public contract covered by procurement directives. 718

In Ärtzekammer, the role of a regional medical association as a body governed by public law was evaluated by the Court. In the ruling, the Court of Justice held that functional interpretation meant that a rule (such as the characteristics of a body governed by public law) was to be given an interpretation “independent of the formal rules for its use”. 719 This approach could be classified as teleological or consequentialist, because the formal rules of the use of a rule are abandoned in favour of considering the effects of applying the rule in terms of achieving the objectives of the law: the role of financing by a contracting authority may contribute to the fact that a body governed by public law may be guided by considerations other than economic, which can lead to favouritism. On the other hand, such an approach could be considered systemic, because it directs the interpreter to remove a rule from its original context and transfer it to another. Thus, if the consideration can be considered to have importance in interpretation of a public contract, then this element of consideration could have importance in the context of interpreting the concept of a body governed by public law as well, in the meaning that it distinguishes between payments which are for consideration of a service and

716 Case C-337/06. Para 40.
717 Case C-337/06. Paras 45, 48.
718 A similar type of reasoning was adopted in the Court’s ruling in Hans & Christophorus Oymanns. Case C-300/07. Paras 52-58.
payments which are unilateral. The Court held in Ärtzekammer, that although law determined the tasks of the medical association and the way in which a majority of its financing had to be organized, the association nevertheless enjoyed organizational and budgetary independence and was financed for the most part by its members.720

The Advocate General in Ärtzekammer provided some systemic arguments in the form of the principle of proportionality. The Advocate General discarded the view of the Commission that mere “proximity” to a body governed by public law to public authorities would be sufficient to fulfil the criterion of financing. In his opinion, the Advocate General stated that an excessively broad interpretation of the requirement of financing or other variants of “close dependency” (as meaning the same as “proximity”) might not only distort the need to demonstrate the existence of close dependency, but would “also deprive the other two criteria referred to in that article of effectiveness. 721 Thus, the function of one part of a provision cannot be considered as the function of the whole provision. This argument was not expressly stated in the Courts ruling, but the approach by the Advocate General is reflected in the Court’s reasoning, where the criterion of financing by the contracting authority was interpreted in the light of illustrating control and not some general proximity.

Another element expressing the close dependency of a body governed by public law to a contracting authority is the supervision by that contracting authority. In Commission v France, the Court considered, whether the various controls to which low-rent housing corporations are subjected, render them dependent on the public authorities “in such a way that the latter are able to influence their decisions in relation to public contracts”.722 The Court pointed to the observation by the Advocate General, that management supervision must give rise to dependence on the public authorities equivalent to that which exists where other types of criteria of dependency are fulfilled (such as financing). Here the Court used a systemic argument, emphasizing the similar function of the three alternative requirements concerning dependency. First, the Court held that the activities and rules of management of the housing corporations were defined in the law in a detailed way. The supervision of compliance with these rules could in itself lead to significant influence from the part of public authorities. Second, the housing bodies were subject to supervision by ministers who could appoint a liquidator and suspend the managerial organs and appoint a provisional administrator. Third, the ministers could impose a specific course of management action on the housing bodies and the interministerial task force could be made responsible for carrying out studies, audits or assessments in the field of social housing and could draw up proposals as to the action to be taken. Consequently, the Court

held that the management of the housing corporations was subject to supervision by the public management and that the requirement of dependency was fulfilled.\footnote{Case C-237/99. Paras 49-59.}

In \textit{Adolf Truley}, the Court assessed whether a funeral undertaking owned by the city of Vienna through a holding company could be held as a body governed by public law and whether the requirement of dependency was satisfied by the review of the management of the funeral undertaking. The Court held that mere review could not satisfy the requirement, because supervision through the act of review does not enable the public authorities to influence the decisions of the funeral undertakings “in relation to public contracts”.\footnote{Case C-373/00. Paras 67-70.} The Court stated next that the supervision by the City of Vienna exceeded that of mere review. The undertaking was subject to direct supervision by the City as a result of its ownership through the holding company. In addition, the shareholders’ agreement governing the undertaking provided that the monitoring office of the City was authorized to examine the annual accounts of the company as well as its conduct from the view of proper accounting, regularity, economy, efficiency and expediency. The monitoring office was even authorized to inspect the undertaking’s business facilities and report its findings to the City. All of this constituted an “active control” of the management of the company.\footnote{Case C-373/00. Para 73.} In a similar vein, the Court held in \textit{Ärtzekammer}, that a review \textit{ex post facto} did not satisfy the criterion of supervision, because such a review did not enable the public authorities to influence the decisions of the body in question.\footnote{Case C-526/11. Para 29.}

It is sometimes hard to distinguish whether a certain fact of a case has been used by the Court as relevant in assessing the requirement of supervision, financing or managerial appointment. In \textit{Ärtzekammer} the arguments concerning financing or managerial appointment are nearly impossible to distinguish from each other. In \textit{Commission v France}, the supervision of the housing bodies was hard to distinguish from the public authority’s power of otherwise steering the management through suspending managerial organs or appointing provisional administrators. When the requirement of supervision has been assessed independently, the focus has been on a type of active supervision including access to facilities and bookkeeping. Although the different requirements of dependency can be applied cumulatively and in tandem, it is suggested that by connecting more clearly the facts of the case to the different requirements of dependency, the case law would have painted a more coherent and predictable whole.

The approach utilized by the Court in its cases regarding the rules on a body governed by public law has a number of differences compared to the approach to the control requirement in case law regarding in-house procurement. This
is in some degree due to the fact that the wording in the rules concerning in-house procurement and a body governed by public law are different concerning the control element. The former consists of financing, supervision or managerial appointment, where the latter is about exercising a control similar to that which the contracting authority exercises over its own departments. They also have different origins: a body governed by public law was included in the first directive on works procurement in 1971, whereas the rules on in-house procurement were born in the case law of the ECJ. There are other differences as well. The rules on a body governed by public law are aimed at influencing how the bodies dependent on public authorities apply the principles of equal treatment and transparency in their purchasing activities. This is probably why the case law in these matters has from time to time included references to how the public authorities can influence the decisions of the body “in relation to public contracts”.

It also has to be taken into account that with regard to the rules on a body governed by public law, the mere financing by public authorities is enough to fulfil the requirement of dependency. Thus, a body governed by public law may not have any other forms of control through ownership or through influence over managerial decision-making. In terms of in-house procurement, unilateral funding or financing has not been taken into account in connection with the requirement of control and probably would not, in itself, be sufficient to fulfil the requirement.

On the other hand, the rules on a body governed by public law and the rules on in-house procurement also have things in common. First, the same arguments which support the contracting authority status of bodies dependent on public authorities also support their status as in-house entities. Second, the requirement of control has been presented in such a general way that its features such as supervision, ownership and managerial appointment have all been used as arguments in the assessment of the requirement of dependency in applying the rules of a body governed by public law. In Parking Brixen, the Court stated that the assessment concerning control regarding in-house procurement “must take account of all the legislative provisions and relevant circumstances”. Third, a fortiori argument has been used in the Court’s case law on the issue of a body governed by public law. In University of Cambridge, the Court held that

“borne out by the wording of Article 1(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which defines public undertaking as, inter alia, an undertaking in which the public authorities hold, directly or indirectly, the majority of

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727 For example, Case C-237/99. Para 48.
728 Cases C-458/03 (supervision), C-26/03 (ownership), C-324/07 (managerial appointment).
729 Case C-458/03. Para 65.
the undertaking’s subscribed capital or control, directly or indirectly, the majority of the votes attaching to shares issued by the undertaking. As the Advocate General noted in paragraph 58 of his Opinion, if such quantitative criteria are sufficient to classify an undertaking as a public undertaking, that must be the case a fortiori when determining the conditions under which public financing is to be regarded as for the most part.730

It is suggested here that the rules on in-house procurement and the concept of a body governed by public law can be utilized through the use of systemic arguments, taking into account, however, that the elements and requirements within these rules have differences as depicted above. When the requirements are aligned the most, there are benefits to be had. When the judicial decision-maker is facing an issue concerning the supervision of a public authority in a case regarding rules on a body governed by public law, supportive arguments could be drawn from the case law on in-house procurement. When an interpreter has to assess the issue of managerial appointment in connection to the control requirement of an in-house rule, the arguments made by the Court of Justice in cases regarding the body governed by public law could be utilized.

In his opinion in Saudaçor, the Advocate General held that in directive 2006/112, the concept of a body governed by public law had to be interpreted strictly, but in public procurement legislation the concept should be given a broad and functional interpretation. Thus, the meanings of a "body governed by public" for the purposes of procurement directive 2004/18 and "other bodies governed by public law for the purposes of directive 2006/112 could not be considered the same, "as those directives have very different objectives".731

Graells has suggested that the approach of Advocate General in Saudaçor creates two difficulties. Firstly, if concepts of identical wording are to be interpreted differently depending on the ultimate goals of the rules of EU economic law in which they are inserted, legal certainty cannot be satisfied. Secondly, the narrow interpretation of Article 13 could have been implemented through a strict approach to the concept of 'activities or transactions in which they engage as public authorities', or to the existence of 'distortions of competition'. This would have been preferable to the dissociation of concepts that are meant to determine the subjective scope of application of rules of EU economic law--which, by the way, are meant to be applied concurrently to the those entities.732

The reasoning of the Advocate General could be considered to be consistent with the systemic restrictions of using arguments from analogy. According to Alexy, systematic arguments refer to logical and teleological relation of a norm to other norms, goals and principles.733 If no such relation can be found at

730 Case C-380/98. Para 31.
732 How to Crack a Nut blog. 2.11.2015.
either of the levels, arguments from analogy should not be used. It is suggested here the mere uniformity of the wording of rules in two separate pieces of law does not constitute a logical relation sufficient enough to apply these rules analogically.

In conclusion, it has to be once again recognized that teleological arguments have had quite a strong role in the case law of the ECJ concerning the issues of contracting authorities and entities. There has also been a degree of inaccuracy in the Court’s case law in assessing the control or influence requirement of a body governed by public law. An approach based more on the use of systemic arguments and the distinction between different types of control or influence could have improved the coherence and consistency of the case law. Considering the similarities in the rules regarding bodies governed by public law and in-house entities, it is also suggested that arguments from analogy could be utilized more.

9.10 ARGUMENTS FROM FREE MOVEMENT PROVISIONS

As EU public procurement legislation stands next to a variety of neighbouring fields of EU law, it is of interest – especially in terms of systemic interpretation – to assess the possibilities and restrictions in using arguments from the provisions, principles and objectives of these other fields of EU law in procurement cases. We shall start with arguments from free movement provisions.

As was stated in Chapter 1, EU public procurement legislation belongs to EU internal market law because the directives have been given based on Article 114 of TFEU. The way in which this has manifested in the case law of the ECJ has usually been in the form of a reference to the internal market objectives linked to the EU public procurement legislation. In terms of the scope of the procurement legislation, a more interesting question concerns whether internal market rules have been invoked either as justification for the requirement to tender and be transparent or as justification for the exclusion from such requirements.

The connection between the public procurement directives and internal market law is quite visible in the fact that in the directives, there are specific mentions to the Treaty rules on internal market. For instance, in directive on public procurement from 2014, the first lines go as follows:


Article 53 concerns the right of establishment and Article 114 states that The European Parliament and the Council shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative
action in Member States which have as their object the establishment and functioning of the internal market.

The long line of case law concerning concession contracts is a good example of the Court invoking the treaty rules on internal market freedoms as arguments for extending the requirement to tender transparently to arrangements which would not be covered by the directives themselves.\textsuperscript{734} In \textit{Telaustria}, the Court held that, even though service concessions were not covered by the directives at that time, contracting entities are, nonetheless, bound to comply with the fundamental rules of the Treaty and the principles of non-discrimination and transparency.\textsuperscript{735} As was suggested above, such a reference primarily constitutes a teleo-systemic argument, because it was not the rules, which were the essence of the reasoning, but the principles, which formed the basis from which the requirement of advertising the contract was derived in \textit{Telaustria} and many of the other rulings on the issue of concessions. Perhaps it is due to the more general nature and lower level of formality (using the model by \textit{Summers}) of the internal market rules in the treaties that their usage in many cases needs the additional support of deriving more operational principles from them. It has not only been concession contracts which have been subjected to tendering requirements based on the rules in the Treaties. In \textit{SECAP}, the Court held that the rules and principles of the Treaties could be applied to public contracts with a value below the threshold set in procurement directives.\textsuperscript{736} It is contested that the Court’s case law where it has extended the tendering requirements outside the scope of application of the procurement directives is problematic in terms of the institutional relationship between the EU legislator and the Court and the \textit{Tedeschi} principle (following a \textit{lex specialis} logic) which is addressed below. An interesting counterpoint to the case law where the Court has extended tendering requirements outside the scope of public procurement directives can be found in the ruling of the Court in \textit{Strong}.\textsuperscript{737} In \textit{Strong}, the Court had to assess the question whether rules in the public procurement directive from 2004 on the right of an economic operator to rely on capacities of other entities in fulfilling requirements concerning economic and financial standing, could be applied in the procedure of awarding public contracts listed in Annex II B of the directive, which were mostly outside the scope of the procurement directive. The Court first stated that although the principle of effective competition constituted an essential objective of the public procurement directive, that object could not lead to an interpretation “that is contrary to the


\textsuperscript{735} \textit{Case C-324/98}. Paras 60-61. \textit{See also} Caranta. 2012. 33-34. On the coverage of the EU procurement directives through their history, see Caranta. 2012. 25-28.

\textsuperscript{736} \textit{Joined Cases C-147/06 and C-148/06}.

\textsuperscript{737} \textit{Case C-95/10}. \textit{See also} Caranta. 2012. 51-52.
clear terms of the directive”, which did not mention the rules on relying on the capacities of other entities in the contracts in question. Next, the Court held that “the fact that an economic operator cannot rely on the economic and financial capacities of other entities has no connection with the transparency of the contract award procedure”. The Court also held that the absence of such right did not give rise to any discrimination on the basis of nationality or place of establishment. Finally the Court argued that if “such a broad approach to the applicability of equal treatment could lead to the application” of rules concerning the right to rely on capacities of other entities or other rules regarding the selection of candidates or the contract award criteria to Annex II B services, this would “involve the risk of rendering entirely ineffective the distinction drawn by Directive 2004/18 between the services of Annexes II A and II B, as well as the application of that directive on two levels”. Consequently, the Court held that the rules of the procurement directive on the right to rely on the capacity of another entity did not have to be applied to Annex II B services.738

It is quite interesting that in Telaustria, the distinction made in the procurement directives regarding public contracts and concession contracts did not prevent the Court from extending tendering requirements outside the scope of the procurement directives, but in Strong, a distinction between two types of contracts did prevent the Court from applying certain rules of the procurement directive not considered to reflect the principles of equal treatment and transparency. Thus, the Court seems to have assumed power (over the legislator) in both defining the scope of the principle of equal treatment and transparency in the different market activities of public authorities as well as the content of those principles.

Wolswinkel has called the approach by the ECJ of deriving tendering requirements from a general principle of law as the use of a corollary award rule:

“Such corollary constructions are even indispensable in legal reasoning, once we consider a general principle as a general proposition of law of some importance from which concrete rules derive. A corollary award rule may therefore be regarded as ‘less than a fundamental principle, but more than a mere rule of positive law’: public authorities must also comply as ‘less than a fundamental principle, but more than a mere rule of positive law’: public authorities must also comply with such a corollary award rule when awarding contracts or authorisations that fall outside the scope of secondary legislation (“positive law”) providing for this specific rule.”739

Wolswinkel has argued, however, that the legal corollary approach is “surrendered by uncertainty” and has increased legal uncertainty as to the applicable award rules.740 First, several award rules can be considered just one

739 Wolswinkel. 2015. 138.
740 Ibid.
means (among others) to ensure freedom of service provision. Thus, the corollary approach should respect the variety of legitimate choices in protecting the freedoms in Articles 49 and 56 TFEU. Second, arrangements outside the scope of EU procurement directives may hold special characteristics which make tendering rules similar to those in the procurement directives difficult to apply to such arrangements. In terms of limited authorisations, there are differences to public contracts regarding, for instance, the existence of demand from the public sector and the presence of a contractual relationship.\textsuperscript{741} It is also suggested that a problem of the corollary approach stems from the institutional relationship between the EU legislator and the European Court of Justice. As Wolswinkle has pointed out, the definitions of public contracts, concessions and authorisations are aimed at being mutually exclusive, since the EU legislator has chosen to adopt distinct legal regimes for each of these arrangements. This distinction has been confirmed in the preambles of several directives.\textsuperscript{742} If the regimes have been designed by the legislator to be distinctive, introducing tendering requirements from primary law or general principles when there is another piece of legislation capable of dealing with the arrangement or where the legislator has not wished to extend tendering rules to a certain type of contract or arrangement in secondary law does not paint a picture of reciprocal support between the institutions. This is particularly evident in SECAP, where the ECJ held that Treaty rules were to be applied also in public contracts below the monetary threshold regulated in the EU procurement directives, but only if the contracts were of “a certain cross-border interest”.\textsuperscript{743} In essence, the Court discarded the monetary threshold set up by the legislator and replaced it with its own (case-by-case) threshold. Advocate General Jääskinen has referred to these kinds of problems in using broad interpretation:

“...in my opinion, the Court should exercise a certain restraint if a broad interpretation of an EU law concept seems to lead, in practice, to an instrument of national law losing its raison d'être or a detailed EU legislative act becoming applicable to phenomena that have not been considered by the EU legislature during the legislative process.”\textsuperscript{744}

Bovis has argued that the reason that the ECJ has derived tendering requirements from EU primary law regarding, inter alia, concessions has been the exhaustive harmonization of the public procurement directives which, combined with their lex specialis character, has resulted in the porosity of their legal effectiveness. This has resulted in the inability of the directives to “regulate contractual relationships which mimic inter-administrative

\textsuperscript{741} Ibid. 162-163.
\textsuperscript{742} Ibid. 142.
\textsuperscript{743} Joined Cases C-147/06 and C-148/06. Para 35. On the issue of cross-border interest, see also Treumer. 2012. 335-358.
\textsuperscript{744} Opinion in Case C-306/08. Para 75.
interfaces in the public sector”. According to Bovis, the Court has reacted to the porosity of the procurement directives with, *inter alia*, the conceptual action of signalling the necessity to supplement the remit of the procurement directives with the acquis deriving from fundamental principles of EU law. 745 It can, however, be questioned whether the outlining the scope of the directives in 1990s was a legislative action resulting to porosity or an action of reserve. Bovis himself admits that the approach by the RCJ was nonetheless “temporary and not conducive to legal certainty and legitimate expectations”.746

The tendering obligations from (primary) internal market law do, however, have some restrictions. In its established case law, the Court of Justice has held that, in order to apply the free movement provisions, there has to be a sufficient level of cross-border interest in the procurement. In *Commission v Ireland*, the Commission claimed that Ireland had violated Articles 56 and 49 TFEU by awarding a contract concerning welfare benefits without any advertising. Due to the subject-matter of the contract, it was not covered by the procurement directives at that time. The Court stated that Ireland had not breached the free movement provision in the Treaty because the Commission had not shown a cross-border interest. 747 This test of cross-border interest has been applied in subsequent case law, for instance in *SECAP*, where the Court and the Advocate General both suggested that the test is a manifestation of the case law that excludes from the scope of the free movement provisions cases where the potential impact of a measure on trade is too remote, as being too uncertain and indirect. 748 As Arrowsmith has demonstrated, the Court’s case law has been somewhat inconsistent about the level of certainty of the cross-border interest. 749 Arrowsmith has posed the question whether a domestic firm with no recognized cross-border interest could invoke the Treaty to complain of a procurement decision where the contract might have been of cross-border interest to an economic operator abroad. According to her, the arguments in favour of allowing such complaints are based mainly on legal certainty. 750 Consequently, it is argued that the systemic arguments based on coherence and consistency and ultimately legal certainty require that the contextual specificities of an individual case should not unconditionally preclude the Court from invoking Treaty rules when the content of the procurement, the nature of the internal market and other relevant facts point

746 Ibid. 288.
747 Case C-507/03. Para 32.
749 Arrowsmith. 2014. 245-249. She has referred to Cases C-91/08, Wall AG, and C-95/10, Strong, where in the latter the Court has used the test of a certain cross-border interest and in the former only a test of a cross-border interest.
750 Arrowsmith. 2014. 249.
to the direction that cross-border interest is at hand. On the other hand, it has to be stated that the contextual specificities of the fact that no foreign economic operators are taking part in the procurement procedure can be taken into account as indicium of the proposition that no cross-border interest is at hand.

Coname is an interesting example of the Court looking at an arrangement mainly in terms of EU internal market law and not in terms of public procurement legislation. In Coname, a question was presented to the Court of whether the tendering obligations of the procurement directives applied to the direct award by a municipality of a concession for the management of a gas-distribution service to a company in which the municipality held a 0.97 % share. In the case, the Court did not refer to the requirements from its case law on in-house procurement. This was starkly contrasted just a few months later in Parking Brixen. In Coname, the case law of in-house procurement was probably casted out because the arrangement in Coname was considered outside the scope of procurement legislation because it constituted a concession contract. The Court stated first that just because the municipality had “a very modest economic interest at stake” it was not “apparent” that undertakings from other Member States would not be interested in the concession and that the fundamental freedoms would be too uncertain and indirect to warrant the conclusion that these freedoms may have been infringed. The Court proceeded to assess whether a minority share holding by the municipality could constitute an objective circumstance that could justify a difference in treatment between undertakings from other Member States and national undertakings. According to the ruling, it did not. The Italian government did refer to “in-house structures” but in a peculiar way: it held that most Italian municipalities lacked the resources to provide, through in-house structures, public services and were obliged to resort to jointly owned structures. The Court then made a very short reference to in-house rules, without referring to any specific case law, stating that the company whose capital the contracting authority held, was at least partly open to private capital, which precluded it from being regarded as an in-house entity.

Coname is an interesting departure from the usual line of reasoning in cases where in-house rules and requirements are assessed. First, there is no specific string citation to case law on the matter – only one requirement, presumably from Stadt Halle, is presented concerning the openness of the capital to private operators. Second, the control by the contracting authority is not assessed in terms of specific in-house criteria but in terms of the fundamental freedoms of internal market law. It is of interest to note that the structure of reasoning is such that the internal market law considerations do

751 Case C-231/03.
752 Case C-458/03.
753 Case C-231/03. Para 20. The Court referred here to case law in internal market law such as rulings in Case C-69/88 and C-44/98.
754 Case C-231/03. Para 26.
not follow from the in-house exception not being applicable to the case. Instead, they are considered first (and foremost). As stated above, just a few months later, in *Parking Brixen*, the structure and line of reasoning in a case similar to *Coname* in terms of concession being in question, was much more built on the traditional argumentative structure of the Courts’ case law on in-house procurement.\textsuperscript{755}

If there is a case to be made that the ECJ has used arguments from EU internal market law to extend tendering requirements to arrangements outside the scope of application of the EU procurement directives, could the opposite be also possible? Could the rules or principles from the internal market provisions in the treaties be used in support of excluding arrangements otherwise in the scope of the procurement directives from the scope?

The key Treaty rules on internal market freedom concern the free movement of goods (Articles 28, 34 and 35 TFEU), the freedom to provide services (Articles 56 and 57 TFEU) and the freedom of establishment (Articles 49-55 TFEU). In terms of free movement of goods in the context of public procurement, Article 36 TFEU is of particular interest, as it presents justifiable prohibitions to the freedom, such as public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. The principle of proportionality has been often used in connection with these prohibitions.\textsuperscript{756}

There is also the Court-made doctrine of mandatory requirements which act as grounds for restrictions to the free movement of goods. In the famous *Cassis de Dijon* case, the Court held that obstacles to movement must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. Article 36 or the doctrine of mandatory requirements are, however, only available in areas that are not harmonized at EU level and where the national restriction applies similarly to national and foreign goods. In subsequent case law we have seen numerous other issues being considered as mandatory requirements, such as improving working conditions, diversity of the press, and environmental protection.\textsuperscript{757}

An interesting restriction to invoking arguments from EU internal market law as grounds of restricting the fundamental freedoms comes from the *Tedeschi principle*. Under this principle, rules of primary law can apply only in absence of more specific secondary law. The principle was introduced in the

\begin{itemize}
\item Case C-458/03. Paras 55-71.
\item Raitio. 2016. 395. Cases 72/83, Campus Oil and 104/75, de Peijper.
\item Cases 155/80, Oebel, C-368/95, Vereinigte Familiapress, C-55/93 van Schaik and 302/86, *Commission v Denmark*.
\end{itemize}
Court’s ruling in Tedeschi, where the Court was asked whether a Member State could have power to consider certain substances as “undesirable substances”, even though these substances were not classified as such in a relevant directive. The Court stated that when issues regarding the protection of animal and human health have been considered in harmonizing directives, recourse to Article 36 of the treaty was no longer justified.758 In Van der Veldt, the Court held that, in reverse, the Tedeschi principle meant that as long as the laws of Member States relating to a particular field had not been harmonized, the corresponding national legislation could restrict the principle of free movement to the extent that those restrictions are justified on one of the grounds listed in Article 36 of the Treaty or by imperative requirements.759 The Tedeschi principle can be seen as a good example of the key systemic argument of lex specialis.

It must be taken into consideration, under the Tedeschi principle, that the EU directives on public procurement provide long lists of specific exclusion grounds to their application. Some of these cover all types of public and concession contracts such as contracts awarded pursuant to international rules.760 Some are specific to service contracts, like the acquisition of existing buildings or some legal and financial services.761 Some cover only concessions or utilities procurement.762 The breadth of these specific exclusions casts a shadow over the possibility to invoke arguments for exclusion from the scope.763 As we shall see from the case law below, some of these issues have been taken into account by the Court in its case law on public procurement, at least indirectly.

The use of the Tedeschi principle can be found in Commission v Spain, where the Court held that the only permissible exceptions to the application of Directive 77/62 concerning the procurement procedures of public supply contracts are those which are expressly and exhaustively mentioned in it.764 This observation was repeated in another ruling in Commission v Spain, where the Court also stated that the rules on the grounds for not setting up a transparent tendering procedure are intended to ensure the effectiveness of

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758 Case 5/77. Para 35.
759 Case C-17/93. Para 25.
760 Article 9 of directive 2014/24/EU, Article 10 (4) of directive 2014/23/EU.
761 Article 10 (a), (d) and (e) of directive 2014/24/EU. Article 10 (8) (d) and (e) of directive 2014/23/EU.
762 Article 10 (1) and (3) of directive 2014/23/EU. Article 18 of directive 2014/25/EU.
763 In RegioPost, Case C-115/14 (EU:C:2015:760), the Court held that provisions in the procurement directive concerning special conditions relating to the performance of a contract were not exhaustive and, consequently, the directive and its rules could be assessed in the light of the primary law of the EU. Paras 57-59. See also Brown. 2016. NA49-NA55.
764 Case C-71/92.
rights conferred by the Treaty in the public supply contracts sector, and, as such, must be interpreted strictly.\textsuperscript{765}

On the other hand, as Wolswinkel has pointed out, in the absence of secondary legislation, the consequences of the award of arrangements by public authorities must be examined in the light of the Treaty provisions.\textsuperscript{766} It should, however, be taken into account that the absence of secondary legislation concerning a certain type of arrangement by public authorities may be based on the conscious decision by the legislator. If decisions by the legislator of excluding certain public arrangements from tendering requirements based on situating them outside the concepts which form the main content of the secondary legislation covering tendering requirements (such as procurement directives had been for decades up to the 2000s) are always considered to leave these arrangements to the rules of the Treaties and the Court’s interpretations, this approach may lead to a significant increase of secondary legislation (with its own exceptions) regarding every conceivable public arrangement. This, in fact, has been the case in the recent years with the introduction of the concessions directive 2014/23 or the services directive 2006/123. On the other hand, this type of corollary approach by the ECJ illustrates that it has not wished to utilise exclusions in secondary legislation analogously outside their scope of application. Similar to the case law of the ECJ, Wolswinkel has not given much weight on the legislator’s wishes: “Any political reason to exclude certain services from the scope of secondary EU legislation (e.g. gambling, healthcare services), cannot justify the award of these contracts or authorisations not being subject to these overarching...corollary award rules resulting from arts 49 and 56 TFEU”\textsuperscript{767}. It is suggested that the reasons for excluding a certain type of arrangement from a piece of secondary EU legislation could be used fruitfully as an argument from analogy in a case close to this secondary legislation. This, in turn, could improve the coherence of EU legislation as well as legal certainty. As Sypris has pointed out, the Court of Justice itself has, in some cases, taken account the decisions made in secondary legislation when assessing the content of the rules in the Treaties\textsuperscript{768} Tókar has argued that excluding the application of the Treaty principles in situations where the procurement directives would not apply should be subject to a two-fold proximity test: first, only such arrangements should be excluded from the application of the principles that are reasonably similar to a public contract that would otherwise be covered by the procurement directives; second, the consequence of the exclusion should be limited to those obligations that would oblige the contracting authority to

\textsuperscript{765} Case C-328/92.
\textsuperscript{766} Wolswinkel. 2015. 144. Case C-59/00, C-507/03 and Joined Cases C-147/06 & C-148/06.
\textsuperscript{767} Wolswinkel. 2015. 162.
\textsuperscript{768} Sypris. 2015. 477-482. Case C-341/05. Laval and C-346/06. Rüffert. See also the Court’s ruling in Regiopost, Case C-115/14.
obtain the supplies, services or works in question in a manner similar to that prescribed by the relevant provisions of the Treaty.769

Going back to the question of deriving exemptions from (other) internal market law, the Courts ruling in Evans Medical is of interest.770 In Evans Medical, the Court took a standing in the question of the relationship between the protection of health and the absence of a tendering procedure. The governments of Portugal and France argued that the distinctive character of the medicine in question (the fact that it could be used as unlawful narcotic) required security measures which had to be taken in order to prevent any diversion of the product and that these measures justified the conclusion of private contracts with no open or restricted invitations to tender.771 The Court first stated that, the provisions which authorizes derogations from the rules intended to ensure effectiveness of rights conferred by the Treaty in the public supply contracts sector, must be interpreted strictly. The Court then stated that it was not assured of the fact that the special nature of the medicine and the security measures to be taken in order to prevent its diversion make it impossible to have an open or restricted invitation to tender. On the contrary, a tenderer’ s ability to implement proper security measures could be taken into account as a criterion for the award of a contract.772 In Evans Medical, the arguments utilized in terms of the requirement to tender referred solely to the provisions in the public procurement directive from that time, and no mention was made of Treaty rules or the doctrine of mandatory requirements. It can, however, be derived from this reasoning that the Court did not see harmful consequences to the protection of health, a part of the reasoning related to the doctrine of mandatory requirements. The ruling in Evans Medical is another illustrative example of the Tedeschi principle (although it was not specifically referred to in the ruling).

In Medpac, the issue concerned a Greek hospital which had procured medical supplies through a tendering procedure and rejected a tender based on the claim that it did not meet the technical specifications for the contract in question.773 The medical supplies included in the rejected tender did, however, bear the CE marking which makes them, prima facie, suitable to be used in their attended use. Directive 93/42/EEC provided possibilities for specific safeguard procedures for rebutting the marking. The Court held that where proposed products, although bearing the CE marking, give rise to concern on the part of the contracting authority as to patients’ health or safety, the principle of equal treatment of tenderers and the obligation of transparency,

769 Tókar. 2014. 194.
770 Case C-324/93. It has to be noted that Evans Medical (or Medpac, assessed next) did not cover issues regarding the scope of the procurement legislation. It is, however, of interest in illustrating the lex specialis approach to utilizing other internal market rules in procurement cases.
771 Case C-324/93. Para 46.
772 Case C-324/93. Paras 48-49.
773 Case C-6/05. See also Brown. 2007b. NA 159-NA162.
which apply irrespective of whether the directive on public procurement is applicable, preclude, in order to avoid arbitrariness, the contracting authority from being able itself to reject the tender in question directly and requires it to follow a procedure, such as the safeguard procedure provided for in Directive 93/42.774

In Medpac we see the use of a systemic argument (lex specialis) derived from the division of tasks of different fields of EU internal market law. If there is an instrument (a piece of legislation, for instance) more suitable for tackling an issue regarding public health, that instrument should be used instead of the possibility of rejecting a tender in a procurement procedure. Here we also see a specific reference to a variation of the principle of legal certainty. This type of reasoning also illustrates the viewpoint that a public procurement procedure must rely on the notion that the internal market works adequately, supported by (other) internal market law rules. Different concerns (such as public health or environmental protection or social responsibility) can, in principle, always be taken into account in public procurement procedures, but it should, first, be taken into account whether these concerns are tackled in other contexts (or whether the procurement legislation allows for taking them into account).

The key provisions on the freedom to provide services are found in Articles 56-62 TFEU. The freedom to provide services also contains the principle of non-discrimination on the ground of nationality, which has been invoked in a number of procurement cases of the ECJ. The freedom of establishment, on the other hand, is closely connected to the use of the criteria, which the contracting authority can set concerning the suitability or quality of the tenderer itself (instead of the suitability or quality of the service provided), i.e. the selection criteria. Similarly to the free movement of goods, the freedom to provide services as well as the freedom of establishment also have grounds for restricting them. Under Article 52 TFEU the free movement rules shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. Here we also have the Court made doctrine of overriding reasons of public interest which have been used as exclusions to these freedoms.775 The principle of proportionality also has a place in the interpretation of these derogations.776

In Sodemare, the Court had to assess a situation where an Italian for-profit company had applied for approval to enter into contractual arrangements with local health and welfare centers, which would have enabled it to be reimbursed by authorities for certain health-care services.777 The authority issuing the approval rejected the application on the ground that under national legislation

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774 Case C-6/05. Para 53.
776 Case C-275/92.
777 Case C-70/95.
only non-profit-making entities could be approved. The Court held that a Member State could, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making.\footnote{Case C-70/95. Para 32.} The Court also referred to the fact that the system of social welfare was based on the principle of solidarity and the fact that the requirement did not place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they were established.\footnote{Case C-70/95. Paras 29 and 33.}

Although the issue of public procurement was not directly addressed in the ruling, it could be argued, that the arrangement in question might have met the characteristics of a public contract, because the national law in question stated that the contracts in question were to govern “financial relations between the relevant public contracting authority and the private operator and also provides for the form of reimbursement for each service on the basis of predetermined tariffs within the limits set by the regional social welfare plans”.\footnote{Case C-70/95. Para 8.}

*Hancher* and *Sauter* have criticized the ruling in *Sodemare*. In their view, the reasoning in the case dismissed the fact that it was in practice considerably more difficult for foreign companies to take part in the contractual arrangement. *Hancher* and *Sauter* have also suggested that the connection between not-for-profit characteristics of an operator and the prioritizing of social goals was quite naïve. They argue that the Court of Justice has in too many cases started from the notion that for-profit operators cannot be trusted and that Member States enjoy large discretion in setting restrictions to the freedom of establishment without detailed assessment of the principle of proportionality.\footnote{Hancher – Sauter. 2009. 20. See also Case C-141/07 and joined Cases C-171/07 and C-172/07.}

A similar approach to *Sodemare* was utilized in the Court’s ruling in *Spezzino*. In that case, the question was about a piece of national legislation whereby emergency ambulance services had to be awarded on a preferential basis without a tendering procedure to voluntary entities. The Court ruled that a Member State, “in the context of its discretion to decide the level of protection of public health and to organize its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the emergency ambulance services and may help to control costs relating to those services”. The Court did, however, require that a system of organization of the emergency ambulance services must “actually contribute
As Caranta has pointed out, the ruling in Spezzino differed considerably from the opinion of the Advocate General, who argued that, while measures which are genuinely designed to ensure the reliability and quality of a medical service and minimizing the cost to the public are, in principle, capable of justifying a restriction to fundamental freedoms, the national legislation in question was not capable of contributing to the attainment of those objectives. According to the Advocate General, the function of voluntary organisations cannot be pursued “by acting outside the scope of the common rules, but by operating within the boundaries of those rules”. He added that the procurement directive 2004/18 as well as the case law of the ECJ themselves provide opportunities to take into account social considerations. Caranta has criticized the Court’s ruling in Spezzino arguing that the discussion on possible justifications for derogating from fundamental freedoms does not sustain the conclusion that direct awards are lawful. The existence of competition (in the form of a tendering procedure) would normally encourage a non-profit entity to be more economically effective which would contribute towards budgetary efficiency, referred to by the Court itself. Caranta also suggests that the Court failed in assessing the proportionality of the national measure. In conclusion, Caranta argues, the Court of Justice was “drilling a big hole in the fabric of EU public procurement law”.

Based on the ruling in Sodemare and Spezzino, it seems that the focus is on reasoning at the level of structural decisions, concerning the whole market, instead of the level of decisions within a single public procurement procedure. The Advocate General in Spezzino pointed out that Sodemare did not entail any public procurement but was instead about the structuring of a welfare system. Ølykke has also concluded that the choice of how the market should be organized is within the competence of Member States, subject to limitations imposed by the Treaties, and it must be distinguished from the choice of the provider of services. These decisions, however, affect procurement procedures, as operators cast outside the market cannot take part in a procurement procedure within that market. Within a single procurement procedure, the possibilities to use arguments from the solidarity of the subject-matter of the procurement or the characteristics of certain market operators seem difficult to justify, if there are no general or structural restrictions on who can operate in this market. This element emphasizes the characteristic of

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782 Case C-113/13. Paras 59-60.
784 Opinion in Case C-113/13. Para 65.
785 Caranta. 2016.
786 Opinion in Case C-113/13. Paras 71-72.
787 Ølykke. 2014. 15.
EU public procurement legislation that the contracting authorities and entities seem more to *tap into the market* rather than to *mould the market*. This type of approach could be classified as the use of systemic arguments because in the reasoning the different tasks of procurement legislation and other legislation regarding the freedom of movement are taken into consideration.

The relationship between structural decisions concerning the market as a whole and decisions made within a procurement procedure was also tackled in *CoNISMA*, where the Court had to assess whether under the directive on public procurement a consortium made up by solely of universities and public authorities could take part in a public tendering procedure for the award of a service contract. The Court first referred to a provision in the directive prohibiting Member States from rejecting candidates or tenderers solely on the ground that, under the national law, they are required to be either natural or legal persons. The Court also pointed out that the provision did not distinguish between candidates or tenderers on the basis of whether they are governed by public or private law. After using such linguistic argument, the Court proceeded to refer to its previous case law where it was held that one of the primary objectives of EU public procurement rules was to “attain the widest possible opening-up of competition”. The Court then stated that although Member States can determine whether certain entities such as universities are authorized to operate on the market, if and to the extent that such entities are entitled to offer certain services on the market, national law cannot prevent them from taking part in public procurement procedures.

The Court also concluded, using consequentialist arguments, that “the effect of a restrictive interpretation of the concept of ‘economic operator’ would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as ‘public contracts’, could be awarded by mutual agreement and would thus not be covered by Community rules on equal treatment and transparency, which would be inconsistent with the aim of those rules”.

Thus, it seems that the Court of Justice has used systemic arguments in public procurement cases where the question of exemptions from Treaty rules has been addressed, but only to the extent that the Court has also taken into consideration that the restrictions to fundamental freedoms have to apply in the larger scale of the market and its structure and not in a specific public procurement procedure. Here we have an interesting element of such systemic arguments: their original context and operating mechanism must be taken into account when using them in another field of law. The nearest wider context in the logic of *sedes materiae* is consequently not necessarily the same context than the context of the applicable provision. Here we should remind

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788 Case C-305/08.
789 Case C-305/08. Para 31.
790 Case C-305/08. Para 37.
791 Case C-305/08. Paras 48-49.
ourselves of the finding of Arrowsmith concerning the difference of procurement rules and internal market rules from in the TFEU: the former set up an active obligation to promote internal market goals, whereas the latter usually set up negative obligations. This is reflected in their scope: active tendering requirements use and depend on the market whereas negative obligations to keep from restricting the market freedoms operate on the level of the market. The use of systemic (and linguistic) arguments in the rulings referred above can be held to have brought necessary, and sufficient, justificatory power to the judgments. Once again, it is submitted that teleological or consequentialist arguments regarding the objectives of public procurement legislation and the effects on certain interpretations to the achievement of these aims would not have been necessary in reaching a valid judgment. As to the criticism presented by Caranta, it is quite easy to agree with the conclusion that a more rigorous application of the principle of proportionality might have been desirable in both Sodemare and Spezzino and could have contributed to a more coherent view of the EU procurement legislation without holes in its fabric.

But is it so that the exceptions of market freedoms are completely outside the question in matters of public procurement procedures? The case law of the ECJ and the lex specialis Tedeschi principle, generated by using systemic arguments, seem to support this view. It is suggested that if in an individual procurement case, it was held that the exclusion grounds for tendering in the public procurement directives would not provide a solution to an issue where there was a genuine overriding or essential public interest which would be seriously damaged by the application of the EU public procurement rules, and that the issue had to be addressed within an individual procurement procedure, it could perhaps be possible to invoke arguments from the internal market rules of the Treaty. Such an argument would, however, have to be coupled with the use of the principle of proportionality.

Perhaps the situations which could most warrant the use of the exceptions to the fundamental freedoms could be those connected to the issue of urgency. For instance, one could imagine a situation where a public authority would have to purchase medicine without the possibility to confine to the rules in the procurement directives on time limits for receiving bids. However, in EU public procurement directives, there is a ground for using negotiated procedure without prior publication (so-called “direct award” procedure) which is related to the issue of urgency. According to Article 32 (2) (c), this procedure can be used if it is strictly necessary where, “for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with”. According to the provision, the circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority. Another situation where it could be justified to derive exemptions from the fundamental freedoms could cover the
fact that there is no “service” defined in Article 57 TFEU. This question will be covered below.

It has to be kept in mind that there are also specific provisions in the public procurement directives, which have as their basis rules from the internal market rules of the Treaty. One example of this can be found in Article 15 (2) of the public procurement directive 2014/24, where it is stated that, in conformity with point (a) of Article 346 (1) TFEU, the directive shall not apply to public contracts and design contests to the extent that the application of the directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security. As the exemption is situated specifically in the directive, there is no need to look for support from the provisions in the treaty. According to Article 346 TFEU (1), the provisions of the Treaties shall not preclude the application of the rule that any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. Such measures may not, however, adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

The reference to Article 346 TFEU as an exclusion ground for not tendering has been quite popular in Member States defence procurement. Kennedy-Loest and Pourbaix have argued that especially before the adoption of the specific directive on defence procurement, the Member States were keen to invoke Article 346 TFEU, regardless of the characteristics of the procurement in question, the result of which was that the majority of defence procurement was held to be excluded from EU rules on public procurement.792 The European Commission reacted to this practice by issuing an interpretative communication on the application of the article in the field of defence procurement and by preparing a new directive specifically designed for defence procurement (and its misuses).793 In the interpretative communication, the Commission first argued that The Court of Justice had consistently made it clear that any derogation from the rules intended to ensure the effectiveness of the rights conferred by the Treaty must be interpreted strictly.794

The possibility to refer to Article 346 as basis for not setting up a tendering procedure is interesting, because the reasoning is not based on the concept of a public contract but on the context of the procurement and the purpose of the

792 Kennedy-Loest – Pourbaix. 2010. 400.
794 Case C-328/92.
procurement. This would seem to follow a teleological logic. The case law of the Court has, however, brought the argumentation closer to the subject-matter of the contract. This has been done through the utilization of a list of military equipment from a Council decision from the 1950s (255/58).

The characteristics of the equipment on the list and the reference in Article 346 to "specifically military purposes" make the connection quite clear. The General Court has concluded that the derogation in Article 346 (1) (b) can only be applied to equipment mentioned in that list. In practice, the utility of the list is made more problematic by the general nature of the depiction of the equipment on the list and the fact that it is quite old.

The possibilities to refer to the purpose of the procurement with regard to Article 348 TEFU has been restricted even more by the subsequent case law of the Court. In *Commission v Italy*, the Court of Justice stated that in the purchase of equipment, the use of which for military purposes is “hardly certain” (i.e. dual-use items), must necessarily comply with the rules governing the award of public contracts.

In *Insinööritoimisto Instiimi*, the Court had to assess whether the purchase of a tiltable turntable for carrying out electromagnetic measurements, could be considered to be purchased specifically for military purposes and thus in the scope of Article 346 TFEU. The Court stated first that the word ‘military’ and the phrases ‘insofar as they are of a military nature’ and ‘exclusively designed’ used in in the Council list 255/58 indicate that “the products referred to in those points must, in objective terms, have a specifically military nature”. The Court then argued that the equipment in question can be considered to be intended specifically for such purposes only if it is established that, unlike the similar material intended for civilian uses invoked by the applicant in the main proceedings, that equipment, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes.

Thus the Court focused once again on the (intrinsinc) nature of the object of the procurement and not on the context-dependent purpose of that object in a specific procurement.

Based on the case law of the ECJ depicted above, it would seem that the possibilities of pointing systemic arguments to the exclusion grounds of the TFEU concerning the security interests of Member States and are restricted by the requirement of building the reasoning from the subject-matter or object of the individual public contract instead of the context-dependent purpose of the procurement. This seems to illuminate a requirement that the systemic argument has to be fitted to the context of the EU public procurement legislation, where the nature of the public contract in question has been,

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795 Case T-26/01. Para 61.
796 Case C-337/05. Para 47.
797 Case C-615/10. Para 41.
798 Case C-615/10. Para 44.
traditionally, of importance in cases regarding the scope of these rules and the scope of the requirement to tender out. In its Communication, the Commission emphasized the use of the principle of proportionality in invoking Article 346 in the context of public procurement. It has also been emphasized by Pourbaix in his article on the application of Article 346.\textsuperscript{799}

In consequence, it is argued that the Court has been willing to utilize EU internal market or free movement rules in procurement cases in order to expand the tendering requirements of contracts not specifically covered by the procurement directives. However, in issues regarding internal market of free movement rules as possible \textit{grounds of excluding} tendering requirements, the approach of the Court has been quite restrictive, with an emphasis on the \textit{Tedeschi principle}, the market as \textit{a whole} (has the market been closed from some operators \textit{in general}) and the principle of proportionality (for instance in cases regarding Article 346 TFEU). In the more restrictive approaches the Court has decidedly used systemic arguments (such as \textit{lex specialis}), but in the concession cases the reasoning has been derived from the objectives of the procurement legislation.

\textbf{9.11 ARGUMENTS FROM EU COMPETITION LAW}

The relationship between EU competition law and public procurement law as part of internal market law presents an interesting viewpoint to the use of systemic arguments in the legal reasoning of the ECJ. If the use of linguistic arguments is not sufficient in justifying a ruling, can the ECJ utilize, by way of \textit{analogy}, the provisions and concepts in EU competition law? In terms of the \textit{sedes materiae} logic, this type of argument would run \textit{horizontally} from public procurement legislation to, arguably, the next nearest field of EU law. But can the EU competition law be considered a \textit{sister field of legislation}, close to EU procurement law, and is such an analogy running in horizontal lines justifiable as a systemic argument?

\textit{Graells} has suggested that there exists a strong normative basis for the development of a more competition-oriented public procurement system. He justifies this proposition by, first, arguing from an economic perspective, that public procurement and its impact on market dynamics have potential competition distortions that would have a negative impact on social welfare. Secondly, he argues that there is significant commonality between public procurement legislation and competition law in terms of their basic goals and objectives. Both sets of \textit{economic regulation} of a horizontal nature aim at correcting market failures and, in a significant ways, overlap. Economic considerations such as economic efficiency and social welfare are the core goals of both competition law and public procurement law. According to \textit{Graells}, even if it may require certain balances and trade-offs with
complementary goals of public procurement, such as transparency and efficiency of the system, a revision from a competition perspective is largely consistent with the goals and functions of public procurement.\footnote{Graells. 2015. 116-117.}

According to Farley and Pourbaix, the way in which EU procurement and competition rules seek to achieve the aims of facilitating competition in the European Union is however quite different because, in general, each set of rules targets the conduct of different market actors. Competition law applies to the conduct of undertakings, while public procurement rules apply to public bodies or utilities. Farley and Pourbaix suggest that competition law and the public procurement rules enjoy a complicated and sometimes turbulent relationship.\footnote{Farley – Pourbaix. 2015. 15.}

One of the first key rulings of the EU courts assessing the relationship between public procurement and EU competition law was built on a legal question posed from an opposite viewpoint to the questions listed above. In Fenin, the Court of First Instance (now the General Court) assessed whether the arrangement of public procurement could be held to be in the scope of application of EU competition law.\footnote{Case T-319/99. \textit{See also} Halonen. 2015. 8-11.} In EU competition law, the key concept governing the scope of application is that of an undertaking. In both Article 101 and 102 TFEU, the rules apply to agreements between undertakings or the abuse of a dominant position of such an undertaking. In previous case law, the ECJ had held that in the context of competition law, the concept of an undertaking encompasses “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.\footnote{Case C-41/90, Höfner & Elsner. Para 21. Joined Cases C-159/91 and C-160/91, Poucet & Pistre. Para 17. Case C-244/94, Fédération Française des Sociétés d’Assurance. Para 14.} In another case, the ECJ had defined the concept of economic activity as “any activity consisting in offering goods and services on a given market is an economic activity”\footnote{Case 118/85, Commission v Italy. Para 7. Case C-35/96, Commission v Italy. Para 36. Joined Cases C-180/98 – 184/94, Pavlov. Para 75.}.

In Fenin, the Court of First Instance, stated that the “business of purchasing, as such” was not the characteristic feature of an economic activity. According to the ruling, “it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put”. The Court held that “the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity”.\footnote{Case T-319/99. Paras 36 -37. \textit{See also} Skillbeck. 2003. NA75-NA77.}

Thus, the (mere) purchasing activities of a contracting authority cannot be considered to constitute economic activity. Graells has pointed out that there
are, in fact, only two types of activities regarding (the typical activities of) public authorities which fall within the competition rules in the TFEU: the rules governing the granting of state aid (107-109 TFEU) and the granting of special or exclusive rights to public undertakings as well as the entrusting of operation of services of general economic interest (Article 106 TFEU).806

Does the Fenin ruling mean that the concept of an economic activity holds no weight in the internal market law-based EU procurement legislation? Hatzopoulos has argued that the concept of economic activity should have a uniform meaning both in competition and internal market law, because these fields of law have the same objectives and a relationship of mutual influence. He has referred to the case law by the ECJ where arguments from competition law have been utilised as justification for not applying internal market rules (Case C-355/00, Freskot807) and where exception grounds for internal market freedoms have been used to support a judgment regarding internal market law (Case C-309/99, Wouters808).809

Damjanovic has assessed the case law of the ECJ and concluded that it does not automatically follow from the internal market concept concerning the remuneration for the provision of a service that the provision of the service in question would also be considered an economic activity within the meaning of competition law.810 This conclusion was also reached by the Advocate General in his opinion in Case C-205/09 P, FENIN:

“However, the scope of freedom of competition and that of the freedom to provide services are not identical. There is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law. As stated above, the Member States may withdraw certain activities from the field of competition if they organise them in such a way that the principle of solidarity is predominant, with the result that competition law does not apply. By contrast, the way in which an activity is organised at the national level has no bearing on the application of the principle of the freedom to provide services. Thus, although there is no doubt that the provision of health care free of charge is an economic activity for the purposes of Article 49 EC, it does not necessarily follow from that that the organisations which carry on that activity are subject to competition law.”811

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806 Graells. 2015. 132-134.
807 Case C-355/00.
808 Case C-309/99.
809 Hatzopoulos. 2011. 4-6.
810 Damjanovic. 2013. 1700-1701.
811 Opinion in Case C-205/03 P. Para 51.
In *Laval*, the Court held that the fact that the activity was not economic in the sense of EU competition law did not automatically exclude it from the rules of internal market law:

“The fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances.”

*Damjanovic* has consequently argued that the concept of an economic activity does not have weight in public procurement legislation based on internal market law:

“As to the public procurement rules, which are secondary law concretizations of the free movement rules: it is well known that for the determination of their scope of application it is not relevant whether the services awarded are of economic nature or not. In particular, they also embrace public service contracts, and in the future will cover service concession contracts too, through which welfare services are awarded. For the contracting out of these services, though, a lighter, more flexible regime applies. In this context, however, the distinction between economic or non-economic activity plays no role either, as the public procurement rules refer to the concept of non-priority services (and in the future they will refer to the concept of social services) to distinguish special from the ordinary regime.”

The restrictive approach of using the concept of economic activity analogically in EU public procurement cases can be derived from the *lex specialis* principle of division of tasks between procurement legislation and EU competition law. Even though these two fields of EU law share objectives, they still have distinctively different tasks and principles of operation which do not make it simple to deduce an outcome in one field of law based on the concepts, rules and principles from the other one. This approach is also supported by the model of analogy by *Sunstein* where analogical reasoning is a version of “bottom-up” thinking in which the focus is on the particulars of an individual case and where “ideas are developed from the details”. Rather than making a policy-oriented jump from the source to the outcome, the analogical argument “operates without a comprehensive theory” using small steps.

The application of the concept of an economic activity could also present practical problems in public procurement legislation. The Court of Justice has held that the concept of an economic activity does not always require *actual* competition. Instead, economic activity can take place also when private

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812 Case C-438/05.
813 Damjanovic. 2013. 1702.
814 Sunstein. 1993. 746-748.
undertakings could practice economic activities. The tendering procedure based on EU public procurement rules is, however, contingent upon whether there is actual competition in the market. Under EU public procurement rules, contracting authorities are not obliged to tender out their contracts, if, in actuality, there is only one economic operator in the market. According to the views of the European Commission, the principle of non-discrimination would still have to be applied, even if there was no economic activity in question.

We can, thus, see a complex relationship between the procurement activities of public authorities and the market. On one hand, the purchasing activities and the tendering procedures are dependent on the effective competition in the market: only a procurement procedure where there are numerous economic operators can bring economic efficiency to the spending of public resources. On the other hand, the decisions made within the purchasing activities and the public tendering procedures affect the activities of the market: the requirements, specifications and other criteria set by contracting authorities in procurement procedures affect, which economic operators are eligible to take part in these procedures. These complexities do not provide for a fertile or trouble-free soil for the adoption of the concept of an economic activity.

The way in which the concept of an economic activity can (indirectly) affect the interpretation and application of the rules on the scope of application of the procurement legislation has to be evaluated in more detailed terms. It is necessary to consider that the character of economic or non-economic nature can be attributed, at least, in three separate ways relevant to public procurement. First, one can talk about the economic nature of the object or subject matter of the procurement or a public contract. Second, the attribute of economic or non-economic nature can be allocated to the market that the procurement procedure is utilizing. Third, one can assess the economic or non-economic nature of the economic operators in that market.

The categorization of a certain object of public purchase as non-economic and the subsequent exclusion of that object (i.e. service) from the scope of application of EU public procurement legislation does not seem to be possible, due to the lex specialis nature, the structure and the content of the EU public procurement directives. Under those directives the tendering rules are extended to a great variety of social and health care services or other services...
which, in many Member States, are provided by public authorities or not-for-profit organisations. These services enter into the realm of procurement rules, if (and only if) they are tendered out from competitive markets.\textsuperscript{818} As Commissioner \textit{Barnier} (responsible in Commission for the drafting of the directive on concessions) stated in his press release from 2012:

"En conclusion, que ce soit dans le cadre des directives actuelles ou de la proposition législatif, la reference dans les annexes aux "services se sécurité sociale" n’est pertinente que dans la mesure où un Etat member souhaitierait -dans le cadre de son autonomie en la matière – externaliser sa sécurité sociale à un opérateur économique á travers un marché public. Si jamais un Etat souhaite organizer sa sécurité sociale á travers un marché public (ce qu’il est libre de faire, même si ce scenario est très peu probable), il faudra dans ce cas précis avoir les outils juridiques pour faire respecter des régles de transparence et d’équité dans le choix du contractant privé."\textsuperscript{819}

The issue of the nature of the market itself as being non-economic does have indirect influence in the EU public procurement directives. If there is or can be no economic activity in a certain market, there are no grounds for a public procurement procedure. These situations are covered in the rules concerning the use of a negotiated procedure without a notice (a so-called \textit{direct award} procedure).\textsuperscript{820} Markets can also be \textit{restricted} on based on legislation. The directive on public procurement includes an exclusion ground for these situations. According to Article 11 of the directive 2014/24/EU, the directive “shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU”.

The economic nature of the market participants and its relationship to public procurement rules hold a question whether the non-economic characteristics of an operator can be used as exclusion grounds in the public procurement legislation. In some discussions, \textit{general interest} nature or \textit{not-for-profit} nature have been considered as grounds for giving advantages to such operators in a tendering procedure. Even though these considerations

\textsuperscript{818} The scope of application of the public procurement directives holds a large variety of these types of services, where they are not typically, at least in most Member States, purchased from the market: Foreign-affairs services, Diplomatic services, benefit services, compulsory social security services or maternity services.


\textsuperscript{820} Article 32 (2) (b) of the public procurement directive 2014/24/EU.
have held some weight in EU competition law and state aid law, EU public procurement legislation has usually taken a restrictive view on the matter. First, the ECJ has stated in many of its rulings that the nature or character of the contracting party in a public contract does not preclude the application of public procurement legislation. In its ruling in CoNISMA, the Court held that if a Member State has not restricted, by means of legislation, the provision of services to only some of the operators in the market, the national legislation cannot prevent a certain group of operators to take part in a procurement procedure concerning these services. In Centro Hospitalar de Setúbal, the Court held that a direct award to an association whose private partners carried non-profit activities would, however, offer advantage to these partners because they were not barred from engaging in economic activity.

It is, however, submitted that the European Court of Justice has responded more openly to instances where a Member State has, through national legislation, restricted the provision of services in certain markets to only some operators. The non-profit characteristic of a contractual partner to the contracting authority have been taken into account within internal market law considerations (as overriding reason in the general interest), as has been done by the Court in Sodemare and Spezzino, depicted above in Chapter 8.8. In Sodemare, the Court held that it was not against the internal market rules for a Member State to allow for only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature. According to the reasoning in the judgment, a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system implies that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making. The Court also stated that the requirement was not liable to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established. In its ruling in Spezzino, the ECJ stated that Articles 49 TFEU and 56 TFEU did not preclude national legislation, which provided that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded

822 Case C-84/03, Commission v Spain, and Case C-480/06, Commission v Germany.
823 Case C-305/08. Paras 42, 48 and 49.
824 Case C-574/12. Para 40. The general reasoning in this in-house case reflects, however, a strong consequentialist emphasis in terms of the consequences of a direct award to the competition in the market.
825 Case C-70/95. See also Case C-113/13. Paras 55-61.
826 Case C-70/95. Paras 32, 33.
directly to voluntary associations, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based.  

Graells has criticized the ruling in Spezzino, commenting that the ruling could be at odds with the state aid law criterion concerning services of general economic interest and introduced by the Court in Altmark. In Altmark, the Court held that, in order to exclude compensation for public service obligation from state aid rules, four criteria have to be met, one of which is that where recipient of the public service obligation is not chosen in a public procurement procedure, the level of compensation has to be determined on the basis of an analysis of costs which a typical undertaking would have incurred in discharging those obligations. Although this might be the case, it is once more suggested that, due to the lex specialis rule of the division of tasks between EU procurement legislation and competition law, it is not for the procurement legislation (and interpretations of that legislation) to look after the effects on award decisions to the competition in the market. This was actually supported by the ruling in Spezzino where the Court stated that “as regards the interpretation of the rules of the Treaty on competition, it follows from the findings relating to the interpretation of EU law on public procurement that there is no need to examine legislation such as that at issue in the main proceedings in relation to those rules on competition”.

In conclusion, it is suggested that the concept of an economic activity does not affect, at least in direct terms and within the meaning of EU competition law, to the scope of application of EU public procurement legislation, which is the lex specialis in terms of tendering requirements of public authorities and other contracting authorities and entities. There would, thus, seem to be limits to the systemic arguments from analogy concerning this key concept in a neighboring field of EU law.

A more relevant concept in EU public procurement legislation comes from EU internal market law on which the procurement directives are based. Key primary internal market law Articles include such concepts as services whose freedom of movement is protected by the Treaties. According to Article 57 (1), services shall be considered to be “services” within the meaning of the Treaties, where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. In Humbel, the Court of Justice stated that the essential characteristics of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider

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827 Case C-113/13, Spezzino.
829 Case C-113/13. Para 64.
and the recipient of the services.\textsuperscript{830} In the case, the Court held that publicly financed education lacked the essential characteristic of remuneration, because the State was not seeking to engage in “gainful activity”, but was fulfilling its duties to its own population, and because the education system was not, as a general rule, funded by pupils or their parents.\textsuperscript{831} Here we can see why the concept of a public (or concession) contract and the conceptual analysis connected to it are so important in interpreting EU public procurement law: the sub-elements of contract such as consideration are embedded in the very essence of EU internal market law, i.e. the free movement rules. In its subsequent case law, the Court has extended the meaning of “normally provided for remuneration” to also cover remuneration which is paid by another person than the one for whom the service is performed.\textsuperscript{832}

The differences between the internal market concept of a service “provided for remuneration” and the concept of economic activity are reflected in EU public procurement legislation in that procurement legislation is more concerned whether there is, in actuality, a potential market of economic operators interested in the consideration of a contract than whether there have been or there might be a market consisting of private entities.\textsuperscript{833} Thus, according to EU public procurement directives, a contracting authority is free to conduct a direct award if it has concluded, through advertisement, that no economic operator has been interested in participating in a procurement procedure.\textsuperscript{834}

Leaving the question of economic activity, it is of use to assess whether arguments from EU competition law could be invoked in public procurement cases. Graells has suggested that EU competition law considerations should, based on the principle of competition embedded in procurement directives (and especially Article 18(1) of the directive 2014/24), be taken into account in EU public procurement cases in a general manner. He argues that EU public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. In addition, contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition.\textsuperscript{835} In terms of the scope of the procurement rules, this approach requires, \textit{inter alia}, that public-public cooperation exception should be interpreted and applied in a very restrictive manner by the ECJ and especially to the requirement that no private provider of services is placed in a position of advantage vis-à-vis competitors or, in other

\begin{footnotesize}
\begin{enumerate}
\item[830] Case 263/86. Para 17.
\item[831] Case 263/86. Para 18.
\item[833] Case C-41/90. Para 22. \textit{See also} Sylvan, who has challenged the opinion that the existence of competition, actual or potential, is essential for the definition of a service. Sylvan. 2016. 271.
\item[834] Article 32 (2) (a) of directive 2014/24/EU.
\item[835] Graells. 2015. 486-487.
\end{enumerate}
\end{footnotesize}
words, “there is no restriction or distortion of competition in the relevant markets”. In addition, the approach requires that the interpretation of the in-house exemption should be clearly restrictive.836

The approach by Graells differs from the approach taken in this work, where the lex specialis rule of the division of tasks between EU procurement and competition rules is seen as restricting the possibilities of the Court of Justice to take into account in procurement cases arguments from the rules and principles of EU competition law. Graells has supported his suggestions with a vast amount of sound arguments, from the provisions and preambles of both the 2014 directives and those before it, from the case law of the ECJ and from the similar connections to the core principles and same type of goals.837 He has also argued that the competition principle within EU procurement directives has two dimensions. In its positive dimension, public procurement rules are designed to abolish protectionist purchasing practices by Member States that result in a segmentation of the internal market. In its negative dimension, procurement rules would have to be designed and implemented in a way that existing competition between undertakings is not distorted.838 Kunzlik, has presented an interesting critique of the views by Graells. He has argued that the concept of competition to which the public procurement directives relate is not the concept emphasizing efficiency suggested by Graells, but rather a structure of competition concept which is concerned to protect the structure of the market and equality of competitive opportunity of economic operators. According to Kunzlik, it is a concept that in the context of public procurement “simply requires that the law must ensure equality of opportunity for potential tenderers and a structure of competition for public contracts that allows sufficient opportunities for EU-wide competition, thereby ensuring the integrity of the internal market”.839 Similarly, Arrowsmith has argued that the concept of competition in EU public procurement directives “is limited to...namely removing discrimination and barriers to entry into the competitive market, and implementation of competitive procedures for transparency reasons”.840 Thus, both Kunzlik and Arrowsmith seem to support only the positive dimension of the principle of competition. Graells has responded by stating that the structure of competition concept also facilitates economic efficiency and that Kunzlik’s argument is actually no different from his.841 In addition, he has argued that “economic efficiency must, by necessity, derive from the completion of the internal market if that results in stronger competitive pressures for economic

837 Graells. 2015. 196-204.
838 Graells. 2015. 205.
839 Kunzlik. 2013. 327-335.
841 Graells. 2015. xvi-xvii.
operators”. It is, however, suggested here that the fact that two fields of EU law share a similar (ultimate) objective is not sufficient in enabling the unrestricted use of arguments from adjacent fields of law and that the lex specialis rule has to be used in curbing the excesses of this approach. As has been argued above, otherwise there would be no restrictions to using arguments from all kinds of different fields of (EU) law.

Although there are cases from the European Court of Justice which seem to support the negative dimension of the principle of competition in procurement rules (the most prominent being the ruling in Sintesi843), Arrowsmith has argued that such suggestions have been based on a misunderstanding of the functions of the core rules. According to her, “a broad interpretation involves an unjustified judicial reorientation, which is outside the legitimate bounds of judicial interpretation” and such an interpretation is “not needed to explain the outcome of CJEU decisions”.844 This observation of Arrowsmith could be reformulated as follows: the internal market principles of transparency, equal treatment and competition in the narrow sense provide enough justificatory power to make the decisions by the ECJ “valid” and the invoking of the principle or the object of competition in a broad sense is not necessary or justified. This would seem a good example of a sequential approach to legal reasoning where systemic arguments play a key role. In his opinion in the recent Specializuotas case, the Advocate General also seemed to favour a more narrow definition of competition in procurement legislation: “In the area of tendering procedures, the aim is not so much to protect the (general) competition between independent operators in the internal market as to protect the (more specific) competition which must operate in procedures for the award of public contracts(...) the protection of competition in tendering procedures must be sought, first, in secondary legislation; in this case, Directive 2004/18”.845

Graells does not support the view that EU procurement legislation should be seen as lex specialis compared to EU competition law. He argues that “the enforcement of public procurement law does not preclude the enforcement of competition law, it cannot alter the content or modify the prohibitions established by competition rules – which is one of the general traits present in bodies of rules tied together by a relationship of speciality”.846 In addition, public procurement rules are generally open-ended and can potentially give rise to both competitive and anti-competitive results. Finally, Graells argues that EU public procurement rules are not of a general character, but focus on a number of very specific phases of the tender and award process and the execution of contracts. According to Graells, public procurement rules seem

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842 Graells. 205. xv.
843 Case C-247/02. See also the opinion of the Advocate General in the case.
846 Graells. 2015. 206.
therefore insufficient to become an alternative to competition rules and competition and procurement rules remain largely complementary. It is submitted that the fact that procurement legislation is insufficient in attaining competition law goals is very much the reason why it should not be used as an instrument of competition law.

9.12 ARGUMENTS FROM EU STATE AID LAW

EU State Aid law has mostly been held to be situated within EU competition law rules. This is also reflected in the structure of TFEU, where the rules on State Aid are situated in Chapter 1 “Rules on Competition”. Unlike the rules on cartels or the abuse of a dominant position, the rules on State aid have, as their object, State measures (instead of measures by undertakings). European Commission has illustrated the objectives of the State aid law in its State aid action plan:

“State aid control comes from the need to maintain a level playing field for all undertakings active in the Single European Market, no matter in which Member State they are established. There is a particular need to be concerned with those state aid measures, which provide unwarranted selective advantages to some firms, preventing or delaying the market forces from rewarding the most competitive firms, thereby decreasing overall European competitiveness. It may also lead to a build-up of market power in the hands of some firms, for instance when companies that do not receive state aid (e.g. non-domestic firms) have to cut down on their market presence, or where state aid is used to erect entry barriers. As a result of such distortions of competition, customers may be faced with higher prices, lower quality goods and less innovation.”

The wording and argumentation is quite similar when compared to the Commission green paper on the modernization of EU public procurement policy. The emphasis of the green paper is, however, on the viewpoint of the public authorities:

“When spending public money, public purchasers have to weigh up different incentives from those of managers of a private business who bear the risk of losses and ultimately bankruptcy, and are directly controlled by market forces. For these reasons, public procurement rules provide for specific contract award procedures to enable public purchases to be made in the most

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847 Graells. 2015. 206-207.
rational, transparent and fair manner. Safeguards are put in place to compensate for the potential lack of commercial discipline in public purchasing, as well as to guard against costly preferential treatment in favour of national or local economic operators. Therefore, European public procurement rules apply to all public contracts that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European Procurement Market.**850**

When comparing these texts, we can see the difference in legal argumentation between **consequentialist** arguments (removing negative effects to competition between undertakings) and **arguments from EU principles and economic rationality** (bringing rationality, transparency and fairness into the purchasing or contract awarding activities of public authorities). The differences between internal market law and competition law depicted above can be seen in the relationship between state aid law and public procurement legislation as well. There are also other differences. The rules on State aid are situated mainly in EU primary law and documents issued by the European Commission. The rules of State aid law issue mainly negative obligations towards Member States and their public authorities, whereas the procurement legislation imposes active tendering obligations, as **Arrowsmith** has pointed out.**851**

The similarities between these fields of law start to become more apparent when one assesses the **exclusions** to the State aid obligations, whether in Commission documents such as the block exemption Regulation 330/2010 or guidelines such as the Commission Communication 2014/C 200/01 regarding guidelines for environmental protection and energy or in the case law of the European Court of Justice.**852** In many of these sources on exemptions, the issue of a **tendering procedure** has been presented as an instrument of clearing the State funding or financing in terms of State aid rules. The rules on State aid and public procurement also share the (ultimate) objective of creating and sustaining undistorted competition in the internal market. In terms of economics, both have the aim of economic efficiency.**853** Assessed in the light of the theory of reasoning by **Alexy**, arguments of analogy from EU state aid law in procurement cases could be supported by the fact that public procurement rules and state aid rules have a degree of **teleological relation** (as does EU competition law in general). Because the rules in the economic

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**851** Arrowsmith. 2014. 264.


legislation of the European Union share many objectives at least in the more general levels, analogical arguments from other fields of economic EU law could have no boundaries if a certain level of restraint were not followed. Consequently, it is suggested that the *lex specialis* approach or the *principle of division of tasks* should be taken into account when evaluating the possibilities of using analogical arguments from EU state aid law.

But what about the issue of using systemic arguments from State aid law in cases regarding the scope of application of the tendering requirement? The consequentialist argument of the negative effects to the market in awarding public contracts without tender has been utilized in the Court’s case law on in-house procurement, in the form of the requirement of restricted market activities of the in-house entity. Some scholars have criticized the laxity of this restriction in the 2014 procurement directives by arguing that awarding contracts without tender to an in-house entity with up to 20% of its activities provided in the market could constitute unlawful state aid.\(^{854}\) It is argued here that these views do not take into consideration the *lex specialis* nature of state aid rules, even though EU state aid law and procurement legislation share some objectives.

The other way in which EU State aid rules can become relevant in the question of the scope of procurement legislation is through the concept of a public contract and the element of consideration within it. As presented above, in cases where there is no consideration in the arrangement of a contracting authority and an economic operator, no public contract (or even concession contract) can be held to be in question. An arrangement including a financial input but excluding consideration is, instead, quite close to a State aid measure. From the viewpoint of State aid law, the evaluation can even exceed the question of consideration and remuneration. In *BAI*, the Court of First Instance (now the general Court) held that a State measure in favour of an undertaking cannot be excluded in principle from the concept of State aid merely because the parties undertake reciprocal commitments. Instead it was of greater importance to evaluate if the arrangement could be regarded as a *normal commercial transaction* and if there was a *real need to conclude the purchase* in question.\(^{855}\) This is not the case in procurement legislation, where no provision or no ruling by the ECJ has assessed the question whether there was a *real need for the object of the procurement*. Consequently, even though the Commission has emphasized the object of the procurement legislation on promoting economic rationality in the tendering activities of public authorities, the use of the *market economy investor principle* has not been used (at least to its fullest extent) in procurement law cases.\(^{856}\)

Moreover, the case law of the Court of Justice in procurement cases has been permissive in issues which some scholars have argued that the

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\(^{855}\) Case T-14/96, BAI. Paras 71-73.

contracting authorities conduct could constitute unlawful state aid. The Court of Justice has approved of using so-called secondary policies (i.e. taking into account in award criteria environmental aspects for instance). Prieß and von Medveldt have suggested that taking account these secondary policies in the awarding of a public contract could constitute state aid, because a market economy investor might not do so.857

In conclusion, it is suggested that the different tasks of the EU state aid law and procurement legislation and the lex specialis principle do not provide large possibilities in using arguments from EU state aid law in matters regarding the scope of procurement or tendering rules. Arrowsmith has come to the same conclusion from the texts of the public procurement directives: “the recitals to, and the Commission’s proposals for, the successive directives suggest that they are not aimed at [supporting the state aid rules]”.858 The role of state aid law is perhaps more useful as a kind of a mirror arrangement which can be compared to the concept of a public (or concession) contract: a lack of consideration transfers the arrangement from the area of procurement rules into that of state aid rules.

9.13 THE MONSTER THAT IS SGEI

Services of general economic interest are governed by Article 106 TFEU. The provision of these services has been considered so important to the citizens that provisions in EU law could be dismissed, under certain conditions, in order to ensure their availability. Another key criterion is that these services would not be supplied or would be supplied in such an insufficient way without public intervention.859 According to Article 106 (2) TFEU, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not, however, be affected to such an extent as would be contrary to the interests of the Union.

The interesting characteristic of the rules on SGEI is that it covers and affects a wide range of EU fields of law: from competition law and state aid law to internal market law and the legislation on public procurement. Neergaard has suggested that services of general economic interest could, in fact, be classified as a “conceptual disaster”.860 In terms of the legislation on public procurement, the key concept from the rules on SGEI is the imposing of a

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858 Arrowsmith. 2012b. 35.
859 Regarding the characteristics of these services see Cases C-320/91 and C-393/92.
860 Neergaard. 2009. 49.
public service obligation. On one hand, one can ask, whether the handing of the public service obligation has to be put out to tender. On another hand, it could be assessed if public or concession contracts awarded to an entity providing services of general economic interest would have to be put out to tender.

In many works on EU public procurement, the issue of services of general economic interest has been approached from the viewpoint of state aid law. The landmark ruling in Altmark is often referred to. In that case the Court held that a set of four criteria has to be met in order for the compensation for the delivery of a public service obligation not to amount to state aid. The obligation has to be clearly defined, the calculation of the compensation must be laid down in advance in an objective and transparent manner, no overcompensation must occur and the obligation has to be given through a public procurement procedure or the level of compensation must be at the level which a typical undertaking would have borne in discharging public service obligations. The Court’s ruling does not, however give guidance to the question whether the entrustment (“award”) of a public service obligation has to be tendered. Nor do the three different approaches suggested by Bovis concerning the financing of public services and SGEIs, which are situated more firmly within the realm of State aid law.

Petersen and Ølykke have argued that there is “probably not much doubt that if the provision of SGEIs fall within the scope of the public procurement directives (i.e. it is entrusted through a contract, concession or financed by an exclusive right), its provision must be tendered or at least be awarded with adherence to the principles of equal treatment and transparency”. As Petersen and Ølykke have pointed out, exemption in Article 106 (2) has not yet been successfully invoked to avoid the duty to tender.

One of the unsuccessful cases where the exemption in Article 106 (2) was attempted to be invoked in a procurement setting was Commission v Germany. In the case the Court held first that it was incumbent upon a Member State which invokes the exemption from Article 106 (2) to show that all the conditions for application were fulfilled. While considerations such as the need to ensure cross-subsidisation of ambulance services between profitable and less profitable geographic areas or the importance of a service that is in close proximity to other emergency work could justify the adoption of specific measures to ensure the provision of such service, such considerations did not clarify “how the obligation to ensure the results of the award of the contract concerned are published is liable to prevent the

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862 Case C-280/00. Paras 89-93.
863 Bovis. 2009. 163.
864 Petersen – Ølykke. 2016. 196.
865 Petersen – Ølykke. 2016. 197. See also Ølykke. 2011. 103, 115.
866 At the time Article 86 (2) EC.
accomplishment of that task of general economic interest”. Consequently, the arguments based on the exemption regarding services of general economic interest were rejected by the Court. This represents the use of a systemic argument according to which the criteria of the application of Treaty rules have to be respected even in the context of procurement, with its own system of rules.

In Commission v Italy, the Italian government stated that contracts concerning the collection of waste were intended to “delegate authority for the performance of a service of general interest, the continuity of which the operator is obliged to ensure”, which should have been taken into account in assessing the application of the services procurement directive 92/50 to those contracts. The Court held that sewage and refuse disposal services as well as sanitation and similar services were listed under services covered by the directive and that the collection and treatment of waste belonged to these concepts. It can be deduced from the ruling that, according the Court of Justice, the classification of the waste management service as a service of general interest was of no influence. Ølykke has suggested that the outcome in Commission v Italy was correct, because most services procured by contracting authorities will have general interest purposes and that the opposite outcome would have created possibilities of circumvention of the public procurement rules.

The relationship between a tendering procedure and the performance of the public service obligation has been summarized by Graells:

“The proper performance of the tasks entrusted to the public contractor generally does not require a departure from the basic principles of the TFEU and public procurement rules in the award of special or exclusive rights by the Member States. Since compliance with public procurement rules and principles concerns the contracting authority (not the public contractor) and must take place before the undertaking starts rendering the services of general interest, it does not affect in any material way the ability of the public contractor or concessionaire to discharge effectively an obligation that (as regards the time of conducting the procurement process) still does not exist.”

Graells has referred to the opinion of the Advocate General in Commission v Ireland, according to which it has to be assessed whether the entity in question was entrusted with the operation of services of general economic interest and whether the application of the provisions of primary law would have obstructed the performance, in law or in fact, of the tasks assigned to it.

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867 Case C-160/08. Paras 126-129.
868 Case C-160/08. Para 130.
869 Case C-382/05. Paras 23, 43.
870 Ølykke. 2014. 13-14.
871 Graells. 2015. 133.
Interestingly, the Advocate General then held that “it must in principle be acknowledged that, because of the lead time involved and the period to be specified for the submission of tenders, the carrying out of an award procedure entailing a call for tenders can in certain cases obstruct the performance of tasks. That would be true, for example, in the case of a utility company if interruptions or delayed commencement of the energy or water supply were to result”.

The approach suggested here is that the use of Article 106 TFEU as an exclusion from tendering obligations should be subject to the same restrictions and requirements that have been utilized in the use of other primary law rules (such as Article 346 TFEU): the rules and requirements of applying the rule and the principle of proportionality. As Article 106 (2) and Article 346 TFEU provide grounds for exemption from the primary law rules, these rules also provide (at least when the *Tedeschi principle* does not prevent this) exemption from the secondary legislation which is based on the rules of the treaty. Such approach seems to promote the coherence of EU public procurement legislation, as it restricts the possibilities to invoke new exclusions from tendering obligations from the primary law of the European Union.

Under the heading of services of general economic interest, secondary EU legislation has begun to emerge, usually concerning a specific area such as transportation or energy. This secondary legislation has included, *inter alia*, rules on tendering procedures. According to Article 1 of the Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road, the purpose of the directive is to

“define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.”

Under Article 5 of the Regulation, public service contracts shall be awarded in accordance with the rules laid down in the Regulation. There is a caveat, though: service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives.

In *Hörmann Reisen*, the Court of Justice had to give an answer to the question whether the rules on subcontracting in Regulation No 1370/2007 or in the procurement directive 2004/18 had to be applied in a contract award procedure for public passenger transport services by bus. The rules on

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872 Graells. 2015. 133. Case C-532/03. Paras 102-103. See also Stergiou. 2009.

873 See also. Ølykke. 2008. NA84-NA89.
subcontracting between the Regulation and the 2004 directive on procurement differed from another in the sense that according to the Regulation, contracting authorities could impose heavier restrictions to the use of subcontractors by the tenderers. The Court held that because the Regulation, “by its nature”, sought to provide for methods of intervention in general schemes for public contracts, that implied that it contained “special rules in relation to such schemes”. The Court then proceeded to state that as the Regulation only covered public passenger services by rail and road, its rules on subcontracting constituted a special rule and, as a *lex specialis*, took precedence over the rules on subcontracting in the procurement directive.  

In *Hörmann Reisen*, the use of systemic arguments was thus in the forefront. The ruling could also be seen as an instance, where the general principles of the TFEU concerning equal treatment and non-discrimination, common to both the Regulation and the procurement directive, were not held to require selecting the less market restricting rule. In addition, the Court seemed to respect the choices of the EU legislator in terms of the scope of tendering rules and the fact that in services of general economic interest, the requirements of equal treatment and non-discrimination could perhaps not be extended as far as in the general procurement rules of the procurement directives. On the other hand, it could be argued that the Court had no other choice, because the coverage and relationship between the tendering rules of the Regulation and the procurement directive were regulated in a clear-cut manner. It is also the view of Graells, that the *Hörmann Reisen* Judgment needs to be read in a minimalist fashion and construed to simply indicate that the general procurement rules cannot prevent a contracting authority that awards contracts for the provision of bus and tram services from prohibiting subcontracting.

In addition to the regulation on transport sector, there is other sectoral legislation concerning services of general economic interest. Regulation 1008/2008 on common rules for the operation of air services in the Community states in Article 17 that the right to operate air services shall be offered by public tender in accordance with the rules of the Regulation. Similarly, according to Article 8 in the directive 2009/72 concerning common rules for the internal market in electricity, Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency or demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. The way in which the Regulation concerning public transportation is somewhat more refined than the other sectoral legislation on tendering public service obligations is the fact that Regulation 1370/2007 seems to hint to the characteristic of public service obligations being similar to those of concession contracts. This is due to the

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874 Case C-292/15. Paras 45-47.

875 Graells. How to Crack a Nut blog. 29.10.2016.
fact that by receiving the service obligation it also receives the right to exploit the service. It is interesting that the concepts of special or exclusive rights, familiar to us in the context of services of general economic interest, are not utilized in the Court’s case law on concession contracts.

9.14 THE ROLE OF THE 2014 DIRECTIVES ON PUBLIC PROCUREMENT

Set against the backdrop of the ECJ case law depicted above, it is interesting to notice that many parts of the reasoning in this case law have been adopted as provisions in the new directives on public procurement.

One of the most striking novelties in the new directives is the addition of the autonomous concept of “procurement” in the Directives. Thus, now we have not one, but two key concepts defining the scope of application of the procurement legislation.

According to Article 1 (2) of the directive 2014/24/EU, procurement within the meaning of the directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose. Public contracts, however, have been defined in a more conservative way as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

Caranta has argued that the new definition provided in Article 1(2) of Directive 2014/24 as well as the whole legislative drafting technique of having two similar concepts leave wide margins of ambiguity and much to be desired. The two provisions might easily have been merged. Now the distinction between “procurement” and “public contract” is simply lost in most of the other language versions. In addition, the concept of public contract, which is the genus, should have been defined before the concept of procurement which is the species with the specification elements (in writing, acquisition, pecuniary interest, and so on) added at a later stage.876

In Article 1 (3) of the directive 2014/24, it is stated that the directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, the Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

876 Caranta. 2015. 391-459.
According to Wehlander, 2014 public procurement directives reflect the approach (manifested, inter alia, in Article 14 TFEU) that public procurement rules have to at least allow SGEIs to operate according to conditions enabling them to achieve their missions. Wehlander argues that this is emphasized by the statement in Article 1 of the procurement directive 2014/24 according to which the directive does not affect the freedom of Member States to define how services of general economic interest should be organized and financed, “which is indispensable for the very legitimacy of public procurement in many fields of activity”. It is, however, suggested that these statements in the procurement directives from 2014 are so general in nature that they reveal very little in terms of the relationship between public procurement legislation and the primary law rules on SGEI. This is because, the EU procurement legislation has never affected the freedom of Member States to organize and finance any of their services (at least directly); procurement directives impose tendering requirements if the Member States decide to organize or to finance their services as public or concession contracts covered by the directives.

The definition and rules on concession contracts are written in Article 5 (1) of the directive on those concession contracts. According to Article 5 (1) (a), works concession means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment. According to Article 5 (1) (b), services concession means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment. It is also stated in the Article that the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible. Here we can see a significant influence of the case law of the ECJ, as the wording regarding the nature of the consideration in these contracts as well as the nature of the risk transferred to the concessionaire is extremely close to the wording used in the case law depicted above.

877 Wehlander. 2016. 266.
The key case law in terms of in-house procurement and the cooperation between contracting authorities can also be found in the 2014 directives. According to Article 12 (1) of the directive on public procurement,

A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.878

The rules concerning cooperation between public authorities can be found in Article 12 (4) of the directive:

A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

The rules in the directives from 2014 on in-house procurement are lighter than in the Court’s case law, but the rules on public-public cooperation include new criteria compared to the case law. Implications of these differences have been addressed by Caranta and Graells, among others.879

Issues regarding cooperation between public and private parties are not expressively covered by the procurement directives from 2014. Some internal market rules in the TFEU are, however, mentioned in the provisions regarding the scope of application of the directives, such as Article 346 TFEU on security exemptions or Article 14 TFEU on services of general economic interest

878 In Article 12, there are also rules on in-house entities with more than one controlling contracting authorities as well as rules on what the control of the contracting authority means.

(among other issues).\textsuperscript{880} In the recitals of the procurement directives, there are also references to environmental protection in Article 11 TFEU.\textsuperscript{881} State aid law is mentioned in Article 69 concerning abnormally low tenders and their role in a procurement procedure, but is not covered in the provisions regarding the scope of application. Competition is also mentioned in several Articles of the procurement directives, but usually in the context of the procurement procedure and not in the context of the coverage of the directives. The main manifestation of competition can be seen in Article 18 (1) of the procurement directive 2014/24 which states that the design of the procurement shall not be made with the intention of artificially narrowing competition. According to the Article, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

As the propositions in the case law of the European Court of Justice are codified in the directives, the reasoning connected to them is situated more strongly at the linguistic level in future cases. Consequently, the Court of Justice is not, in principle, required to derive consequential reasoning in in-house cases from the objectives of procurement legislation or teleological reasoning in the tendering requirements of concession contracts. The case law of the Court also no longer illustrates the different stances of the EU legislator and the Court (as institutional actors), as their approaches have mostly been unified in many of the issues regarding the scope of tendering requirements. It will be of interest to witness the future activities of the Court in these matters and whether the Court will continue to be the pioneer in connecting the objectives of the procurement legislation to the questions on the scope of application of the legislation.

\textsuperscript{880} Articles 3, 15, 16 of directive 2014/24 on the security exemption and Article 1 of directive 2014/24 on Article 14 TFEU.

\textsuperscript{881} Recital 91 of the directive 2014/24.
10 CONCLUDING REMARKS

In the first pages of this work, it was depicted how the evolution of EU public procurement law has been rapid and expansive and how the European Court of Justice has been a central part in building this complex piece of legislation. A question was put forward whether the jurisprudence of the ECJ has met the standards which secure the coherence and legal certainty and consequently the acceptability of the rulings. The aim was also to show how, by using systemic arguments, the judicial decision-maker could both help to systematize the law and to improve legal certainty.

In Chapter 3, the ontology of EU public procurement law was evaluated, as it was held that the theory of justification of judicial decisions is interlinked to the ontology of the law. The model by Wróblewski, dividing the validity of law into systemic, factual and axiological, was utilised. In terms of systemic validity, the theory of Kelsen and its applications to the relationship between EU legal order and that of the Member States was assessed. The emphasis in the academic work on the subject was shown to have expanded from conflictual monistic and pluralistic approach to one based on dialogue between the legal systems of EU and the Member States. The work on the different constitutions of Europe by Tuori was utilised in conceptualizing the relationship between different objectives of public procurement law. The factual validity of EU (public procurement legislation) was assessed through the work of legal realists, H.L.A. Hart and the institutional theory of law by MacCormick and Weinberger. Axiological validity was approached through the theories of Radbruch, Dworkin and natural law theorists such as Fuller and Finnis. In terms of the relationship between principles and policies, it was suggested that because the fundamental logic of public procurement is based on a procedural tendering procedure, the Court of Justice has prioritized the legal standard based on procedural rights of the economic operators in a procurement procedure over legal standards based on objectives of the procurement legislation such as environmental or social protection, as the tendering procedure does not, by itself, promote such objectives, but does, instead, promote the equal treatment of the economic operators. The study took as its starting point the fact that the EU legal order gains its validity from its Treaties and is constituted in the momentary legal order which is affected by the dialogue between the constitutions of the Member States and the EU Treaties. Systemic validity of EU public procurement legislation is based on its connections to the Treaty rules on free movement. Procurement legislation is also subject to the tension-filled relationship between microeconomic and social sectoral constitutions of the EU. The factual validity of EU procurement law is built from the fact that it has been recognised as a criterion of legal decision-making by the Court of Justice and by other law-applying officials and is likely to be recognized as such in the future based on the consistent field
of normative meaning (depicted by Jääskinen). The system of EU public procurement legislation (and the EU legal order in general) is held to possess enough cohesion that values can be taken into account in legal reasoning of the judiciary, thus supporting the axiological validity of the law.

In Chapter 4, the sources of law of the EU public procurement legislation were assessed. It was held, in the lines of Wróblewski, that the decision concerning the sources of law also affect the choices of arguments in justifying judicial decisions. The model of sources of law by Siltala was utilised. It was argued that through the degrees of formality, structural axiology, institutional justification premises and the meta-theory of the law the sources of law of EU public procurement legislation have been built from international agreements on public procurement to EU primary law to the directives on public procurement to the principles of equal treatment, transparency and proportionality to legal acts and other guidelines by the European Commission.

Chapter 5 of this work was focused on legal reasoning and interpretation especially in the context of the European Court of Justice and EU public procurement legislation. It was shown how the theories of reasoning by Wróblewski and the Bielefelder Kreis were seeped into the academic work on interpretative actions of the ECJ. Different approaches to the validity, acceptability and rationality of judicial decisions were depicted with a special focus on the theories of coherence both at the levels of normativity and legal reasoning. The descriptive, normative and rational reconstruction approaches to legal reasoning were also covered. In this work, the starting point was the normative-critical approach to using legal arguments, where the second-order directive of sequential procedure was held to require the interpreter to move at the level of first-order directives from linguistic to systemic and finally teleological arguments. Using the terminology of MacCormick and Siltala, this approach is based on the Three C’s in Legal Reasoning: from linguistic consistency to the pursuit of principled, analogy-aligned coherence among legal principles and, ultimately, to the value-laden social consequences of law. In the terminology of Summers and MacCormick, one could argue for this directive based on the principle of economy of interpretative effort. It was then assessed, whether in the legal reasoning of the European Court of Justice one could find other types of second-order directives of interpretation, giving preference to certain types of arguments or topoi which would override the sequential logic of the Three C’s. Going through the academic work on the legal reasoning of the ECJ, it was suggested that there may not be a need for such directives of preference and that numerous approaches to the legal reasoning of the ECJ support the sequential directive of interpretation, including the normative theory of legal reasoning by Conway, the institutional actor approaches to legal reasoning of the ECJ by Horsley and Davies and the economy of interpretative effort by MacCormick and Summers. Especially in the context of EU public procurement legislation, which is a complex field of procedural legislation with risks of getting mixed
with other EU legislation concerning the relationship between public authorities and the market, it is suggested that the essential elements of consistency, coherence and the formal side of legal certainty (as predictability) are hampered if there is an excessive emphasis on teleological or consequential arguments. It was not argued, however, that the validity or acceptability of judicial decisions in matters regarding public procurement would not need teleological or consequential arguments. It was merely put forward that focusing only on coherence of the upper echelons of objectives and values of the law could deprive the legislation of much of the coherence which was intended for it by the legislator at the level of provisions.

In Chapter 6 the problems of indeterminacy in EU procurement legislation were depicted at both the levels of linguistic and teleological interpretation. In Chapter 7 it was argued that by using systemic arguments (as an individual group) the consistency, coherence and formal legal certainty of EU procurement legislation can be promoted. Utilisation of these arguments in legal reasoning also helps to systematize the procurement legislation or at least lends itself more easily to systematisation by legal scholars. In Chapter 8 the content and relationship between different types of systemic arguments was covered. Particular emphasis was given to arguments from analogy and precedents as well as the role of concepts in systemic reasoning.

In Chapter 9, the case law of the ECJ in cases concerning the scope of application of public procurement legislation and the requirement to tender out public contracts was evaluated through the normative viewpoint of sequential use of arguments. It was shown how the consistency and coherence (and consequently the validity) of the Court's reasoning and justification was improved through focusing on the concept of a public contract and its elements such as consideration. Same positive effects were drawn from the conceptual analysis of cooperation between contracting authorities. On the other hand, it was argued that the excessive use of teleological and consequential arguments had had negative effects on the coherence of both the normative field of EU public procurement legislation and the reasoning itself (with "jumps" from objectives of the legislation to a particular proposition not easily reconcilable with the provisions of the procurement legislation such as procurement directives). The excessive use of teleological or consequential arguments has led to the expansion (against the intentions of the drafters of the procurement directives in the 1990s) of tendering requirements concerning concession contracts, the use of the procurement legislation to achieving objectives of EU competition law, the introduction of new objectives such as administrative efficiency (hard to reconcile with the principle of equal treatment), indeterminacy regarding the relationship and the division of tasks between free movement rules of the Treaty and the procurement directives, and the general uncertainty as to what types of arrangements of public authorities are covered by tendering rules. The institutional relationship between EU legislator and the ECJ has been heavily centred on the Court as a bellwether in issues regarding the coverage of tendering requirements, with the legislator
settling for the codification of the case law. Through systemic reasoning (using, *inter alia*, conceptual analysis and the *lex specialis* rule) it is argued that better cooperation with these institutional actors could have been achieved. In addition, the use of systemic arguments (and particularly the *lex specialis* rule) has been and could have been even more efficiently used as an essential tool in preventing the useless duplication of reasons and mixing together pieces of legislation which may be loosely connected in terms of their objectives but not in terms of their tasks. In many cases it is hard to understand, what specific shortages in acceptability (from the viewpoint of the audience of the decisions or the value foundation of EU law or justifiability in general) have required the frequent use of teleological or consequential arguments in the reasoning of the Court.

I conclusion, if the EU public procurement legislation is seen as a jungle of rules, then it is the main argument of this work that the travellers within that jungle would be better off guiding themselves – not by the stars but – with the use of a map.
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