Proportionality in methodology?

Identifying a methodological framework to provide acceptance and legitimacy for the CJEU

Author: Anton Orrenius
Supervisor: Andreas Moberg
Examiner: Joachim Åhman

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Department of Law
University of Gothenburg, School of Business, Economics and Law

UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

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Abbreviations etc.

CJEU	Court of Justice of the European Union
EU	European Union
e.g.	for example
FCC	German Federal Constitutional Court
i.e.	that is
ibid	in the same place
inter alia	among other things
supra	above
PSPP	Secondary markets public sector asset programme
ultra vires	beyond powers, 'invalid'

INTRODUCTION

A methodological framework to provide acceptance and legitimacy for the Court

1. Methodology to provide acceptance and legitimacy for the CJEU

The Court of Justice of the European Union (CJEU) performs to different audiences. The quality of the performance will be harshly judged by these audiences. From time to time, the Court receives criticism under different labels. How can the Court avoid being criticised for its performance? Effectively, how can the Court receive the acceptance of its audiences? Eckes states that 'sound legal method can ensure acceptance and recognition'.[1] This is my starting point.

In order to be accepted in the legal context of the EU, the CJEU should rely on sound methodology. This thesis will provide a theory about what such a methodology could, or perhaps should, look like. In this work, I will identify four key components of a *methodological framework* which seeks to provide the Court with *acceptance* and *legitimacy*. While I prefer the term 'acceptance',[2] seeing as this study is focused on what the Court should do in order to avoid criticism from its audiences, I will still include 'legitimacy' since it is a term that is usually used in this context.[3] Let me put it this way: if the Court's work receives the acceptance of its audiences, it can be deemed legitimate. To me, legitimacy is a juridically framed consequence of acceptance. With that said, the methodological framework will, principally, settle for 'acceptance'. Some might say that 'legitimacy' requires *something* beyond merely 'avoiding criticism'. Perhaps there is more to legitimacy than that – perhaps the Court needs to provide 'justice', or *something* like it, to be legitimate. Regardless of such a view, the purpose of this thesis is to identify a methodological framework which enables the Court to avoid criticism on a methodological basis, and to me, this intention means that the methodological framework will also provide the Court with legitimacy, since its work will be deemed acceptable by the audiences in the EU legal context.

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[1] Eckes, C., 'European Union Legal Methods – Moving Away from Integration', in Neergaard U. and Nielsen, R. (eds.), *European Legal Method: Towards a New European Legal Realism*, DJØF Publishing, Copenhagen, 2013, p. 179.

[2] Mainly used on account on the inspiration from Paunio, E., *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*, Ashgate, Farnham, 2012, where she states, for example, that the work of courts must be 'rationally acceptable to the legal community in question' on p. 53.

[3] See for example Adams, M. et al., 'Introduction: Judging Europe's Judges', in Adams, M. et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, Oxford, 2013, p. 3.

Handed down in the spring of 2020, *PSPP*[4] is the case that sparked my inspiration for this work, and the interesting situation it gave rise to, seeing as the German Federal Constitutional Court (FCC) was so unhappy with the Court's application of the principle of proportionality in *Weiss*[5] that it declared the decision *ultra vires* in Germany. As I will make clear in the following, the scope of this thesis extends beyond these cases, but the situation remains eye-catching. To me, this is the kind of criticism that the Court, through sound methodology, must seek to avoid. Not only did *PSPP* make me wonder about the details (or *components*, as I have come to call them) of 'sound methodology', I also wanted to see whether effects (or *consequences* in the terminology of this thesis) did have a place among those details. Do consequences hold any position, pronounced or unpronounced, in the methodological framework? While I admit that it was the FCC's strong reaction in *PSPP* that put this question in my mind, I maintain that there is an interesting discussion to be had about the position of consequences in the Court's methodology, even though it may seem provocative just to mention it as a possibility (some might say that the Court is not a legislator and that it should not reason from consequences etc.).

Furthermore, the title of the thesis needs to be commented. Without giving it all away, I will submit that the study does find some compelling arguments for the inclusion of consequences in the methodological framework. In my view, the *value of proportionality*[6] carries such importance for the Member States that such a demand of proportionality serves as an interesting counterweight to the EU perspective's expectations on the direct effect and primacy – or simply, the effectiveness – of Union law. As you will see, I thus argue that a methodological framework that recognises the Member States' demand for proportionality is indeed more suitable for providing the Court with acceptance and legitimacy in the Union legal context. That being said, the purpose of this thesis, i.e. identifying a methodological framework with the capacity to provide the Court with such acceptance and legitimacy, will be fulfilled in two Parts.

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[4] Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, ECLI:DE:BVerfG:2020: rs20200505.2bvr085915, hereinafter *PSPP*.
[5] Judgment of the Court (Grand Chamber) of 11 December 2018, *Weiss*, C-493/17, ECLI: EU:C:2018:1000, hereinafter *Weiss*.
[6] I will elaborate on this below, see section 7 and section 10.

In Part I, which follows this Introduction, the four key components of the methodological framework will be identified, and described one at the time. Then, in Part II, I will analyse the position of consequences in this methodological framework. The analysis will build on the components as they were presented in Part I. In addition to this, the components will be revised and specified as their continued assessment is carried out in Part II. Before we get to those two Parts, however, section 2 elaborates on the relevance of the *PSPP* and *Weiss* cases, and section 3 provides some theoretical and methodological remarks. The rest of the thesis has the following outline.

Section 4 is the beginning of Part I and describes the Court's legal reasoning and teleological interpretation. Section 5 provides an overview of the Court's approach to precedent, while section 6 elaborates on the legal context and the communicative situation the Court finds itself in. Section 7 will touch on the importance of legal principles in EU law and section 8 provides a summary of the components presented in Part I. Section 9 begins Part II and provides a reminder about why we should care about the CJEU's methodology. Section 10 consists of a discussion of the position of consequences in the methodological framework, and is divided into three subsections. While section 10.1 and 10.2 revisits the components in the methodological framework, section 10.3 provides an illustration of a concept I have called 'methodological deficit'. Lastly, section 11 concludes Part II, and thus also the thesis, with a brief summary.

With that said, we now look into some of the details of what actually transpired when the FCC in *PSPP* voiced some serious complaints regarding the Court's methodology in *Weiss*.

2. The demands on methodology – a methodological framework

Giving its decision in *Weiss*, the CJEU ruled that there was no reason to doubt the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset programme (PSPP, for short).[7] Interestingly, the FCC then took issue with not only the decision in the judgment, but also the Court's methodological approach. In *PSPP*, the German

[7] *Weiss*, *supra* note 5, para 168.

court initially recognised that the CJEU, creating its 'methodological standards […] based on the (constitutional) legal traditions common to the Member States', enjoys a margin of error when it uses these standards to interpret and apply the Treaties.[8] Put differently, the methodological standards and margin of error combines for, as I call it, a *methodological framework* within which the Court must operate in order to receive the acceptance of national courts such as the FCC. If the Court was to step outside of this framework when interpreting and applying the Treaties, 'its actions are no longer covered by the mandate conferred' upon it, the FCC concludes.[9] Let me make clear, though, that this thesis extends far beyond the scope of the situation of the *PSPP* and *Weiss* cases. This situation is used as an *example* for two reasons: first, the cases provide a good *entry* into the subject of methodology (even though some might argue that the FCC's standpoint is more focused on the principle of proportionality specifically than methodology in general) and, second, they showcase the *importance* of the subject of methodology, seeing as the FCC subsequently declared the *Weiss*-decision *ultra vires* with reference to the Court's lacking methodology. The thesis will, following this entrance into the subject, proceed to a description of a methodological framework which, on the one hand, can be applied to the CJEU's *work in general* and, on the other hand, may be utilised to understand *specific cases* like *PSPP*/*Weiss*. In short, the methodological framework is a theory about the CJEU.

Turning back to *PSPP*, then, it should be remarked that the FCC asserted that the Court in *Weiss* failed to take account of the *effects* of the PSPP in such an apparent manner that the 'review of proportionality [was] rendered meaningless'.[10] Accusing the CJEU of neglecting to make an appropriate balancing of the interests at stake in the case, the FCC stated:

> When applied in this manner, as undertaken by the CJEU, the principle of proportionality enshrined in Art. 5(1) second sentence and Art. 5(4) TEU cannot fulfil its corrective function for the purposes of safeguarding the

[8] *PSPP*, *supra* note 4, para 112.
[9] *Ibid*, para 113.
[10] *Ibid*, para 133.

> competences of the Member States. The *complete disregard of* the PSPP's economic policy *effects* means that already the determination of the ESCB's objectives is *not comprehensible from a methodological perspective* […] given that suitability and necessity of the PSPP are not balanced against the economic policy effects […]. This contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law.[11]

It is indeed interesting to observe the severity of the wording with which the FCC attacked the Court's *methodological performance*. At the very least, this sends a clear signal of how important this issue is to the German court.[12] In summary, the FCC considered the CJEU's methodology in *Weiss* to be so lacking that the decision had to be declared *ultra vires*.[13]

It was thus the method with which the principle of proportionality was applied that failed to convince the German court. In this sense, the CJEU did not put enough emphasis on the consequences of the program (PSPP) at hand in the case. Conversely, I argue that this means that the FCC would not have declared the *Weiss*-decision *ultra vires* if the CJEU had in fact analysed the consequences of the PSPP more thoroughly. This is the idea that has provided the inspiration for the question posed in the Part II of this thesis: should consequences be included in a theory about a methodological framework of the CJEU? My focus on consequences in Part II thus stems from the FCC's strong reaction in *PSPP*, but, again, the study extends beyond that particular judgment. Rather, the idea is to analyse whether a methodological framework that includes consequences could be more successful in providing acceptance and legitimacy for the CJEU's work among the different audiences of the Union legal context than a methodological framework that does not openly include consequences in that manner.

Before turning to the discussion of what position *consequences specifically* could hold in such a framework (Part II), however, we need to identify the *general components* that build into the CJEU's methodological framework (Part I). First

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[11] *Ibid.* Italics added.

[12] Regarding 'judicial signalling', see section 10.2 below.

[13] *PSPP*, *supra* note 4, para 154.

of all, though, a few comments regarding some of the methodological and theoretical issues in this thesis are in order.

3. Methodological and theoretical considerations in a theoretical study of methodology

This is a study of methodology in the CJEU. Despite the associations such a notion may bring to mind, it is *not* a study of the case law of the CJEU (which is remarkably evident if you, reader, were to take a quick look at the content of the reference list). Rather, it is a study that seeks to identify a methodological framework that can provide acceptance and legitimacy for the Court, based on previous research including both theoretical and practical analyses of the CJEU's work. This particular statement demands, in my view, answers to two questions: Why not carry out a study of the Court's case law if you want to describe its methodology? How is this thesis different from the previous research seemingly already available on the subject?

First of all, the nature of the type of work this thesis is has not allowed for such a comprehensive study of the CJEU's case law. There would simply not have been enough time to complete a useful work employing that method. This is the case since such a work would also have needed to be based on some sort of a theoretical structure against which the case law was assessed. Suffice it to say that some effort would thus have been needed to be put into constructing or identifying some sort of a theoretical framework anyway. With that said, it would indeed have been interesting to 'test' the theory of the particular methodological framework proposed below against a substantive body of the Court's case law in order to see whether this theory can in fact help the understanding of certain features of the Court's work. Another aspect to the choice of method in this thesis is the intention of employing a *wider view of which components may be identified* as parts of the methodological framework. If the thesis was confined to being a study of case law from the CJEU, this intention would have been, in my view, hindered by the fact that the study of components would have been limited to the Court's own perspective. Rather, it is more interesting to consult the available research, in order to receive perspectives and viewpoints different from those that may be attained from a pure study of case law. This

way, I feel confident in saying that I have made an attempt to identify the key components of the methodological framework proposed here, without a significant risk of overlooking one or several relevant aspects or features that can be associated with the CJEU's methodology. Still, as suggested above, in a context where the format would have allowed for it, a study of the Court's methodology that could combine a theoretical outlook (perhaps along the lines of what is presented here in this thesis) with an elaborate study of case law would probably yield interesting results.

In summary, seeing as a combined study of that type would have been well beyond the timeframe of this thesis, I have focused on laying down the 'groundwork' of such a theoretical perspective, by identifying a methodological framework of the CJEU. While this methodological framework does not make any claim to be the only way to understand the Court's work, I argue that it provides a *starting point* for those interested in the key aspects that influence the way the CJEU carries out its task. Additionally, the methodological framework is based on the underlying idea that the Court's work needs to be *accepted in the Union legal context*. This particular notion of acceptance in the context within which the Court is embedded is discussed in section 6 below and identified as one of the key components of the methodological framework. Speaking of this view of the legal context as a 'methodological component', we turn to the other of the two questions posed above.

Secondly, this thesis is different from most of the works on methodology in the CJEU. Framing it in that way, however, is somewhat misleading – seeing as there is not much written about the 'methodology of the CJEU'. The *legal reasoning of the CJEU*, though, is another story! Here, the doctrine is rich. Wandering this particular land of EU research, I came across Gunnar Beck's *The Legal Reasoning of the Court of Justice of the EU*[14] which has provided a great deal of inspiration for this thesis. In a somewhat different area of research, one finds Elina Paunio's *Legal Certainty in Multilingual EU Law*[15] – another work that has influenced this thesis considerably. While these two works cover different parts of the field of CJEU-research, they have one thing in common; they describe

[14] Beck, G., *The Legal Reasoning of the Court of Justice of the EU*, Hart, Oxford, 2012.
[15] Paunio, 2012, *supra* note 2.

aspects of EU law that inform and influence the methodology of the CJEU, or, put differently, aspects that make for important components of the CJEU's methodological framework.

Returning to the question of how this thesis is different from works such as Beck's or Paunio's, the short answer is that this thesis looks to bring the insights from authors as Beck (pertaining to the legal reasoning of the Court) and insights from authors as Paunio (pertaining to the legal context of the Court) *together* in one context. Only by utilising a more extensive perspective, I argue, can a *comprehensive* notion of a methodological framework of the CJEU be established. On this point I might add that while Beck, for example, uses a very broad view of 'legal reasoning', which enables him to include a variety of aspects which he finds to be of interest within the context of reasoning, I understand legal reasoning in a narrower sense. Beck's concept of legal reasoning comes really close to a concept of methodology. At this stage, I find that if 'legal reasoning' becomes almost indistinguishable from 'method' or 'methodology', the understanding of the CJEU's work becomes hindered. Put differently, a wide concept of legal reasoning will only get you so far. It may enable an analysis of several interesting aspects, but if there are certain methodological characteristics 'left-over' that do not relate to reasoning, they cannot be considered within a theory of a 'legal reasoning framework' that seeks to explain the Court's work. Instead, the methodological framework proposed in this thesis thus promotes a narrow concept of legal reasoning as one of its key components. With that said, this framework consists not only of the two components of the legal reasoning and legal context of the CJEU, but also *its approach to previous case law* as well as the *legal principles of EU law*. These components are described below in Part I, and subsequently added into the methodological framework, illustrated by a larger box containing the four components in smaller boxes. After the framework illustration has been completed, I will turn in Part II to the question of the position of consequences in this methodological framework.

Briefly, it can be noted that the order in which the components are presented in Part I does not represent their comparative importance with regard to each other. The order of presentation is neutral on this point. Suffice it to say that they carry importance from different perspectives. The understanding of the

Court as embedded in its broader context is of crucial importance for the perspective that the Court needs to seek acceptance and legitimacy in the first place. In this sense, this component may be seen as the most important from the standpoint employed in this work. The other components, however, are crucial – as I see them – for a methodology that provides such acceptance and legitimacy. The order of presentation of the components is thus not decisive, since the main point is that it is the *whole*, the four of them together in a methodological framework, that is of interest here.

To summarise the points made thus far, this is a study which seeks to, first, propose a theory of a methodological framework that seeks to explain the CJEU's work from a methodological point of view and, second, examine the position of consequences or consequential analysis in this framework. The study draws on previous literature that has described and analysed the concepts and features of EU law that influence the Court's methodology, but seeks to bring these insights *together in one context*, illustrated by a methodological framework.

In order to identify these particular concepts and features, I have adopted an *institutional approach*, which allows for a 'dynamic perspective' rather than a 'static understanding of law'.[16] This is necessary because a static legal analysis of the main sources of EU law – the Treaties and the CJEU's case law – would not be able to identify all relevant aspects of the Court's methodology. Instead, it is required that the CJEU's institutional position, embedded in the broader legal and political context of the European Union, can be taken into account. With a static understanding of law, certain aspects relevant to the understanding of the methodology of the CJEU may remain untouched or unidentified. Maintaining a dynamic perspective can thus facilitate a deeper understanding of the CJEU's work and function. This is true especially since the 'process of adjudication [itself] will necessarily have to be dynamic' in a context where the Court has to apply 'law [that] is increasingly interlinking different sets of interests' and is 'expected to weigh and reconcile the relevant interests' on its own.[17]

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[16] Bakardjieva Engelbrekt, A., 'Institutionell teori och metod', in F. Korling and M. Zamboni (eds.), *Juridisk metodlära*, Studentlitteratur, Lund, 2013, p. 271, my translation.
[17] Adams, 2013, *supra* note 3, p. 2.

On this point, the thesis largely follows the standpoint adopted in *European Legal Method: Towards a New European Legal Realism*,[18] and Nielsen's notion of 'one big system':

> Institutional legal theory has contributed significantly to understanding law as a phenomenon that function beyond the nation states. In my view the functioning of EU law beyond the state is better understood if EU law, the domestic law of the Member States and at least the European parts of public international law are seen as forming 'one big system'.[19]

It is in this particular sense that I commit to an institutional approach, utilising an understanding of EU law as one big system beyond domestic law. It is not necessarily to allow for a more 'open and including attitude to relevant source material'.[20] What is essential for this thesis is instead the realisation that the CJEU is 'embedded in [its] broader political environment'.[21] Put differently, the possibility of taking into account the 'broader social, economic and cultural context' that law and legal rules exist in[22] that an institutional approach provides thus enables a perspective that the Court should be seen as part of the 'one big system' that is the EU legal order.

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[18] Nielsen, R., 'New European Legal Realism – New Problems, New Solutions?', in Neergaard U. and Nielsen, R. (eds.), *European Legal Method: Towards a New European Legal Realism*, DJØF Publishing, Copenhagen, 2013, pp. 75-124.
[19] *Ibid*, p. 121.
[20] Bakardjieva Engelbrekt, 2013, *supra* note 16, p. 268, my translation.
[21] Dyevre, A., 'Outline of a Legal Realistic Approach to Legal Integration', in Neergard, U. and Nielsen, R. (eds.), *European Legal Method: Towards a New European Legal Realism,* DJØF Publishing, Copenhagen, 2013, p. 68.
[22] Bakardjieva Engelbrekt, 2013, *supra* note 16, p. 240, my translation.

PART I

The four components of the methodological framework

4. CJEU's legal reasoning and interpretation

With all introductory remarks out of the way, we now turn to constructing the methodological framework-theory that is proposed in this thesis. The theory is based on the identification of four methodological components, and the first component pertains to the *legal reasoning* of the Court. This component is also the only one in the methodological framework that actually has a piece of written EU law clearly attached to it. From Article 36 in the Statute of the Court of Justice of the European Union ('CJEU Statute' below) thus follows that judgments shall state the reasons on which they are based. Interestingly, though, this is essentially the only provision of written law which governs the legal reasoning of the CJEU. And it does not really govern the legal reasoning of the CJEU. It only demands that the Court state the reasons behind its decision-making. The provision in Article 36 is important, of course – for example from a legal certainty-point of view – but it seems superficial and quite uninformative for those interested in understanding in what way legal reasoning builds into the CJEU's methodology. Put differently, I submit that merely 'stating reasons' is not the same as the concept of 'legal reasoning'. The stated reasons may provide certain hints about the reasoning behind some of the decisions and interpretations in a specific case, but it does not paint a full picture of the actual reasoning that took place. More importantly, a narrow concept of stated reasons is not at all of the same interest from a methodological point of view as a more comprehensive understanding of the concept of legal reasoning. Again, Article 36 is thus not very helpful if you are looking for knowledge about the CJEU's legal reasoning. In order to understand reasoning beyond the stated reasons, we must ask the question of what then, if not written provisions of EU law, feeds into the design of the legal reasoning of the Court?

Before turning to the answer to this question, which encapsulates the purpose of this section, I will briefly clarify my use of the term legal reasoning. I have already touched on the fact that legal reasoning should be understood in a narrow sense for the purposes of this thesis in section 3. Bengoetxea, MacCormick, and Moral note that '[b]y analysing the legal reasoning of the Court, one draws attention to how the Court takes account of reasons – legal

norms, values, principles, policies - to *justify its decisions*'.[23] In my view, legal reasoning should thus be understood as the effort to justify a decision or an interpretation. While it is not certain that the Court itself feels the need to justify its decisions and interpretations – perhaps it merely feels obliged to explain them – I maintain that the purpose of the methodological framework, which is to provide the CJEU with acceptance, makes the methodological understanding of legal reasoning as a way of justifying decisions and interpretations valid, regardless of the Court's self-perception. The audiences will still demand justification. Returning to the question above, we shall now take a closer look at what builds into the design of the legal reasoning of the CJEU.

The FCC actually touched on it in *PSPP* and, as mentioned above, the CJEU is expected to create its methodological approach with inspiration from the legal traditions common to the Member States.[24] Put differently, 'in justifying its decisions the [CJEU] is bound by the constraints of judicial reasoning accepted in the EU legal system'.[25] Furthermore, the legal reasoning used by the Court 'should correspond, as much as possible, to the traditional understanding of judicial reasoning'.[26] Being a sentiment of this, the CJEU's legal reasoning as a means of justifying its decisions mainly consists of so-called *formal reasoning*, meaning that the legitimacy of the Court stems from the 'recognition of, and not creation of, the law'.[27]

Poiares Maduro has pointed out that the use of formal reasoning by the CJEU made it possible to present the European integration through expansion of Union law 'as a logical process of legal reasoning'.[28] It must be noted, however, that a long time has passed since the CJEU first adopted this style of reasoning, in the beginning of the European integration. With this in mind, it seems relatively easy to agree with Poiares Maduro when he declares that:

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[23] Bengoetxea, J., MacCormick, N., and Moral, L. 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in de Búrca, G. and Weiler, J.H.H., *The European Court of Justice*, Oxford University Press, Oxford, 2001, p. 44. Italics added.

[24] *PSPP*, *supra* note 4, para 112.

[25] Paunio, 2012, *supra* note 2, p. 22.

[26] Poiares Maduro, M., *We the Court: the European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty*, Hart, Oxford, 1998, p. 10.

[27] *Ibid*, p. 10.

[28] *Ibid*, p. 25.

> The adoption of *formal reasoning* as a model of justification in the Court's decisions is, in part, a consequence of legal traditions in Member States, that are, nevertheless, *becoming outdated*.[29]

Thus, while formal reasoning is still needed to maintain principles of certainty and equality, it is 'no longer sufficient'[30] in the legal culture of the European Union today. Additionally, this particular model of justification means that the exercise of *discretion* in the Court's reasoning stays concealed, as no 'second-order justification' is provided.[31] In short, formal reasoning is superficial in the same way as the provision in Article 36 of the CJEU Statute is superficial: there is no demand for justification beyond the formal reasons for the decisions and interpretations. What then lies behind the formal reasoning that needs justification? What guides the choices and decisions made by the Court beyond the formal reasons presented in the judgment? This is where we turn to the subject of *interpretation*. To be clear, this section does not look to provide a thorough analysis of legal interpretation. Rather, the purpose is to present the subject on a descriptive level that is sufficient to illustrate how the concept of interpretation is important for the understanding of legal reasoning as a component of the CJEU's methodological framework.

Generally, there are mainly four models of interpretation, all providing the Court with different discretional scope, that can be distinguished – consisting of historical interpretation, literal interpretation, systematic interpretation and teleological interpretation.[32] The moment in which interpretation enters the process of adjudication has been expressed in different ways. Put simply, the CJEU 'must apply European law where its meaning is clear, and must interpret it where its meaning is not clear'.[33] According to this view, some cases will involve no interpretation. However, the process of determining whether a case

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[29] *Ibid*, p. 22. Italics added.
[30] *Ibid*, p. 20.
[31] *Ibid.*
[32] Schütze, R. *European Union Law*, 2nd edn., Cambridge University Press, Cambridge, 2018, p. 211.
[33] *Ibid.*

is clear can be said to 'already includ[e] an interpretative evaluation of the case in question'.[34] Regardless of which stance one prefers, interpretation is an important part of the legal reasoning of the CJEU, considering that, on the one hand, the majority of cases before the CJEU are hard[35] and, on the other hand, the indeterminacy of EU law is a cause for judicial discretion,[36] which in turn is exercised through interpretation.

Between the four interpretational models presented above, the CJEU has famously leaned towards the teleological one, seeing as it has preferred a 'purposive style'.[37] It has been argued that this approach is 'especially well suited to the problems of interpretation to which the [Union] law sometimes give rise'.[38] There are two main reasons for the suitability of a teleological model: the manner in which provisions of EU law have been drafted and the multilingual character of EU law.[39] It has been claimed that the provisions of the Treaties and other EU legislation have, on the one hand, been drafted with a 'high degree of vagueness' and, on the other hand, a 'teleological theme written into [their] texture'.[40] While it is true, then, that it is the dominant style of interpretation, the CJEU 'refers not only to teleological arguments but also to systemic and contextual as well as linguistic arguments'.[41] In fact, as Paunio puts it, reasoning based on teleological considerations is 'particularly persuasive […] when tied to systemic arguments'.[42] In summary, it is accurate to describe the interpretational model employed by the CJEU in its legal reasoning as a teleological one which does not leave linguistic and systemic arguments completely out of the picture.

The objective of this section has been to show that the legal reasoning of the CJEU is built in no small part around the interpretational model the Court has chosen. In the Court's work, interpretation plays an important role because of

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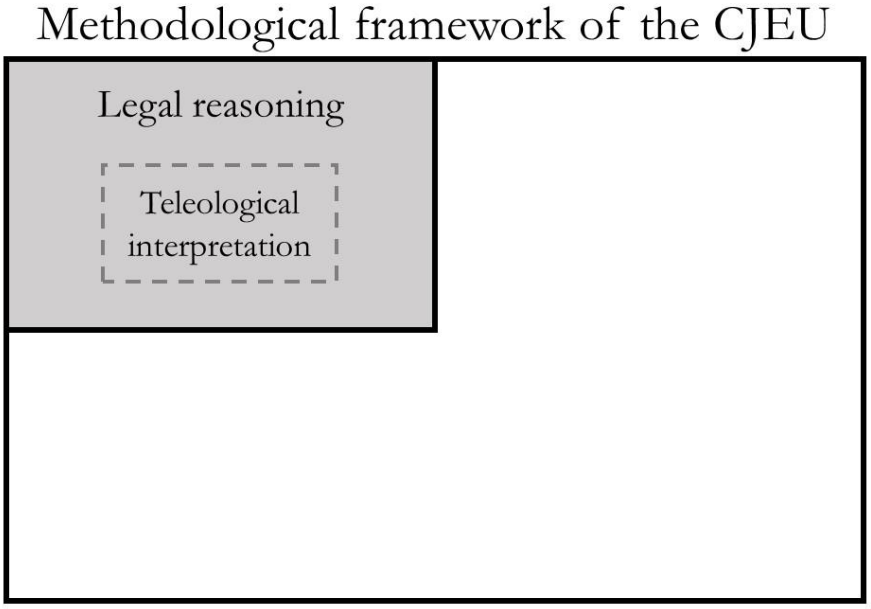
[34] Paunio, 2012, *supra* note 2, p. 23.
[35] *Ibid.*
[36] Poiares Maduro, 1998, *supra* note 26, pp. 17-18.
[37] Bengoetxea et al., 2001 *supra* note 23, p. 45. See also Arnull, A., *The European Union and its Court of Justice*, 2nd edn., Oxford University Press, Oxford, 2006, p. 515.
[38] Arnull, 2006, *supra* note 37, p. 515.
[39] *Ibid*, p. 517.
[40] Beck, 2012, *supra* note 14, p. 157.
[41] Paunio, 2012, *supra* note 2, p. 42.
[42] *Ibid*, p. 45.

the problems posed by vagueness and multilingualism in EU law. In order to address these challenges, the Court has adopted a teleological method of interpretation. To avoid going beyond the introductory purpose of this section, I have stayed at a brief overview and not gone too deep into the vast subject that is interpretation in legal reasoning. More constructive comments will be provided in Part II (see especially section 10.1), where I build on the points presented above. For those further interested in the interpretational nitty-gritty of the CJEU, I refer to the several already existing works on this subject (some of which are cited in this thesis).

Returning to the overriding topic of methodology, some clarifications may be in order. I believe that my use of the word 'methodology' is best explained by relativising it to other components of the terminology used in the thesis up to this point. The methodology of the CJEU should be understood in a broad sense for the purposes of this thesis. It is the methodological framework, and the boundaries it imposes, within which the CJEU must operate in order to ensure the acceptance and legitimacy of its work when it decides a case and presents its decision in a judgment. In doing so, presenting the judgment, the Court has recourse to legal reasoning. An integral piece of the legal reasoning of the CJEU is, as shown above, teleological interpretation. Hence, one component of the CJEU's methodological framework is legal reasoning, and a sub-component to the legal reasoning of the CJEU is teleological interpretation. This relationship between the concepts of methodology, legal reasoning, and teleological interpretation is illustrated by the methodological framework:



Much of the work done on the Court's legal reasoning paints a picture where the concept of legal reasoning is equivalent to the concept of method (see the discussion above in section 3 regarding Beck's view on legal reasoning), but I would like to distinguish between the two, and thus argue that legal reasoning only is one part of the methodology of the CJEU. To be sure, it is a critical part, but it can still be seen as one component among others. Moreover, the other methodological components described in the following sections, can be said to 'inform the reasoning', but it is still possible to maintain a distinction between them. In short, legal reasoning may be recognised as the Court's 'methodological voice'.[43] As we move towards filling out the methodological framework illustration sketched out above, the focus will now be shifted to how *recognition of precedent* plays a part in the CJEU's methodology.

5. CJEU's approach to precedent

Put simply, the CJEU 'is not bound by its previous decisions but in practice it does not often depart from them'.[44] This position should be understood in the context of what the Court was when it was established. At this stage, the Court

[43] I expand on this in the summarising section 8, seeing as it is better explained once the other components of the methodological framework have been described.
[44] Arnull, 2006, *supra* note 37, p. 529.

was the decision-maker of first and last resort, and seeing as its decisions could only be changed through the hefty process of Treaty amendment, it was 'imperative that the Court [had] the power to change the direction of its case-law'.[45] Moreover, the understanding of the approach of the CJEU to its previous case law is furthered not only by knowledge about the 'institutional' position the Court received within the Union when the latter was formed, but also by its 'traditional' position between civil law and common law perspectives. On this point, the Court is considered to lean towards the civilian tradition in which judges '[do] not feel compelled to analyse or reconcile the earlier judgments in the manner of the common law judge'.[46] In summary, the original position of the CJEU within the Union legal order and to some extent the heritage of the civil law tradition combines for the fundamental view that the Court is not unconditionally bound by its previous case law.

Ultimately, though, it is evident that the CJEU 'pay[s] strong regard to over-time coherence of the decisions [it] hand[s] down'.[47] Additionally, the specific nature of Union law and its *vagueness* have provided for the role of case law as a 'source of consistent interpretation and […] legal certainty'.[48] In fact, the Court has increasingly referred to previous case law in its judgments. Beck looked at the 314 judgments from the Court in 2011 that had been made available in English, and found that the Court referred to previous case law in 303 of them.[49] In 116 of these 303 judgments, the CJEU 'appealed at least once to the 'settled case law' on a particular point of law'.[50] Regarding such a policy in the approach to previous case law, it can be concluded that the recognition of precedent clearly influences the methodology of the CJEU.

For the purposes of this thesis, there is merit to drawing on Beck's distinction between *interpretative precedents* and *self-standing precedents*.[51] In his view, interpretative precedents replace a written norm with an authoritative

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[45] *Ibid.*
[46] *Ibid*, p. 530.
[47] Bengoetxea et al., 2001, *supra* note 23, p. 46.
[48] Beck, 2012, *supra* note 14, p. 237.
[49] *Ibid*, p. 239.
[50] *Ibid.*
[51] Beck, 2012, *supra* note 14, p. 236.

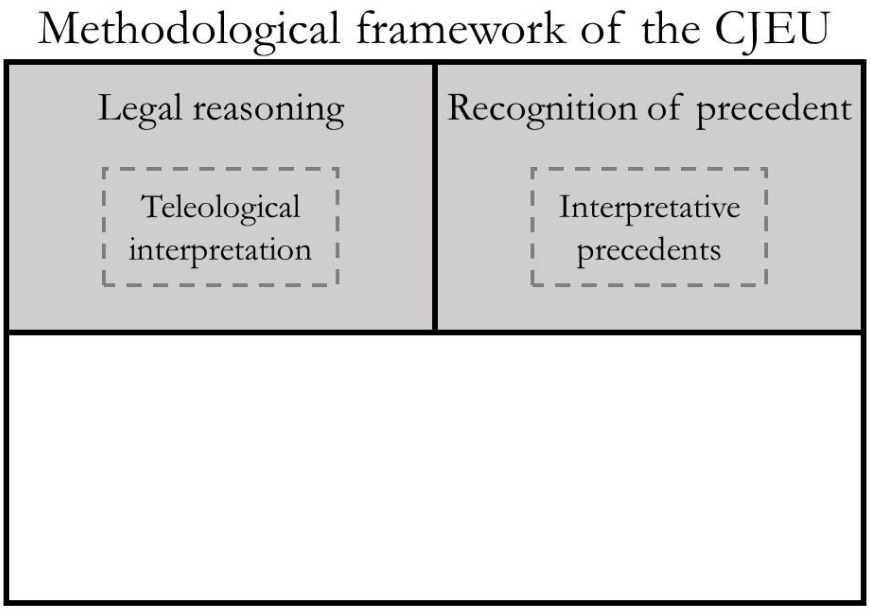
interpretation in a judge-made rule and self-standing precedents are constructed when the Court fills 'gaps' in the Union law.[52] The latter category essentially creates rules or norms within the legal system in question. In Union law, it is 'gap-closing' self-standing precedents of the CJEU which have provided for fundamental principles such as 'supremacy, direct effect and harmonious interpretation […] which in turn underlie key developments in the law of judicial protection'.[53] Interpretative precedents, on the other hand, are less remarkable and they make up 'by far the largest number of EU precedents'.[54] It is, nonetheless, these 'every-day-precedents' that are of the biggest interest here. Crucially, the interpretative precedents have a 'dual nature […] as both interpretative arguments and rules'.[55] Put differently, they aid the 'construction [of] interpretative criteria in the application of legal rules' while they also 'generally represent more or less binding quasi-rules about how to interpret certain provisions'.[56]

In this context, I would like to propose a concept of *methodological precedents*. Some of the interpretative precedents would then be regarded as methodological in character inasmuch they produce a demand for a certain *way of application* of a rule which is applicable to the case in question. This concept would then be a sub-category to interpretative precedents and differs from that general category of precedents since the norm established by a methodological precedent does not merely demand a *certain interpretation* of a rule or provision of Union law but rather a *specific methodology with which the interpretation and application* of a rule or provision is carried out by the Court. I will return to methodological precedents in Part II,[57] seeing as the main purpose of Part I is to provide a level of detail regarding these general components that is sufficient for the inclusion of them in the methodological framework to seem warranted. It is my view that the more analytical comments are better suited for Part II, which to some extent utilises

[52] *Ibid.*
[53] *Ibid*, p. 242.
[54] *Ibid*, p. 240.
[55] *Ibid*, p. 107.
[56] *Ibid*, p. 107.
[57] See specifically section 10.2.

PSPP/Weiss as examples in order to reduce the level of abstraction in the discussion of this methodological framework.

For now, it will thus suffice to add recognition of precedent as a main component, seeing as 'the very fabric of judicial legitimacy would be threatened if courts paid no attention and felt in no way constrained by their own previous decisions',[58] and the category of interpretative precedents as a sub-component to the illustration of the methodological framework introduced in section 4.



With that said, we now move on to the next piece of the methodological framework puzzle, namely the aspect of EU law often referred to as the dialogue between the Court and not only the national courts, but also other participants in the Union *legal context*.

6. CJEU in the Union legal context and the communicative situation

In describing the legal context within which the CJEU finds itself, the preliminary ruling procedure appears to be a natural point of departure. The purpose here, however, is not to provide a description of the material features of this procedure, which concern, for instance, questions of the *scope* (i.e. questions such as 'courts which may refer', 'matters which may be referred' and

[58] Beck, 2012, *supra* note 14, p. 339.

'discretion or obligation to refer') or of the *operation* (i.e. questions of 'form and transmission of the reference', 'suspension of the proceedings before the national court', 'appeal against the reference', etc.) of the procedure.[59] Rather, the objective is to clarify why it is important that this procedure is considered when identifying the components of the methodological framework.

Because of the preliminary ruling procedure, the CJEU is in a 'constant dialogue with the national courts'.[60] The term 'dialogue' is common in the discussion of the preliminary ruling procedure. For the purposes of this thesis, however, I rely on a broader concept of dialogue, not confined to the interaction between the CJEU and national courts within this procedure. Instead, this methodological framework builds on the idea of a *communicative situation* – consisting of a 'dialogue between [the] relevant parties' – as it has been presented by Paunio.[61] In my view, this perspective is clearly enabled by an institutional approach to law, which provides a theoretical outlook that facilitates an understanding of the Court as an institution embedded in a broader context.

Before expanding on Paunio's slightly broader view and the communicative situation, the preliminary ruling procedure deserves further comment, especially since the 'case law on preliminary rulings […] has a critical impact upon the way in which the national and EU legal systems interact and communicate'.[62] Furthermore, the preliminary rulings serve to fulfil a variety of functions besides framing the relationship between national courts and the CJEU, such as providing a 'mechanism for discourse between Member States, the CJEU, and the Union institutions' or representing a 'cornerstone of compliance with the principle of effective judicial protection'.[63] Of the most interest here is the so-called 'mechanism for discourse'. De la Mare and Donnelly explain their preference for 'discourse' over 'dialogue' with reference to the fact that the

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[59] For such an overview, see chapter 4 in Lasok, K.P.E., Millet, T., and Howard, A., *Judicial Control in the EU: Procedures and Principles*, Richmond Law & Tax, Richmond, 2004, pp. 308-361.
[60] Rosas, A., 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', *European Journal of Legal Studies*, vol. 1, no. 2, 2008, p. 123.
[61] Paunio, 2012, *supra* note 2, p. 189.
[62] De la Mare, T. and Donnelly, C. 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis', in P. Craig and G. de Búrca, *The Evolution of EU Law*, 2. ed., Oxford University Press, Oxford, 2011, p. 363.
[63] *Ibid*, p. 376.

preliminary ruling procedure is not strictly a bilateral arrangement, seeing as 'third party Member States, the Commission, and other interested parties' often are involved in the proceedings before the CJEU in one way or the other.[64] Regardless of whether the preliminary ruling procedure gives rise to a dialogue or a discourse, it is clear that the context within which the CJEU operates is *communicative*. Additionally, as I do not look to limit the discussion of the communicativeness of the legal context the CJEU participates in to only revolve around the preliminary ruling procedure, there is no need to settle for only one term when framing this particular context. Rather, the aim is to show that this *situation* is part and parcel of the Court's methodology, and thus an important component of the methodological framework.

To do this, as suggested above, I draw on Paunio's thorough overview of the legal multilingual context that the CJEU is embedded in, which she has described with terms such as 'a communicative situation',[65] 'different communicative spheres',[66] or a 'common cognitive basis among the EU legal community'.[67] While this inspiration is indeed important for the thesis, my approach to the communicative context is similar to the one adopted by Poiares Maduro in his analysis of the general rule on the free movement of goods, where he states:

> It is not, however, intended to develop here any such analysis of European legal discourse. The aim is simply to note how the existence of this legal discourse constrains the European Court of Justice and affects its case law […]. Moreover, effective constraints do not simply flow from a discourse with national courts or other national institutions. They also arise from a discourse with the political and legislative actors of the [Union].[68]

With that said, the point here is thus not to dive deep into the multilingual nature of Union law as Paunio has done in her impressive work. Instead, I look to proceed from her conclusion that the 'pluralist EU framework […] divided into

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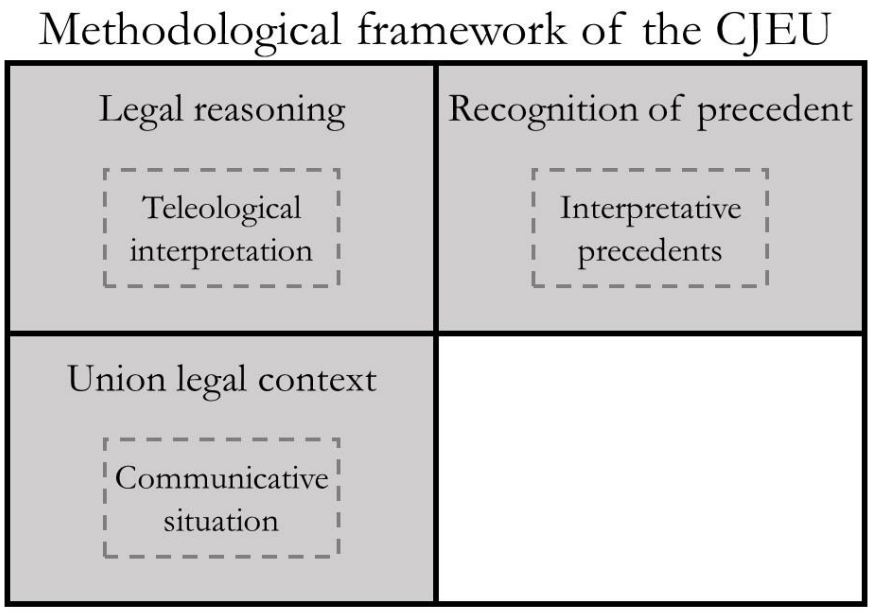
[64] *Ibid*, p. 378.
[65] Paunio, 2012, *supra* note 2, p. 189.
[66] *Ibid*, p. 148.
[67] *Ibid*, p. 155
[68] Poiares Maduro, 1998, *supra* note 26, p. 31.

the EU audience and [27] national audiences, creating EU legal meaning which is accepted within both audiences requires that a communicative situation is established'.[69] Hence, the Court's work is influenced and constrained by this particular legal context and therefore I argue that it is clear that this communicative situation (in no small part created by virtue of the nature of the preliminary ruling procedure) should be viewed as an important component of the methodological framework of the CJEU. In order for it to promote acceptance and legitimacy for the Court, the methodological framework must include this specific legal context. This particular piece can be added to the illustration like follows:



Seeing the methodological framework proposed in this thesis nearing its completion, we now turn to the final key component: *legal principles of EU law*.

7. CJEU and the principles developed in the case law

This section represents a somewhat paradoxical attempt to cover a subject that is not easily covered in a space as small as this section. It is, nonetheless, in my view, essential to make this attempt, seeing as the recognition of legal principles is vital for a theory that seeks to promote the understanding of the CJEU's work.

[69] Paunio, 2012, *supra* note 2, p. 189.

Why is that then? Well, the creation of legal principles has been a remarkable feature of the CJEU in its history. It is indeed the 'development of the general principles through the case law' that has been the main contributor to the criticism under the label of 'judicial activism' directed at the Court.[70] Before I proceed, some terminological remarks must be made.

The topic of discussion in this section involves several different descriptive terms: 'principles', 'legal principles', 'general principles', 'unwritten principles', 'doctrines', or simply 'concepts' or 'notions'. Depending on your theoretical starting point, the *direct effect of EU law*, for instance, could be described either as a principle or a doctrine. Generally, the *doctrine of direct effect* seems to be preferred on occasions where the discussion is more linked to the *nature* of the EU legal order or something close thereto,[71] while the *principle of direct effect* is used if the context regards more concrete statements on a particular *point of law*[72] or if the discussion is directed at the fact that direct effect was constructed within the frame of developments in the CJEU's *case law*.[73] Here, it is this last outlook that is the most important one. In my view, regardless of whether the principles discussed below are framed in terms of legal principles, general principles, doctrines, etc., the common denominator between them is the fact that they were, at some point, *framed within the Court's case law*.

An early warning may also be in order before the discussion of principles is continued. Below in section 10, I make a theoretical argument that consists of comparing primacy and direct effect with proportionality. I understand that this might appear perplexing to some readers, seeing as the direct effect and primacy of EU law remain *unwritten principles* to this day, having stayed left out of the Treaties for decades, while the principle of proportionality is an established piece of *written law*, which provides for a 'rule' or a 'test' that is applied in concrete cases. For now, however, I ask that you, reader, bear with me and keep an open

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[70] Rosas, A. and Armati, L., *EU Constitutional Law: An Introduction*, 3rd edn., Hart Publishing, Oxford, 2018, pp. 42-43.
[71] See for instance, Schütze, 2018, *supra* note 32, p. 79 or De Witte, B., 'Direct Effect, Primacy, and the Nature of the Legal Order', in Craig, P. & de Búrca, G. (eds.), *The Evolution of EU Law*, 2nd edn., Oxford University Press, Oxford, 2011, p. 324.
[72] Rosas and Armati, 2018, *supra* note 70, p. 77.
[73] Lenaerts, K., 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in Adams, M. et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, Oxford, 2013, p. 15.

mind as I lay down the foundations for the study of the argument that the *value of proportionality* can provide a counterweight, from the Member State perspective, against the Union perspective's demands for direct effect and primacy. Suffice it to say here, however, that I argue that the mere fact that there are differences between the principles of direct effect and primacy, on the one hand, and the principle of proportionality, on the other hand, should not stand in the way of a comparative analysis of them. After all, they started out the same, as principles laid down in the case law, and the fact that one of them subsequently 'found [its] way into the text of the Treaties'[74] is, in my view, not enough to altogether preclude a comparative discussion of these concepts.

With that said, we turn to a brief discussion of the direct effect and primacy of EU law. The purpose here is not to describe the developments in the Court's case law, starting with the seminal cases of *Van Gend en Loos* and *Costa*,[75] which gave rise to the two principles. Instead, the idea is to highlight the point made by De Witte about the special nature of the doctrines of direct effect and primacy:

> Direct effect and primacy are not just frequently studied objects of Union law among others; *these principles* are also taken to be defining characteristics of EU law. Those doctrines are therefore *accompanied by meta-doctrines about the overall nature of the European Union legal order*.[76]

It is upon this concept of *meta-doctrines* I wish to draw in the discussion below. Moreover, De Witte's view on these principles as meta-doctrines is in my opinion closely linked to Tuori's theoretical concept of *background-principles*[77] of law. In his level-based system of law, Tuori clarifies that legal principles can, on the one hand, be seen as norms (or simply, 'rules') applied by courts but also, on the other hand, as background-principles which reconcile, explain and even give

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[74] Rosas and Armati, 2018, *supra* note 70, p. 55. See also Schütze, 2018, *supra* note 32, p. 360.
[75] For a quick summary, see de Witte, 2011, *supra* note 71, pp. 324-329.
[76] *Ibid*, p. 324. Italics added.
[77] Tuori, K., 'Om rättssäkerhet och sociala rättigheter (samt mycket annat), *Tidskrift for rettsvitenskap*, vol. 116, no. 3, 2003, p. 349.

rise to legal norms on the surface-level of law.[78] At this point, however, critics may protest: 'the principles of direct effect and primacy do not serve such a surface-level function!'. While I recognise the merit of this response, I maintain that this idea of viewing certain legal principles as meta-doctrines or background principles is of interest when the key components in the methodological framework are identified.

Seeing as both concepts – direct effect and primacy – were laid down in the Court's case law, they do fit the notion of principles that is used in this section. As such, I thus argue that the understanding of these principles as meta-doctrines, as put forward by De Witte, holds great merit. This dual view, that the principles give rise to rules on the surface-level as well as on the background- or meta-level, does hold true, in my view, at least for the *development* of these principles. When first established, the principle of direct effect, for example, was given form in the case law by a 'test' applied to the details of a case[79] (the fact that the 'facts of the case' regarded legislative acts or other acts is irrelevant, in my view; the principle was still 'applied' on the surface-level). In the Union legal order of today, however, I accept that the principles of direct effect and primacy perhaps should be seen *only as meta-doctrines* of EU law, and that there is not really a case to be made for their nature as rules on the surface-level. Put differently, De Witte's statement that the principles of direct effect and primacy are *accompanied* by meta-doctrines is perhaps not the best way to frame it. Instead, this 'non-dual' view of these doctrines seems to be supported by the fact that the CJEU, within the context of the preliminary ruling procedure, 'sometimes 'forgets' the assessment of the norm's direct effect and proceeds immediately to the question of compatibility of national law with EU law', if the referring court does not explicitly ask a 'direct effect question'.[80] I argue that this should be seen as evidence that the doctrine of direct effect mainly functions in background, and not on the surface-level.

Turning back to the methodological framework, I argue that the perception of direct effect and primacy as meta-doctrines of Union law gives rise to

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[78] *Ibid*, p. 349.
[79] Schütze, 2018, *supra* note 32, pp. 84-86.
[80] De Witte, 2011, *supra* note 71, p. 332.

methodological implications. If these principles are something else than rules to decide cases by on the surface-level, it is my view that their different quality means that they provide rules on the methodological level. Put differently, the meta-doctrines of Union law impose on the CJEU *rules on how to decide cases* (rather than the *rules to decide cases by* that are typically provided by legal principles). Interestingly, this conclusion gives a hint about an inherent issue in the 'development of general principles through case law', which often has resulted in criticism against the Court.[81] While I stand by the statement that certain principles (i.e. the meta-doctrines) give rise to rules on the methodological level, one can certainly see the problem in that the CJEU is *making its own methodological rules through principles developed in the case law*. Are the methodological standards not supposed to be based on the common constitutional traditions of the Member States? From this perspective, it seems understandable that the development of 'general' or 'unwritten' principles through the Court's case law on occasion has brought about 'accusation[s] of judicial activism'.[82]

At this stage, however, it is important to remember that the CJEU 'has always sought inspiration in the legal systems of the Member States' when laying down a general principle.[83] Furthermore, the Court seeks to connect the general principles to the 'legislative choices contained and expressed in the provisions […] of EU law itself or from those reflected in the laws of the Member States, including instruments of international law to which they adhere'.[84] In this sense, there is an argument for a certain degree of legitimacy embedded in these 'judge-made'[85] principles. Again, however, it must be noted that this is not necessarily true for the principles of direct effect and primacy. As I see it, when the Court in *Van Gend en Loos* 'cut the umbilical cord with classic international law by insisting that the European legal order was a 'new legal order'"[86] the argument that direct effect has a 'national counterpart' in the Member States' constitutional

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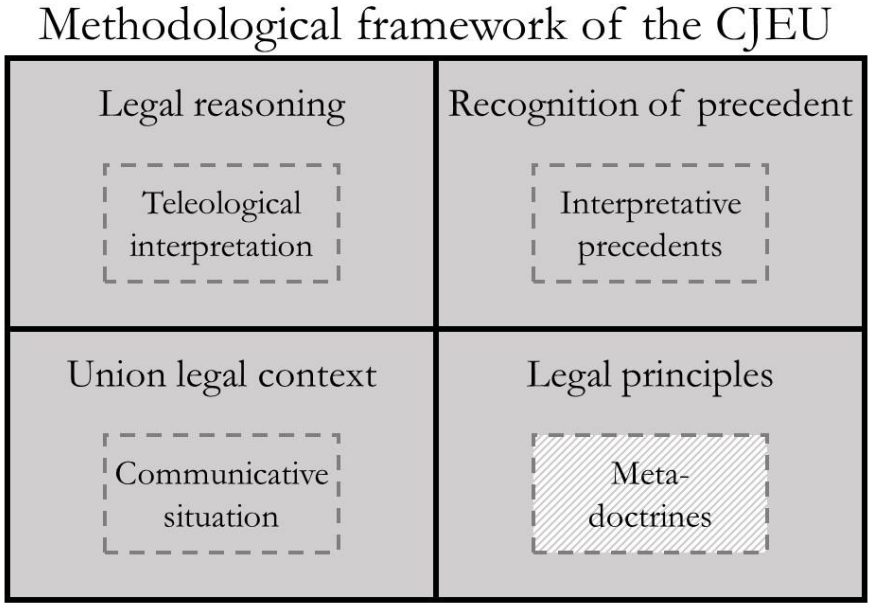
[81] Rosas and Armati, 2018, *supra* note 70, p. 42-43.
[82] *Ibid.* 43.
[83] *Ibid*, p. 56.
[84] Mazák, J. and Moser, M.K., 'Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case Law', in Adams, M. et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, Oxford, 2013, pp. 68-69.
[85] *Ibid*, p. 68.
[86] Schütze, 2018, *supra* note 32, p. 78.

traditions went out the window. The same goes for primacy, which 'could not be derived from classic international law; and for that reason [the] Court had to declare the Union legal order autonomous from ordinary international law' in *Costa*.[87] Consequently, I argue that there is, to some extent, a lacking degree of legitimacy behind the meta-doctrines of direct effect and primacy (in general, this notion is in no way novel, seeing as, for instance, the differing views on the primacy of EU law in the 'European perspective' and the 'national perspective(s)' is a well-established fact[88]) were they to be seen as components of the methodological framework proposed here. And this they will be, considering the impact they have (had) on Union law as well as the Court's methodological approach.

That last statement holds true for the meta-doctrines, specifically, as well as legal principles generally. In summary, then, *legal principles* laid down in the case law have come to play and important role in the way the CJEU carries out its task, and the *meta-doctrines of direct effect and primacy* provide rules not on the surface-level but rather on the methodological level (rules on how to decide cases, that is, and not rules to decide cases by). Accordingly, this viewpoint delivers the fourth and final piece to our methodological framework, which may now be illustrated in the following way:

[87] *Ibid*, p. 123.
[88] Schütze, 2018, *supra* note 32, p. 120.



Legal principles as a concept is thus added as the fourth main component of the methodological framework of the CJEU, seeing as the construction of legal principles through the case law has provided the Court with an interesting way of influencing the European integration through developments of EU law. The sub-component of meta-doctrines is intended to show that certain principles, the doctrines of direct effect and primacy being the ones discussed above, have come to carry particular weight on the methodological level. As you may have noticed, this sub-component has not been entirely filled out in the framework's regular grey base-colour. This is intended to be an indication of the doubts put forward above regarding the capacity of this sub-component to provide acceptance and legitimacy for the Court. Hence, in this illustration of the methodological framework, the idea is that the full grey rectangle represents a level of methodological performance that generally is sufficient to provide the Court with acceptance and legitimacy. With that said, the inadequacies of the sub-component of meta-doctrines are thus one among other topics of discussion in Part II.

Before we turn to that discussion, however, a summary of the four main components in a methodological framework that seeks to provide the Court with acceptance and legitimacy may be needed. Following that summary, we turn in

Part II to the question of whether consequences are to be included in the framework sketched out here in Part I.

8. Summary: a methodological framework of the CJEU

As has been made clear in the foregoing, I propose a methodological framework of the CJEU which consists of four parts. To avoid attracting criticism on a methodological basis, the CJEU must seek to carry out its task within this framework and with respect to constraints posed by its four components.

First of all, from the fundamental call on the Court to provide reasons for its decisions follows that *legal reasoning* constitutes an integral part of the CJEU's methodology. The Court's model of reasoning is guided by the views on acceptable legal reasoning in the Member States. This has inspired a model of *formal reasoning*. It has been argued, however, that formal reasoning is not sufficient in a legal order where judicial discretion is present. In the exercise of this discretion the Court employs a model of *teleological interpretation*, which is focused on purposive interpretations. In its reasoning, the Court must succeed in justifying its decisions in the judgment of any given case. Furthermore, legal reasoning can be described as the 'methodological voice' in the methodological framework-theory. While the three remaining components may be distinguished from the legal reasoning, it is within the function of reasoning they are 'expressed'. That is what I mean when I state that the other components 'inform the reasoning'. Still, it is my view that such a relationship between them does not preclude a separate examination of the four components.

Secondly, the CJEU has to bear in mind its *previous case law*. While there is no strict doctrine in Union law dictating that the Court must follow its previous decisions, that is in reality what the Court does more often than not. This is not only a consequence of the CJEU's institutional and traditional *position*, but can also be understood against the fact that a somewhat firmer approach to precedent does provide for an overall *coherence* in the interpretation of Union law as well as increased legal *certainty*. What is more, building on the concept of so-called *interpretative precedents* and their dual nature, I have proposed a sub-category of *methodological precedents*. These precedents demand a certain methodology when the application or interpretation of specific norm is carried out by the Court,

rather than simply a certain interpretation of a norm (which is the case with interpretative precedents in general). Hence, if there is an interpretative or methodological precedent of relevance to a case, the Court should decide in coherence with it to ensure that the judgment is well in accordance with the values of consistent interpretation and legal certainty.[89]

Thirdly, the Union legal context must be considered as a factor when constructing a theory about the methodology of the CJEU. With the preliminary ruling procedure as the main contributing factor, the Court finds itself in a *communicative situation*. While the preliminary ruling procedure set the stage for a situation of this nature, the communicativeness of it extends beyond this particular procedure. Effectively, the judgments and decisions of the Court – which 'create legal meaning' in the Union legal order – must be acceptable to both the EU audience and the Member State audiences. In my view, the CJEU's participation in both a dialogue with national courts as well as a broader Union discourse clearly influences the manner in which the Court carries out its task, and the communicative situation is thus an important component of the methodological framework.

Fourthly, the development of legal principles through case law has provided the Court with, first, an opportunity to influence EU law as well as, secondly, certain methodological rules. While different terms are utilised when the concept of principles is discussed in the EU doctrine, the standpoint here has been that the common denominator for 'principles' in this context is that they have been developed in the case law of the CJEU. In relation to principles that give rise to rules on the methodological level, I have argued that this is the case regarding direct effect and primacy of EU law, which consequently have been described as *meta-doctrines* in the foregoing. As meta-doctrines, direct effect and primacy thus mainly function in the background, rather than as rules to decide cases by on the surface-level of EU law. Put differently, direct effect and primacy cannot

[89] In a situation where the Court wishes to depart from the rules laid down by previous case law, this should be regarded as a 'methodological deficit' within this component of the framework. To retain an acceptable level of methodological soundness, the Court needs to make up for the deficit within at least one other component. I expand on this notion of methodological deficit below, in section 10.2 and section 10.3.

really be viewed as rules which are applied to the facts of a case (anymore, I argue – in my view, they *started out* like this), but rather as meta-doctrines that influence the *nature* of EU law and, consequently, the *methodology* of the Court.

In creating legal principles through its case law, however, the Court has attracted criticism, often under the label of *judicial activism*. Much can be said about this – and much has been said about this – so suffice it here to note that the fact that certain principles developed through case law have methodological implications can be viewed as an issue considering that the Court is expected to create its methodological standards with inspiration from the traditions of the Member States. In other words, one way of understanding the criticism is that the Court is creating its own rules by which it plays the methodological game. With that said, the Court usually finds guidance in the Treaties and the legal orders of the Member States when it lays down a principle in the case law. Yet, I have argued, that the meta-doctrines of direct effect and primacy cannot be viewed as a fully legitimate component of the methodological framework. In other words, this component is not completely consistent with the framework's purpose of providing the Court with acceptance and legitimacy. Nonetheless, the meta-doctrines are included in the CJEU's methodological framework, being a sub-component to the main component of legal principles, as the paramount influence of legal principles on EU law cannot be denied. I will revisit this issue in Part II.

With that said, we now leave the description of the four components of the methodological framework of the CJEU behind, as they have provided the foundation upon which Part II builds. Seeing as the identification of the key components in the framework has been finalised, the exploration of whether consequences can be integrated into this framework may proceed below.

PART II

Proportionality in methodology?

9. Why methodology matters – some reminding remarks

Before turning to the discussion regarding the position of consequences in the methodological framework laid out in Part I, I will briefly highlight some of the underlying reasons behind the attempted construction of such a framework for the CJEU. In essence, this section attempts to provide a brief answer to the question of why we should care about methodology in the CJEU.

The first perspective on this question concerns the view that the Court needs to justify its judgments. Put differently, I thus argue that the CJEU requires a methodology capable of providing justification. Generally, the justification of a judgment depends on the reasoning provided by the Court. As suggested in section 4, however, formal reasoning – simply stating reasons, that is – does not suffice as the sole component of a process that seeks to ensure justification of the Court's judgments. Reasoning of that superficial kind will not convince the various audiences in the Union legal context that the Court's interpretation or decision in a particular case is justified. Furthermore, formal reasoning is based on the adjudication of *clear cases*, and not many cases before the CJEU are clear. As Bengoetxea, MacCormick, and Moral put it:

> The objection is then that the justification of clear cases has been adopted by the legal community and the dominant legal culture as the paradigm of judicial justification, and this to such an extent that […] there is no particularly strong pressure on judges to spell out how they have come to formulate the premises the way they have.[90]

Instead, the demand for 'acceptable reasons for the premises'[91] beyond the formal reasoning of a judgment is valid. Put differently, the CJEU must justify the sub-decisions behind the major premises in its judgment.[92] If this is done convincingly, the Court's judgment can be considered *internally justified*.[93] Yet, Bengoetxea et al. argues, such internal justification still is not enough. Rather,

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[90] Bengoetxea et al., 2001, *supra* note 23, p. 50.
[91] *Ibid.*
[92] *Ibid*, p. 61.
[93] *Ibid.*

they also demand *external justification*, achieved through a 'theory of coherence or integrity and notion of integration' which allows for 'taking account of all elements of the legal system, but also of normative constitutional and political theories'.[94] In my view, this notion of external justification clearly goes hand in hand with the understanding of the Court as a participant in a communicative situation where it has to provide justification that makes its judgments acceptable to the different audiences in the Union legal context.

It is along these lines of thought that I believe that an institutional approach is necessary. The notion of external justification calls for a perspective that takes into account the fact that the CJEU is embedded in *one big system*,[95] and that the CJEU needs to be understood in this context rather than in isolation. Since the thesis seeks to construct a theory of a methodological framework to provide acceptance and legitimacy for the Court, it is important that the theoretical approach utilised here enables a perspective that provides for an understanding of the Court's context. To summarise, the demand on the Court's legal reasoning to provide external justification is best understood from a theoretical perspective that takes into account the *broader social, economic and cultural context*.[96]

Leaving reasoning and justification to one side, a second aspect to the question of why methodology matters shall be highlighted, namely the connection between the Court and the *people*. This point may appear somewhat detached from the discussion of methodology thus far, but it remains important, seeing as most Europeans grant high courts a lot of respect and 'next to parliaments, more is expected from these courts than of any other political bodies'.[97] Seen from this perspective, where the CJEU 'acts as the conscience of the peoples of Europe',[98] there is a strong incentive to demand a genuine commitment to an adequate methodology from the Court's side. Related to this 'democratic' notion is the fact that the 'EU ordinary policy making process (the

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[94] *Ibid*, p. 63.
[95] Nielsen, 2013, *supra* note 18, p. 121.
[96] Bakardjieva Engelbrekt, 2013, *supra* note 16, p. 268. My translation.
[97] Schepel, H. and Blankenburg, E. 'Mobilizing the European Court of Justice', in de Búrca, G. and Weiler, J.H.H. (eds.), *The European Court of Justice*, Oxford University Press, Oxford, 2001, p. 11.
[98] *Ibid*, 10.

co-decision procedure) has many veto points, which makes it hard to overturn the determinations made by the judges' of the CJEU.[99] Needless to say, these determinations must be made on the basis of a sound methodology.

Briefly, I would also like to mention how the aspect of *finality* in judicial decision-making plays into the question of why sound methodology in the work of courts is needed. This idea ties into the point about the difficulty in overturning CJEU judges' decisions. One could argue that the Court could change interpretations or lines of argumentation in future cases but as has been showed above, the CJEU rarely departs from previous case law. Furthermore, that sort of solution would not be of any help to the parties of a particular case in which the Court potentially makes a decision based on deficient methodology. Finality in this sense is thus a compelling argument in favour of demanding that the CJEU adheres to a sound methodological framework in its work as, on the one hand, the supreme interpreter of Union law and, on the other hand, a court of last resort.

With that said, we turn to the addressing the main issue of this Part II, namely the discussion of what position consequences hold in the methodological framework that has been presented in Part I. Furthermore, the components of the framework will thus be revisited and *revised*, either to be more specific or to appear more coherent with respect to the analysis carried out below. The idea behind revising the framework here in Part II compared to the way it was laid out in Part I has to do with the fact that, in this theory, the methodological framework's 'final design' is intended to be forward-looking, in the sense that it seeks to provide acceptance and legitimacy for the Court as it continues to carry out its task in an ever-changing Union. The point of departure here is the notion provided by the FCC in *PSPP*. In that case, it can be recalled, the FCC found the CJEU's judgment in *Weiss* to be methodologically insufficient in such an apparent manner that the Court's decision was declared *ultra vires* in Germany. There are two reasons for taking this starting point. One is that the case can be utilised as an *indicator of the importance of the issue* of the acceptance and legitimacy of Court's work (and thus an indicator of the importance of identifying a

[99] A Dyevre, 2013, *supra* note 21, p. 68.

methodological framework that can provide the Court with acceptance and legitimacy). The other is that *PSPP* will also be used as an *example to illustrate* some of the points made below. While the focus in *PSPP* was aimed at the inadequate – according to the FCC – application of the principle of proportionality, the following discussion in this Part II will take a broader approach, looking into what position consequences hold in the CJEU's methodological framework as it has been presented here.

10. Proportionality in methodology – purposes *and* consequences

The following discussion is thus aimed at the potential inclusion of consequences in or among the components in the methodological framework sketched out in Part I. Before getting to the specifics of this section, however, some clarifying comments are in order.

Below, I will make a connection between the two concepts 'purpose' and 'consequences'. This connection needs some explanation. In my view, analysing the purpose of a rule, for instance, requires that some cognitive effort is directed at the consequences that follow an application of the rule. The purpose of a rule should, as I see it, be understood against the consequences an application of the rule is supposed or expected to give rise to. In order for the rule to *fulfil its purpose*, certain *consequences must occur*. Here, my view relates to the concept of 'consequences as juridical implications'.[100] I will, however, use an even broader view on the concept of consequences to also include 'consequences as repercussions'.[101] This expansive view on consequences is motivated by the institutional approach and the idea that the CJEU must be understood as a participant in the broader context it is embedded in. Thus, it is a dual understanding of consequences both as *internal* juridical implications and as *external* repercussions – relating to consequences in the 'environment of the law, e.g. in the economy, or in other systems, even in the law as a social or legal field'[102]– that is employed here.

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[100] Bengoetxea, J., *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*, University Press, Oxford, 1993, p. 257.
[101] *Ibid*, p. 256.
[102] *Ibid*, p. 256-257.

This is my understanding of the relationship between purposes and consequences, and it builds into my understanding of the principle of proportionality, which will be put in a somewhat different light than usual. Actually, it would probably be for the best if I dropped the 'principle' from the 'proportionality', here, in order to make it as clear as possible that this is not a discussion of the *regular surface-level proportionality rule*, but something different. With that said, the discussion does build on the typical design of this rule. Still, I will hereinafter speak of a *doctrine of proportionality* (compare the terminology of section 7) when the discussion is aimed at something beyond the conventional principle.

To me, the principle of proportionality is indeed an interesting way of, very concretely, expressing the power-relationship between the EU and the Member States: the Union legal order is allowed to interfere with the Member States' legal orders, but only to an extent that can be deemed proportionate. A typical proportionality test, then, takes the purpose (aim) of an EU act and weighs this against the values of suitability and necessity.[103] In my view, consequences constitute an essential factor in this analysis. How could you determine the suitability or necessity of an act without looking at the consequences of the act? Hence, the *doctrine of proportionality* works well as an umbrella concept that brings purpose and consequences – perhaps via 'mediating factors' such as suitability or necessity; although, to me, these are soft factors embedded in a *method* of analysing purpose (a *fact*, laid down in the legislative procedure, for instance) against consequences (*facts*, found by means of consequential analysis) – together in one analytical context. In short, in the doctrine of proportionality as it is proposed here, proportionality is a *value* fulfilled when a balance is struck between purpose and consequences.

Now, purpose already has a clear role in the methodological framework of the CJEU, since the Court has adopted a teleological approach to interpretation within its legal reasoning. Yet, the Court has attracted criticism on a

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[103] See for example Schütze, 2018, *supra* note 32, p. 361 and Amtenbrink, F., 'The European Court of Justice's Approach to Primacy and European Constitutionalism – Preserving the European Constitutional Order', in Micklitz, H.W. and de Witte, B. (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge, 2012, p. 61.

methodological basis, and the following considerations thus pertain to the question of whether an inclusion of consequences in the methodological framework would allow the CJEU to escape such criticism. Would a methodological framework that includes consequential analysis be better at providing acceptance and legitimacy for the Court? Would that framework provide for *proportionality in methodology*?[104] Let us see below.

10.1. A transparent teleo-systemic model of reasoning

Regardless of whether the Court feels the need to justify its judgments, I argue that it is clear that the audiences of the Union legal context expects it to do so. Here, I draw on the discussion of internal and external *justification* provided in section 9. To me, it is evident that the methodological framework must seek to provide both these forms of justification in order to best ensure the acceptance and legitimacy of the CJEU. Seeing as the matter of justification is innate to the Court's legal reasoning, we now revisit this component of the framework, with the concept of consequences, or consequential analysis, in mind.

It is clear that the CJEU relies heavily on teleological argumentation (as opposed to *linguistic* arguments) in its reasoning, often referring to terms like the 'rationale', 'aim and spirit', or 'meaning and purpose' of a norm.[105] Sometimes, however, the Court utilises systemic argumentation which takes the 'general scheme' and 'legal context' of a norm into account.[106] Between teleological and systemic argumentation there is a considerable overlap, and within this category of *teleo-systemic criteria*, Beck puts consequentialist criteria.[107] Consequentialist arguments can relate to either 'social, political or economic consequences that might flow from judicial decisions' or 'juridical consequences of a judicial decision within the legal order'.[108] Seeing as the Court is not unwilling to adopt a teleo-systemic approach in which consequential arguments may be considered

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[104] Here, I thus refer to proportionality as the value of a balance between purpose and consequences, as suggested above.
[105] Beck, 2012, *supra* note 14, p. 285–287.
[106] *Ibid*, p. 289.
[107] *Ibid*, pp. 212–213.
[108] *Ibid*, p. 212. Compare the line of reasoning above regarding consequences as external repercussions and internal juridical implications above in this section.

(it has been argued that the well-known cases of *Defrenne* and *Van Gend en Loos*[109] as well as *Costa*[110] provide good examples of this sort of reasoning), it may be concluded that consequences indeed seem to have their rightful place in the legal reasoning of the CJEU.

There are, however, advantages with the current teleological approach in the Court's reasoning. According to Paunio, teleological reasoning 'may enhance predictable argumentation and the substantive form of legal certainty in that it openly expresses the aims and objectives' that a specific interpretation of a given norm has been based on.[111] Still, this requires a clear 'linkage' between the purposes and the norms in question as to avoid a loss of transparency in the reasoning.[112] In my view, the legal certainty would only be further promoted if the teleological reasoning became even more transparent by not only moving away from the 'meta-purposes',[113] but also by including the consequences of a certain interpretation or application of a norm. By way of this, the model of reasoning would indeed become *transparently* teleo-systemic, openly expressing the purposes as well as the consequences in the reasoning, not leaving them to merely be 'behind the curtain'-considerations.

Critically, 'all judgments have consequences', and they may be of different types and sometimes unforeseen.[114] Still, as has been suggested in the foregoing, not all judgments 'incorporate into their reasoning and motivation an analysis of the consequences of deciding one way or the other'.[115] Crucially, though:

> This [incorporation of consequences in some cases] does not mean that only those judgments have been made or decided on the basis of their

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[109] *Ibid*, pp. 212–213.
[110] Lenaerts, K. and Gutiérrez-Fons, J.A, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice, *EUI Working Paper AEL*, 2013/9, 2013, p. 25.
[111] Paunio, 2012, *supra* note 2, pp. 81–82.
[112] *Ibid*, p. 82.
[113] *Ibid.*
[114] Bengoetxea, J., 'Reasoning from Consequences from Luxembourg', in Koch, H. et al. (eds.), *Europe: The New Legal Realism : Essays in Honour of Hjalte Rasmussen*, Djøf Publishing, København, 2010, p. 41.
[115] *Ibid.*

> consequences, but rather, that in that particular case, *the Court considered reasoning from consequences as an acceptable form of public justification*.[116]

Put differently, since the Court is not averse to the idea of taking consequences into account in its reasoning to justify its decision-making, I argue that there is merit to the idea of including consequential reasoning in the methodological framework of the CJEU.

While I do argue that a transparent teleo-systemic model is the most suitable model of reasoning in a methodological framework that seeks to provide acceptance and legitimacy for the Court, there are explanations to why this sort of reasoning is not always visible in the judgments. Indeed, there must be some rationale behind the fact that the 'Court reason from consequences in many more instances than it explicitly brings to light'[117]. In short, one answer could be that the Court wants to avoid the 'difficult terrain', that might be 'too technical or too political', which may appear if the Court's reasoning is clearly based on consequences rather than strictly law.[118] Another interesting answer relates to the CJEU's position in 'separation of powers issues', and when the Court analyses the consequences of a decision in such a case it indeed needs to 'think as an interstitial legislator'.[119] The problem is, however, that the CJEU 'lacks the legitimacy and know-how of the legislator' and it will therefore be keen to give the impression that the decision was reached by considering the 'aims, objectives and effectiveness of the pre-existing norms'.[120] Putting issues of this kind to one side, the CJEU still is the supreme interpreter of the Treaties, which 'places a special burden on the Court to justify its decisions' and providing reasons for those decisions is the 'essence of justification.[121] Once again we return to the importance of transparency and Bengoetxea summarises it proficiently:

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[116] *Ibid*, pp. 41–42. Italics added.
[117] *Ibid*, p. 53.
[118] *Ibid*, p. 46.
[119] *Ibid*, p. 54.
[120] *Ibid*, pp. 54–55.
[121] *Ibid*, p. 55.

> The citizens, the litigants, the legal system, the jurists, the stakeholders, all the audiences need to know the reasons that support any given interpretation of the law because the law is not the Court's dominion; the law is the emanation of the will of the *demos*, the *demoi* and this requires participative and deliberative rationality and democracy. The Court needs to follow a balanced approach in declaring its meaning because it is the institution that has been entrusted […] with the power of authoritative, official interpretation. Such a power is to be exercised publicly, with transparency and rationality […].[122]

This conclusion clearly pertains to the notion that the Court has audiences to convince – and much more so than national courts, I might add, as they exist in a much more straight-forward (read, perhaps, 'non-pluralistic') legal context than the CJEU – by adopting a rational and transparent methodology.

To summarise, I argue that a transparent teleo-systematic approach should be the principal model of legal reasoning in the methodological framework, and that this sort of reasoning would enable the Court to carry out its task with acceptance and legitimacy in the legal context it finds itself embedded in.

10.2. The place of consequences in the methodological framework, using PSPP *as an example*

It has been argued above that a transparent teleo-systematic approach would be an appropriate model of legal reasoning for the CJEU. Currently, however, the Court's approach still is essentially focused to a teleological model which more often than not conceals decisions and motives behind the formal reasoning displayed in the judgments. With those remarks about the Court's legal reasoning in mind, I now continue the discussion of whether a methodological framework that includes consequences or consequential analysis is better suited for the task of providing the Court with acceptance and legitimacy with regard to the other components. At this point, I will utilise *PSPP* to exemplify the points made below, in an attempt to reduce the abstraction of the discussion.

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[122] *Ibid*, p. 56.

As has been suggested in the foregoing, it is in no small part the particular legal context of the Union that makes the demand for sound methodology in the Court so relevant. In this context, the CJEU and the national courts participate in a 'game of coexistence' where they 'trade issues depending on the importance they attach to them'.[123] Dyevre has described the communication in this 'game' with the term 'judicial signalling', and concludes that such signalling from the national courts 'in the form of threats to disapply EU acts is thus shown to be an effective way to extract concessions from the [CJEU] while avoiding an escalated judicial war'.[124] Viewed from this perspective, the *PSPP* can be understood as a signal from the FCC to the Court to step up its methodological game, and if that does not happen, EU acts will continue to run the risk of being declared *ultra vires* in Germany. Put differently, in this game of coexistence, which is being played in the *arena of the communicative situation* of the Union legal context, the FCC has demanded that the Court must take account of consequences, in this case by means of the proportionality *principle*, with a more compelling methodology. In essence, it is my view that the Court has received a judicial signal from a domestic court which constitutes a call – for a methodologically stronger approach to consequences – that cannot be taken lightly. This point gets even more interesting if one considers that it is the FCC that is the 'signalling court', seeing as 'few [other] domestic high courts can make a credible claim to superpower status'.[125] Perceiving *PSPP* as a signal or a threat from the FCC to the CJEU in this game of coexistence thus makes for a good argument in favour of a methodological framework which promotes the presence of consequences in the reasoning of the Court's judgments.

Moreover, taking the judicial signalling from national high courts seriously can also be considered necessary against the fact that 'Union law does not have the legal instruments needed to cope with extreme cases of disagreement'.[126] The resolution of constitutional conflicts instead relies on the willingness of the

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[123] Dyevre, 2013, *supra* note 21, p. 71.
[124] *Ibid.*
[125] *Ibid*, p. 70.
[126] Baquero Cruz, J., 'Legal Pluralism and Institutional Disobedience' in Avbelj, M. and Komarék, J. (eds.), *Constitutional Pluralism in the European Union and Beyond,* Hart, Oxford, 2012, p. 254.

'guardians of those constitutional orders […] to engage in a productive dialogue with the institutions of integration'.[127] Would the CJEU fail to modify its methodology in the direction of what the FCC demanded in *PSPP*, it runs the risk of pushing the FCC into actions of 'institutional disobedience'.[128] If it not already has, that is. It is indeed interesting to consider if the *PSPP* could be framed in terms of institutional disobedience. Baquero Cruz argues:

> What national constitutional courts or courts that carry out constitutional review are doing when they voice actual or potential reservations to the absolute supremacy of European Union law is, in my view, *closer to an attempt at institutional disobedience* than it is to a defence of state-centered constitutionalism or to a virtuous open-ended pluralistic dialogue. […] These institutions seem to be saying: *if there is a higher principle in danger* we may want to reserve ourselves the possibility of disobeying Union law.[129]

This is an interesting view on the relationship between national courts and the CJEU, and with this notion alongside the considerations above – pertaining to 'judicial war', 'threats', and the 'game of coexistence' – I feel compelled to reframe the terms of the EU legal context, namely by describing it in in terms of a *pugnacious communicative situation*. In short, the communicative situation can be described as pugnacious since its participants play a game of high stakes, stakes related to the survival of the Union legal order. In this game the participants may threaten each other in order to defend either their status or certain legal prospects that they have an interest in preserving or protecting. Returning to Baquero Cruz, it is stimulating to reference his normative framework on institutional disobedience in the context of *PSPP*. According to him, four phases or criteria must be fulfilled when determining whether the actions of a national institution (like a court) constitute institutional disobedience, and these relate to: 1) a higher principle is endangered, 2) other procedures will not suffice, 3) pros and cons must be weighed and 4) the disobedience must be carried out openly.[130]

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[127] *Ibid.*
[128] *Ibid*, p. 265.
[129] *Ibid.* Italics added.
[130] *Ibid*, pp. 266–267.

First, the FCC's demand for a higher quality of methodology is linked to the principle of proportionality. Seeing as this principle is 'common to the systems concerned' and 'not peculiar to the legal order',[131] it fits Baquero Cruz' framework. Second, the FCC has utilised the preliminary ruling procedure, meaning that *PSPP* is not the first and only resort.[132] Third, the FCC must have carefully considered the pros and cons of its action, and also be 'ready to accept all the political and legal consequences of its disobedience'.[133] On this point I would like to express the opinion that the proportionality principle carries so much importance to the Member States that if the CJEU would consistently fail to properly apply or interpret it in its judicial decision-making, most Member States would be ready to take radical action to protest such behaviour. In a European Union where its law is forced upon the national legal orders with both direct effect and primacy, the Member States can be expected to have a fundamental demand that this 'intrusion' is carried out with a certain level flexibility or reasonability (or suitability or necessity, if you will!) – with proportionality. Now, when one implies, to any extent, that the Member States 'do not want direct effect and primacy' the response is often 'then why have they not put an end to it through the Treaties?'. Here, I thus submit that the value of proportionality is one (perhaps among others) reservation that makes the Member States accept the intrusion of EU law in their domestic legal orders. That being said, I thus argue that the FCC was fully knowing and accepting of the consequences of the stance it took in *PSPP*. Fourth, the decision in *PSPP* fulfils the criteria of being performed 'publicly and explicitly'[134] seeing as the FCC was very clear on the reasons for rejecting the Court's decision in *Weiss*.[135] From this perspective, *PSPP* could not be seen as 'sheer silent ignorance of Union law [which] would never qualify as institutional disobedience'.[136] With regard to the foregoing, there is a case for placing *PSPP* within Baquero Cruz' normative framework on institutional disobedience.

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131 *Ibid*, p. 266.
132 *Ibid.*
133 *Ibid.*
134 *Ibid*, p. 267.
135 *PSPP*, *supra* note 4, see for example paras 142 and 163.
136 Baquero Cruz, 2012, *supra* note 126, p. 267.

The point here is not, however, to get too theoretical regarding the acts of the FCC in the context of cases *Weiss* and *PSPP* – the intention is not to review the legality of the criticism put forward by the FCC. Rather, it is to show that in the context of the pugnacious communicative situation, within which the CJEU and high domestic courts like the FCC interact, the CJEU should not take the FCC's judicial signal, calling for methodological soundness, lightly. The result being that the judgment was declared *ultra vires* is highly undesirable from the EU perspective. Critics, however, might say that this was all it was; a call for a more sound application of the surface-level proportionality test, and not a call for proportionality as a 'value of methodology' nor a call for an inclusion of consequences in a methodological framework within which the Court should operate. Some might argue that it was only a coincidence that the FCC in *PSPP* attacked the methodology with which Court in *Weiss* applied the proportionality principle. In response to this, I maintain that there have been grunts about the CJEU's 'methodological shortcomings'[137] for some time, and that it was only when the value of proportionality was on the line that a judgment like *PSPP* was handed down by the FCC. This view relates to the Baquero Cruz' point about 'higher principles at stake' referred to above. Additionally, an analogy with the original *Solange*-doctrine[138] can be made; it was when something as important as fundamental rights was on the line that the FCC felt the need to take radical action against the Court. From this perspective, I argue that *proportionality of EU acts can be seen as value* that seems to lie equally close to the hearts of the Member States (of Germany, anyway) as fundamental rights do. In my opinion, the complaints voiced in *PSPP* provides for a good argument in favour of the view that a methodological framework that openly takes consequences into account is better suited to provide the CJEU's judgments with acceptance in the Union legal context than a methodological framework that leaves consequences out of transparent consideration.

Furthermore, the FCC concludes that 'completely disregarding the economic policy effects of the PSPP contradicts the methodological approach taken by the

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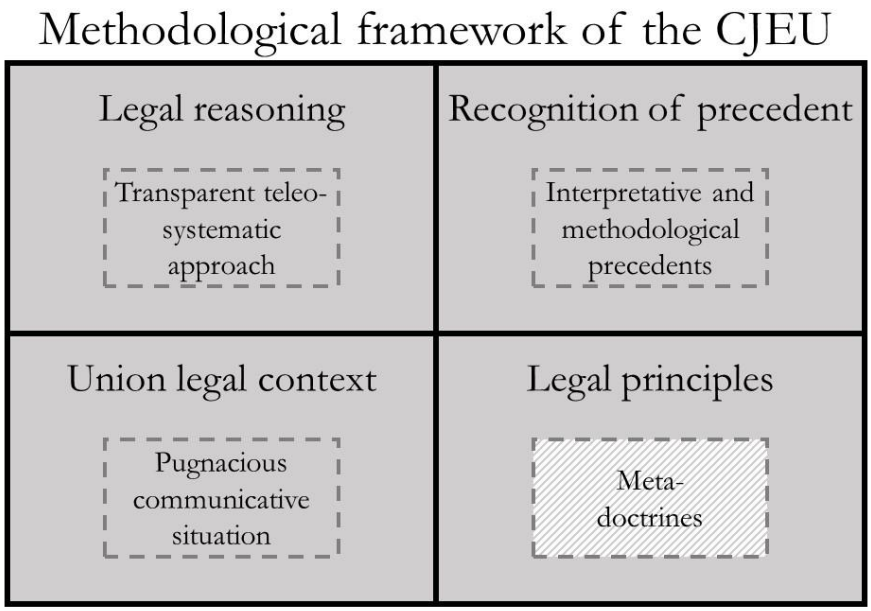
[137] Mazák, 2013, *supra* note 84, p. 61.

[138] For a brief overview, see Schütze, 2018, *supra* note 32, pp. 132-133.

CJEU in virtually all other areas of EU law'.[139] This argument can be understood in the context of methodological precedents that was proposed above in section 5. The FCC essentially argues that by taking consequences into account when deciding cases regarding fundamental rights, indirect discrimination, measures of equivalent effect, the principle of effectiveness, the principle of equivalence,[140] and 'even in relation to provisions allocating competences',[141] the CJEU has established a significant body of methodological precedents which require the involvement of consequences in the Court's methodological approach. From this perspective, it is understandable that the FCC expected 'further reasons to justify [the] different approach'[142] that was employed by the Court in *Weiss*. This brings me to an interesting analytical topic pertaining to the methodological framework laid out in Part I, namely the notion of *methodological deficit*. Before I expand on this, let us revisit the framework illustration, which now can be revised to mirror some of the suggestions made so far here in Part II:



As we can see, the sub-component of teleological interpretation of the CJEU's legal reasoning has been replaced by the concept of a *transparent teleo-systematic*

[139] *PSPP*, *supra* note 4, para 146.
[140] *Ibid*, paras 147–151.
[141] *Ibid*, para 152.
[142] *Ibid*, para 153.

approach, which I have argued should be the dominant model of reasoning for the Court. Furthermore, the Union legal context has been specified to be characterised by the *pugnacious communicative situation* the Court participates in. Additionally, the framework now includes both *interpretative and methodological precedents* as a sub-component to the Court's approach to recognising previous case law. There is no reason to remove the overriding category of interpretative precedents as this type of previous case law still functions, in general, on a methodological level. Put differently, it is clear, from a general methodological perspective, that the Court has to recognise the interpretative precedents of its previous case law. This has to do with the value of promoting coherence and legal certainty in EU law. In certain cases, though, the Court might have to bear specific methodological precedents in mind. Hence, the broad category of interpretative precedents imposes a methodological rule on the Court, while the sub-category of methodological precedents serves as a way of understanding specific situations, like *Weiss/PSPP*, for instance. In this particular case, the general rule of interpretative precedents helps us understand that the Court is expected to follow its previous case law. The notion of methodological precedents, however, helps us understand why the FCC, in *PSPP*, expresses concern about the specific approach to consequences the Court took in *Weiss*. Thus far, reader, you may have noticed, that the last piece of the framework – consisting of *legal principles* – has not yet been amended. I will return to this component after a brief discussion of methodological deficit, a concept which is best introduced in this context.

What I mean by 'methodological deficit' here is a decrease in quality of the acts or the performance of the Court with regard to a given component in the methodological framework proposed in this thesis. On this point, the cases of *PSPP* and *Weiss* once again provide good examples. As noted above, the FCC took the stance that the CJEU should have provided a more comprehensive reasoning concerning the fact that the usual methodology with which the principle of proportionality is interpreted and applied was disregarded.[143] From this perspective, it can be observed that the Court in *Weiss* seemingly departed

[143] *Ibid.*

from its previous case law and, since it does not typically do that, the quality of the methodology decreased. Hereby, the judgment suffered a methodological deficit within the 'recognition of precedent'-component. Interestingly, though, this deficit may be remedied by a methodological 'boost' in another component of the framework. In essence, the Court, in a specific case, can make up for a deficit within one component by enhancing the quality (or perhaps quantity[144]) of the performance within another. Perhaps it is here where the methodological framework sketched out in this thesis lends the biggest help to the understanding of how the Court can ensure the acceptance and legitimacy of its judgments. Moreover, it should be remarked that the CJEU may utilise all four components of the framework to maintain an acceptable level of methodological performance as it carries out the task conferred upon it by the Member States.

For example, if the Court is in a situation where it wishes to depart from *previous case law* – which is within its right, as it is not formally bound by precedent – it has to provide further explanation as to why this is the decision it makes. This, as explained in the foregoing, has to do with the value of coherence or 'consistency', and it is indeed as Snell puts it:

> Similar cases have to be decided in the same way. There must be no arbitrary decisions. If there are rulings that do look inconsistent, the reasoning must convincingly distinguish the situations.[145]

The obvious way of providing further explanation is thus by increasing the quality and/or quantity of the *reasoning*, by providing stronger and/or several arguments in favour of its decision. Another way could of course be to rely on an important *principle* of EU law, seeing as legal principles carry great weight in the Union legal order.[146] Essentially, however, the demand for increase in other

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[144] For example: on the one hand, the *quality of reasoning* may increase within that component while, on the other hand, the *quantity of previous cases cited* in favour of the Courts decision or interpretation can increase within that component.

[145] Snell, J., 'The Legitimacy of Free Movement Case Law', in Adams, M. et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart, Oxford, 2013, p. 114.

[146] Again, while the reliance on an important principle of Union law is of course *expressed in* the legal reasoning, I argue that there is merit to the distinction between the four components of the

components stems from the legal context and the *communicative situation* the CJEU finds itself in – which means that increases in other categories seek to generate an increase in the acceptability of the Court's performance to the audiences it communicates with. In my view, this example has not only illustrated the idea of methodological deficit but also highlighted the indisputable interconnectedness between the four components in the methodological framework. Additionally, it might be of furhter explanatory interest to provide a brief 'opposite example'. If the Court can cite a long row of previous cases that points in the same direction as the Court's view in a given case, it need not dwell on providing a thick body of legal reasoning in favour of its decision. The acceptable level of justification may already be reached. Section 10.3 provides further illustration of the concept of methodological deficit by means of an application of the methodological framework-sketch to this particular notion.

With that being said, we return to the legal principles of Union law and their place in the framework sketched out in this thesis. In section 7 above, the direct effect and primacy of Union law were discussed as separate principles, but it has been argued that they should be seen as 'legal concepts […] fostering the obedience of the Member States', i.e. as concepts ensuring the *effectiveness* of EU law.[147] This principle of effectiveness does not only consist of the direct effect and primacy of Union law, however. Rather, the principle 'comprises all judicially developed concepts conveying effectiveness to [Union] law in the Member States' legal orders; these in turn constitute important norms and thus principles.[148] In addition to direct effect and primacy, these concepts relate *inter alia* to the autonomy of Union law, effective and uniform application by Member State authorities and the concept of state liability under Union law.[149]

There is good reason for a replacement of the discussion of direct effect and primacy with a broader discussion of effectiveness for the purposes of this

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framework being upheld. Some might say that a *principle-based argument* is just another argument, belonging to the component of legal reasoning, but I maintain that such a perspective would fail, on the one hand, to recognise the importance of legal principles in EU law and, on the other hand, to portray a nuanced and all-catching methodological framework of the Court.

147 Bogdandy, A. von, 'Founding Principles', in Bogdandy, A. von and Bast, J. (eds.), *Principles of European Constitutional Law*, 2nd edn., Hart, Oxford, 2010, p. 29.

148 *Ibid.*

149 *Ibid*, pp. 29-30.

thesis. Indeed, it has been suggested that the CJEU has made the principles of direct effect and primacy part of a 'bolder and more ambitious notion of effectiveness'[150]. In my view, the sometimes almost notorious focus on the principles of direct effect and primacy of Union law is thus better directed at the 'overarching principle of effectiveness'[151] in a study of methodology in EU law, such as this one. Here, within the context of proposing a methodological framework of the CJEU, the extensive discussions that may be sparked upon the encounter with the concepts of direct effect and primacy are not of interest. Rather, I rely on the fact that this notion of effectiveness constitutes a principle which undeniably has had a paramount influence on the development of the Union legal order. As such, it does represent a meta-doctrine which is a component of the Court's methodological framework. To reiterate the point made in section 7 about meta-doctrines, the principle of effectiveness thus does not function on the surface-level as a rule to decide a case by but rather as a rule on the methodological level that governs the overall manner in which the CJEU goes about deciding a case.

As I have tried to illustrate above, consequences have a role to play in the different components of the methodological framework. On the back of those considerations and arguments, I assert that the understanding of the *doctrine of proportionality* as a way of promoting the value of balancing purposes against consequences, carry great weight on the methodological level. While it indeed may appear controversial to conclude that proportionality should be included alongside the effectiveness of EU law in a methodological framework of the CJEU, I maintain that it is interesting to view proportionality as a counterweight from the Member State perspective to the Union perspective's demand of effectiveness. While this view on the *doctrine of proportionality* as a broader concept has been presented as controversial, there is some support in the EU legal research. Certain authors have provided similar views, and two of them will be looked at briefly.

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[150] Weatherill, S., *Law and Integration in the European Union*, Clarendon P., Oxford, 1995, p. 117.
[151] *Ibid*, p. 116.

First, Davies puts forward an interesting perspective, proposing that 'there must be a system ensuring that EU law does not cause unnecessary destructive effects on national policy, and […] a system ensuring that national concerns as well as European interests are voiced and articulated in the decision-making process, so that it is apparent why judicial decisions go the way they do'.[152] Furthermore, he asserts that Union legislation 'will often have unintended consequences' and that therefore is a need for a principle 'which addresses the situation where EU law has unusually destructive or chaotic effects, *and balances the interests involved*'[153] before arguing that:

> *Such a balancing belongs naturally within proportionality*, and as such is already part of EU law. Asking whether the application of that law is in fact disproportionate, because it has particularly dramatic or harmful consequences, is not doctrinally new. However, in the application of proportionality national autonomy and the national capacity to formulate and carry out policy is rarely seen as a value in itself. […] The application of this would take place in the context of the preliminary ruling procedure. […] The ambiguous and slippery nature of the division of powers in the reference procedure means that both national and European courts have an important role. Neither is emasculated, and it is the interest of each to formulate their concerns and the relevant interests at their level in the most clear and complete way.[154]

While Davies admits that it is a 'dangerous proposal', seeing as it would sometimes result in the failure of substantive EU law 'in some contexts', he reiterates that 'the interests involved at national level are real and ignoring them would be politically untenable as well as an undemocratic option'.[155] To me, this is indeed a sentiment to the relevance of proportionality as a process of balancing interests as well as evidence of the value of proportionality in the communicative situation the CJEU participates in.

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[152] Davies, G., 'Constitutional Disagreement in Europe', in Avbelj, M. and Komarék, J. (eds.), *Constitutional Pluralism in the European Union and Beyond,* Hart, Oxford, 2012, p. 280.
[153] *Ibid*, italics added.
[154] *Ibid*, p. 281, italics added.
[155] *Ibid*, p. 282.

Secondly, Bobek has, in his discussion of 'procedural autonomy of the Member States'[156] concluded that, in the Court's case law:

> *Van Schijndel* was hailed as the introduction of the 'procedural rule of reason', which would allow of institutionalised balancing between the interests of the [Union] and the procedural interests of the Member States. The *balancing would involve a type of proportionality argument*, which would institutionalise the balancing of the need for effective application of [Union] law on the national level on the hand and various legitimate Member States' interest on the other.[157]

Subsequently, however, the Court has, to Bobek's disappointment, refrained from using and developing the "balancing' or 'proportionality' test' from *Van Schijndel* and instead utilises an internally contradictive 'I-know-it-when-I-see-it' test of effectiveness. Still, his view on proportionality as a 'reasonable balance [that] is struck between (recognised and identified) legitimate interests of the European Union on the one hand and those of the Member State(s) on the other',[158] is indeed interesting and certainly closely linked to the view I have expressed here.

Therefore, in this methodological framework – being a theoretical tool for understanding how the CJEU should work to ensure the acceptance and legitimacy of its judgments – the meta-doctrine of proportionality is included alongside the meta-doctrine of effectiveness. These considerations mean that the final component, *legal principles*, is now revised in the following way:

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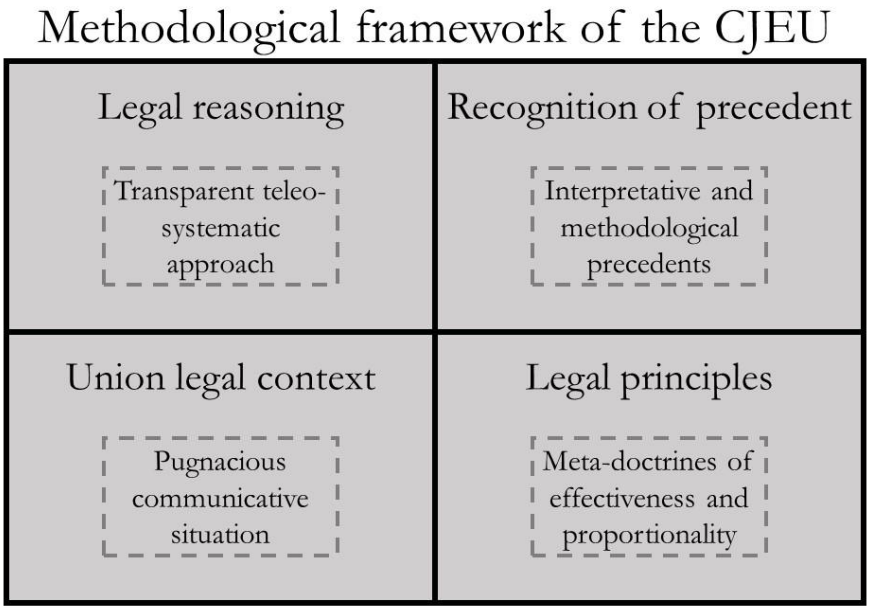
[156] Bobek, M., 'Why There is No Principle of 'Procedural Autonomy' of the Member States', in Micklitz, H.W. and de Witte, B. (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Cambridge, 2012, p. 305.
[157] *Ibid*, p. 310, italics added.
[158] *Ibid*, p. 312.



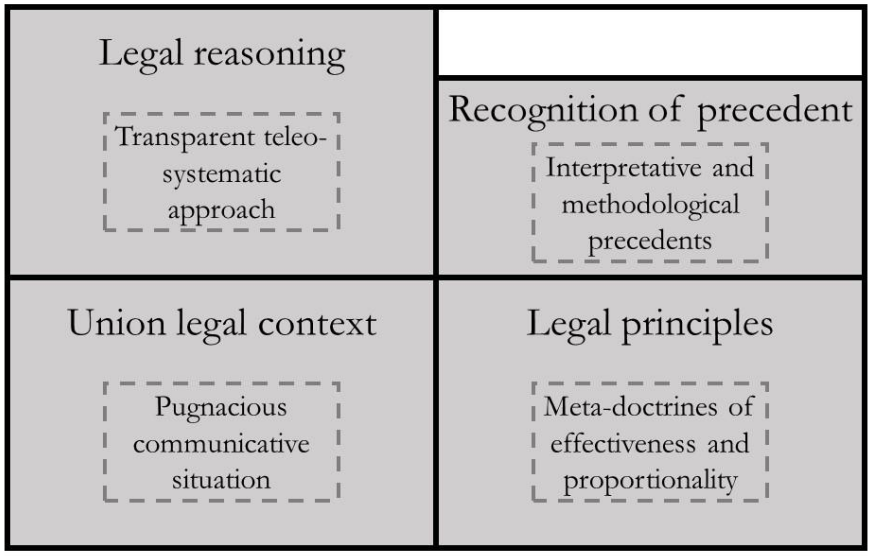
The addition of proportionality as a counterweight to the effectiveness of EU law thus makes the sub-component completely filled out in the grey base-colour, indicating my view that the methodological framework, in this design, can provide the Court with a methodology that ensures the acceptance and legitimacy of its judgments.

As suggested by the title of this thesis, I argue that the importance of the value of proportionality – promoting balance between the purposes of effective EU law and the consequences it has on national legal orders – to the Member States, means that the notion of *proportionality in methodology* is not completely unfounded. As an example, *PSPP* illustrated that the Court's (alleged) manifest failure to take consequences into account pushed the FCC into extreme action – whether you call it judicial signalling or institutional disobedience – as it declared the CJEU's decision *ultra vires* in Germany. This thesis has been fairly theoretical in most part, but it does indeed explore a rather practical problem of EU law, namely the issue of persuading the Member States (and their courts!) to comply with the decisions of the CJEU. In this sense, proportionality is indeed an important value from the EU perspective as well, as it, in my view, enables such compliance. Before turning to some summarising comments in the final section, we will briefly revisit the concept of methodological deficit.

10.3. Methodological deficit

Here, I will provide further illustration of the concept of 'methodological deficit' that was touched on in section 10.2, by utilising the methodological framework-sketch. This illustration is based on the example provided by the situation where the Court wishes to depart from an interpretation or application laid down in its previous case law. The deficit within the previous case law-component could then be illustrated like this:

Methodological deficit: *the Court departs from previous case law*

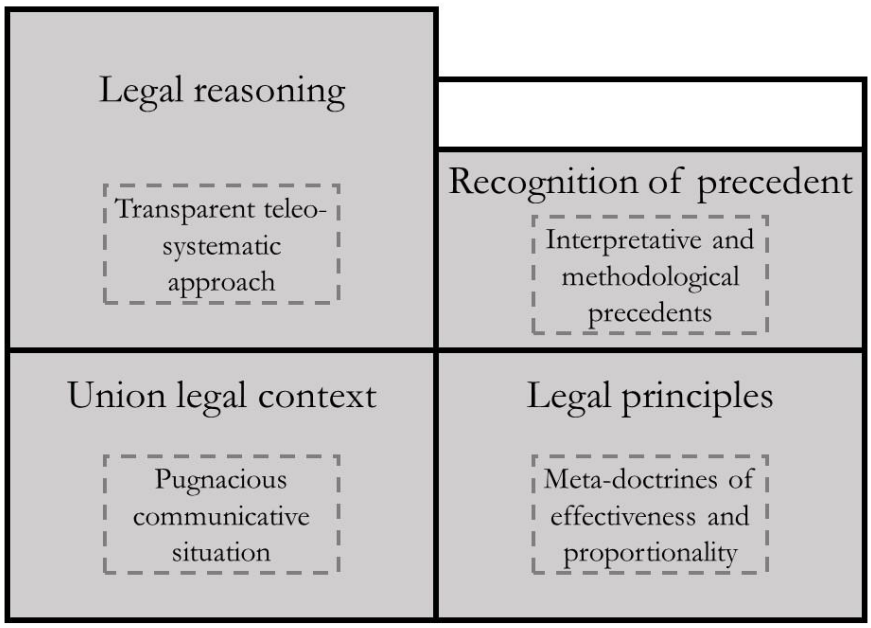


The way the framework-sketch is meant to be understood in this context is thus that the whole rectangle represents a level of methodological performance that is acceptable to the audiences that the Court needs to convince. Put differently, if the Court only reaches a performance level equivalent to the one illustrated above in a given case, the decisions or interpretations of a judgment may be deemed methodologically insufficient by, for instance, a domestic constitutional court such as the FCC. To avoid an outcome of that kind, the Court can attempt to generate a methodological boost in another component, just as suggested in section 10.2.

For example, the Court might then improve the quality of the legal reasoning in this particular case. Whether it provides stronger arguments or perhaps just more arguments, the methodological performance within the component of

legal reasoning would nonetheless gain a boost. This could be illustrated in the following way:

Methodological boost: *the Court provides further reasons behind the decision*



The idea is thus to illustrate that when the Court provides further reasons to explain why it departs from previous case law, the methodological boost in the component of legal reasoning is enough to 'fill the gap' that appeared in the previous case law-component after the methodological deficit illustrated in the first picture in the appendix. By virtue of this boost, the deficit has been eliminated and an acceptable level of methodological performance is maintained.

Lastly, I would like to point out that, had this thesis been the type of work that would have allowed for a more extensive study of the CJEU's case law, it would have been interesting to 'apply' the methodological framework proposed here to samples of said case law. In such a study, it would have been curious to see whether the idea of methodological deficit is merited by the actual work of the Court. With that being said, it can be concluded, that the methodological framework and the notion of methodological deficit, in my view, indeed offers intriguing tools for understanding the CJEU.

11. Summary: a proposed framework, proportionality in methodology, and a concept of methodological deficit

Employing an institutional approach to law, this thesis has conducted a study of the features of EU law that pertain to the methodology of the CJEU. These features have been described within the context of *four key components* of a *methodological framework*. Since the theoretical approach employed here allows for an understanding of the Court as an institution that is embedded in a broader legal and political context, this study reaches further than, for instance, a strict legal analysis of the legal reasoning of the Court. To be sure, the *legal reasoning* plays a big part in the discussion of the CJEU's methodology, but if the external context of the Union legal order can be considered, and thereby the *communicative situation* the Court participates in, the methodological framework as a theory about the CJEU becomes far more comprehensive. In my view, these two components are the most important in the methodological framework, in the design it has been given in this thesis. This has to do with the fact that the two other components, namely *recognition of precedent* and *legal principles*, could be argued to belong in the component of legal reasoning. In other words, I recognise that the distinction is harder to uphold here, between these two components and reasoning, than it is between reasoning and legal context. Be that as it may, it is my view that the components pertaining to recognition of precedent and legal principles are more than merely 'arguments from precedent' and 'arguments from principles'. I maintain, which has been made clear in the foregoing, that they serve a stronger methodological purpose than *types of arguments*, and that is the reason why they have been included as specific components of the methodological framework design.

As the framework 'puzzle' was completed in Part I, the foundation for the discussion in Part II had been established. On the basis of the four components, I argued that there is indeed a place in the methodological framework for consequences or consequential analysis, and therewith, the meta-doctrine of proportionality. In my view, the inclusion is motivated by the importance of the value of proportionality to the Member States, and thereby their compliance with the Court's decisions. In *PSPP*, the FCC reacted strongly against the Court's seeming disregard of the consequences of an ECB programme in the case *Weiss*,

and took issue with the methodology in the case. Whether *PSPP* should be regarded as judicial signalling, a threat to disapply Union law, or as institutional disobedience may not be conclusive, but it is clear that the CJEU should take the call for a more convincing methodology seriously, so as not to undermine the stability of Union legal order by means of a diminishing degree of compliance from certain or several Member States. In short, I have argued that proportionality provides a counterweight to the demand of effectiveness of Union law, and that it therefore should be considered as a component of a methodological framework that seeks to provide the Court with acceptance and legitimacy in the EU legal context.

Finally, the methodological framework inspired the idea presented as 'methodological deficit', which I believe is an interesting concept for analysing and understanding the Court's work. Put differently, the details of the framework may be further discussed or improved – but the notion of methodological deficit provides for a noteworthy perspective on the dynamic between the components which build into the methodology with which the CJEU carries out its task. While I did not foresee this 'sub-theory' to the methodological framework when the work on this thesis began, it appears, in my view, to be a welcome tool to facilitate the understanding of the different methodological aspects of the Court's work.

In terms of 'future research', a short comment will suffice. I will not argue that the methodological framework is a finished theoretical product nor a perfect theory of the CJEU's methodology. Rather, I see the methodological framework as an interesting starting point for those interested in understanding the Court's work, the Court's methodology, and how the Court can provide its judgments with acceptance and legitimacy in the broader context within which it is embedded. As such, I believe that the institutional approach to law has been instrumental in order to employ a wider perspective when identifying the key components of the framework, which has enabled the theory to come closer to its intended purpose. Also, and this has been suggested above, I maintain that a theory which seeks to explain the CJEU's work from a methodological point of view, would become the most useful if it was combined with a study of case law. The idea is thus that future research could use the methodological framework as

a starting point or a template against which conclusions from a study of the Court's case law could be applied and analysed. I sustain that the strength of the approach in this thesis is that it has *brought together the different views and perspectives* pertaining to the Court's methodology available in the EU legal research *in one context*. Hence, while the four components could of course be analysed further, I believe that they make for a useful starting point for those interested in the CJEU's methodology.

Afterword

This thesis was produced during a period of 15 weeks. These 15 weeks happened to occur during a pandemic, in the autumn, in Sweden. It has been a dark time, for many if not all of us. This thesis has brought me joy and inspiration as well as frustration and misery. At the end, though, I feel satisfied and proud. For this, I have three people to thank. Here they are, my Three Thanks:

Thank you, Andreas, for your guidance and input. I will be honest and say that I truly wish you would have had more time to discuss this project with me, but that has been out of your hands, of course. Nevertheless, I am thankful for the feedback you have provided during the process. Still, I am even more thankful for the experience I had taking your course in the autumn of 2019. My girlfriend and my roommate had decided to study abroad, in the same semester, and for the first ten weeks of that time you, and Constitutional EU Law, kept me company and, dare I say, changed my (jurist) life. Not only did I find a new passion in the subject of the course, but I found inspiration and motivation. I will never forget the e-mail I got from you, telling me to send that opinion piece to the Guardian! That has been a slice of positive energy ever since, and I really just want to say: thank you for inspiring me, Andreas.

Thank you, William, for the companionship and the laughter. We have stuck together since day one, making this a journey of a lifetime. There is a lot that could be said, but I feel that we have said so much, probably too much, already. We have talked the mouths off each other, we have written page after page in the CFG-chat, and we have laughed so much, ~~probably too much~~. No, scratch that. Most of all, you and I made juristprogrammet fun. Thank you for making it *so* fun, William.

Thank you, Moa, for making all this happen. I am dedicating this thesis to you, since it would not have been, were it not for you. I have kept my head up, I have stayed motivated, and I have been able to slow down and enjoy my law studies during these years, because of you. Thank you for all your never-ending support, Moa.

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EU law

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