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A NEXUS OF TENSIONS & RECONCILIATIONS



CHAPTER 1

Introduction

Understanding the nexus between EU public procurement law and self-organisation of the EU Member States and their public authorities is the focal point of this research. This chapter introduces this research topic and delineates its scope accordingly. Furthermore, the methodology, research questions, sources, terminology and structure of this research are discussed.

1. THE NEXUS: EU PUBLIC PROCUREMENT LAW & SELF-ORGANISATION

In modern-day societies, services are provided through a plethora of institutions. The Member States are essential in creating and supervising the internal regulatory structure of the playing field in which these services are provided. The market and its economic operators, the Member State's public authorities, and civil society, which also includes religious institutions and NGOs, all have their own role to play as the main providers of services.² Since the initiation of European cooperation in the Treaty of Rome in 1957, EU law has not ceased to influence the conditions that determine how these services are organised, financed and delivered on the level of the Member States.³ Premised on the aim to create an internal market, EU public procurement law has proven to be one of its most predominant influencers.⁴

EU public procurement law regulates the purchasing activities of public authorities in the Member States.⁵ When considering its impact in the European Union (the EU),

^{1 &#}x27;Nexus' is used to indicate a complex and multifaceted relationship. 'Nexus' and 'relationship' are used interchangeably, however. I will do the same for 'EU Member States' and 'Member States'.

² Brandsen et al. 2014. I will focus on the provision of services and related issues in this research, but many conclusions can be used for other categories of activities.

³ The free movement of services and establishment, which are enshrined in the Treaty on the Functioning of the European Union ('TFEU'), lie at the heart of this development.

⁴ In Chapter 2, Section 2, I will further consider 'EU public procurement law' as a source of law.

⁵ Only if public authorities are deemed to be 'contracting authorities' does this field of law apply, however. For a further discussion of its definition, see Chapter 2, Section 3.1. Reference is made to 'public authorities' when these authorities fall outside the scope of EU public procurement law (CJEU, 13 October 2005, Parking Brixen, par. 40.) and to 'contracting authorities' when they fall within its scope. I will solely focus on EU public procurement law. It goes without saying that EU state aid law and EU competition law are also particularly relevant, which is often due to their interaction with EU public procurement law. See, for instance, Skovgaard Ølykke & Andersen 2015.

public procurement encompasses a staggering total value of 14-20% of the EU's GDP.6 EU public procurement law, however, is not simply a collection of procedural rules, but is a powerful instrument to design a sustainable and just society.⁷ Based on the free movement rules,8 it has been substantively regulated by providing the procedural boundaries of public procurement procedures. It is based on the principles of equality, non-discrimination, transparency and proportionality.9 This endeavour, which started in the 1970s with the first Directives on public procurement, 10 aims to create an internal market for public procurement and has not been without benefits.¹¹ It has procedurally improved the transparency and objectivity of public authorities' decision-making by ensuring that national preferences – and thus discriminatory behaviours – are overcome, has safeguarded equality of economic operators in the internal market, and has provided these operators with opportunities abroad and with legal remedies to challenge allegedly illegitimate public procurement procedures or direct awards of contract. 12 Even though there is room for improvement, ¹³ these rules have principally contributed to an outcome in which the public procurement process enables taxpayers to gain the best value for their money at Member State level. 14 Consequently, it strengthens the belief that the underlying benefits of competition in the internal market and therefore of regulating public procurement, are still considered advantageous in the EU's social market economy, which has been the focus of the EU since the Lisbon Treaty in 2009.¹⁵

Inherently, the introduction of EU public procurement law has created a nexus between EU public procurement law and the concept of 'self-organisation'. I will refer

⁶ It concerns approximately 2000 billion Euros. EU Commission 2017, p. 2. Also see, EU Commission 2016a; EU Commission 2016b.

⁷ Manunza introduced this approach for public procurement law and refers to it in Dutch as 'een krachtig instrument [...] om de samenleving op duurzame en rechtvaardige wijze in te richten'. Manunza 2017, p. 964. Also see Telgen et al. 2012; Telgen et al. 2007. I will briefly touch on this again in Chapter 2. This approach also relates in a more general sense to what Ottow has referred to as the Utrechtse School on public economic law, which has introduced public economic law's 'instrumental' and 'safeguard' functions. See for a brief overview of this school of thought, Ottow 2009; Heijnsbroek 2013, pp. 12-16, and, fundamentally, Hellingmans & Mortelmans 1989. The Public Procurement Research Centre (PPRC), part of the same Europa Institute, aims to continue this tradition in terms of public procurement.

⁸ Most important in the public procurement context is the freedom to provide services in Article 45 TFEU.

⁹ See for a general introduction to these rules: Arrowsmith 2014 and in the Dutch context see Hebly 2010; Bleeker & Manunza 2014; Essers 2017.

¹⁰ See Widdershoven 2012 on the concept of Directives in the EU. Also see, generally, Jans, Prechal & Widdershoven 2007.

¹¹ Public procurement law still has a significant national dimension for contracts that fall below the thresholds of the Directives on public procurement. This dimension is not further discussed. See, for instance, Articles 4-6 Directive 20414/24/EU.

¹² In order to fall under the scope of EU public procurement law, these contracts must be either a 'public contract' or a 'concession contract'. See further Chapter 2, Section 3.2. Also see PwC 2013.

¹³ A recent EU Commission study showed that direct cross-border procurement still only amounts to 3.5% (estimated regarding the total value of contracts during 2009-2015). However, indirect cross-border procurement (through their foreign subsidiaries) amounted to a percentage higher than 20%. EU Commission 2017, p. 4; Manunza 2010, p. 78.

¹⁴ The EU Commission has been at the forefront of driving the so-called 'instrumental' role of public procurement, discussed further in Chapter 2.See recently: EU Commission 2017, p. 3.

¹⁵ This is also confirmed by the fact that more types of contracts, such as concession contracts, fall under the scope of this field of law or by the growing number of contracting authorities. See Manunza 2017, p. 964. Criticism of competition as a means to an end exists, nevertheless, and is then referred to as 'market fatigue'. Monti 2010, p. 24.

to self-organisation as the discretionary power of a Member State, including its public authorities, to organize itself as it sees fit.¹⁶ Clearly, the discretionary power of public authorities to determine 'how' to contract out services to third parties is part of this discretion and has therefore been influenced by EU public procurement law in order to establish an internal market for public procurement, to abolish discrimination by public authorities, and to gain the benefits described above.¹⁷ This aspect of selforganisation has gained much attention over the years and is, therefore, not considered further.¹⁸ Interestingly enough, though, understanding the nexus between EU public procurement law and self-organisation is much more complex and less discussed, and for this reason this is the main focus here. Based on relevant literature and the case-law of the Court of Justice of the European Union (CJEU), it can be concluded that this nexus tends to concern three additional discretionary powers, making it a multifaceted ordeal. 19 Self-organisation – at least – comprises of (1) the Member States' discretionary power to allocate responsibilities and competences to an established public authority as it sees fit, (2) the discretionary power of a public authority to decide on the preferred type of service delivery as it sees fit and (3) the discretionary power of a public authority to provide a service itself or in cooperation with other public authorities as it sees fit.²⁰ These three discretionary powers are further introduced in Section 2.2 of this chapter. It is clear, however, that these powers are central to the internal organisation of each Member State and are, therefore, part of the powers that build the structure of its public sector. In other words, self-organisation covers the facets of the power of the Member States to be sovereign countries that can, therefore, be contested in light of the primacy of EU law.²¹ More fundamentally, the doctrine of state sovereignty 'vests in the state the sole and exclusive power of authority on a certain territory, over a certain people.²² In this light, States have the authority to issue binding rules.²³ Clearly, the EU imposes some type of impediment on this initial authority to legislate. This research does not,

¹⁶ The term 'self-organisation' is inspired by its use in physics and biology, where it concerns the ability of a system to spontaneously arrange its components or elements in a purposeful manner. See, for instance, Witzany 2014 and Feltz et al. 2006.

¹⁷ Trepte 2012, p. 95. Nevertheless, the discretionary power to regulate or determine 'what' to contract out has not been set at EU level. This point was raised, however, by the EU Commission, whilst reforming the 2004 Directives on public procurement. EU Commission 2011a, p. 41.

¹⁸ For early research on this in Dutch literature: Van de Meent 1995.

¹⁹ See for such literature, for instance, Wauters 2015; Wiggen 2012; Wiggen 2011; Caranta et al 2010; Manunza 2010; Manunza 2001. Also see in relation to service provision by public authorities by the CJEU: CJEU, 18 November 1999, *Teckal*; CJEU, 9 June 2009, *Commission v Germany*, or in relation to the allocation of responsibilities and competences by the CJEU: CJEU, 21 December 2016, *Remondis* and in the law itself, for instance, Articles 1(6), 11 and 12 Directive 2014/24/EU.

²⁰ At this point in time, it appears that these are the most prominent powers where a discussion on their relationship with EU public procurement law is relevant. Needless to say, it is clear that the discretionary powers that make a 'state a state' are much broader, and can also change over time. The latter is visible – for instance – in the 2014 Directives on public procurement, which have brought forward new questions regarding the third discretionary power in Article 12 Directive 2014/24/EU. See Chapters 6 and 7.

²¹ Sovereignty is usually defined in political sciences as having four dimensions: internal, external, formal and effective. In the following, external sovereignty is most important as it determines that 'states are subject to no higher or other authority, that they are 'free of external authority structures. It describes a state as equal with all others, and generates the principle of political independence and autonomy.' In the European context, the primacy of EU law clearly affects this aspect of sovereignty. Elliot 2008, pp. 193-195. Also see generally: Van den Brink et al. 2015.

²² Van den Brink et al. 2015, p. 3.

²³ See for instance on the subsequent implications of sovereignty Van Rossem 2014, pp. 196-207.

however, delve into the foundations of sovereignty in the EU or into the question if a supranational sovereign power has been established. Instead, it offers a view of the current landscape of the nexus discussed, and how it can be improved.²⁴

In this line of thought, the discretionary powers described above will inevitably be affected to ensure the effectiveness of EU public procurement law.²⁵ The nexus between EU public procurement law and self-organisation, therefore, raises the issue of how this relationship is currently shaped and if revision is required to reach a balance that ensures that the diversity of the Member States is respected and that simultaneously guarantees the effectiveness of this field of internal market law.²⁶

This nexus has, nevertheless, sparked debate over the years. These discussions seem to be fuelled by a coming together of various objectives and interests.

Firstly, in light of the general aim to promote peace, values and the well-being of the peoples in the EU, the EU pursues a significant set of objectives as enshrined in Article 3 Treaty on the European Union (TEU).²⁷ These objectives inter alia include the combat against social exclusion and discrimination, the promotion of social justice and protection, equality between women and men, and solidarity between generations. Furthermore, it aims to promote economic and social cohesion and solidarity among EU Member States. In this context, in the third paragraph of this article, the EU sets out to establish an internal market. Most importantly, it aims to work on these objectives through 'a highly competitive social market economy.'28 This social market economy in turn aims to achieve full employment and social progress, and a high level of protection and improvement of the quality of the environment. I will delve further into the objectives of EU public procurement law in Chapter 2, Section 1, but it is clear that these objectives are closely related to these primary law objectives in light of the internal market. Furthermore, these EU objectives also often tend to - and should logically overlap with the national objectives of the individual EU Member States and with their efforts to achieve them. Therefore, the debate does not question that these objectives are important, but is about how they must be achieved and whether the EU or the MS, which includes the local, regional and national level, must be in charge of achieving them. Various objectives, therefore, come together in this nexus.

Secondly, different interests of stakeholders also apply, which often sparks further debate. Third parties might deem further expansion of the EU public procurement rules important, thereby limiting self-organisation, because it would allow them to contribute to the above objectives by means of competing for public contracts or concession contracts.²⁹ In contrast, public authorities might argue that such an expansion is too onerous, would limit their ability to act as governments for their people, and would spur them to aim to keep 'things public'. Subsequently, these interests have affected

²⁴ This approach resembles the concept put forward in Van den Brink et al. 2015, pp. 4-5.

²⁵ This is further defined in the methodology section.

²⁶ The principles of subsidiarity and conferral are important here and are discussed in Chapter 3, Section 1.

²⁷ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

²⁸ The exact ramifications of this concept are yet to fully crystallise.

²⁹ These concepts define the scope of EU public procurement law, which are discussed in Chapter 2, Section 3.

– and will most likely always affect – the coming about and reforms of the EU public procurement rules and which of the three discretionary powers is influenced or not. These stakeholder positions are also reflected in the academic debate. For instance, it has been stated that in a legal sense self-organisation has gained prominence over EU public procurement law, thereby risking and impeding the effectiveness of EU public procurement law, and, thus, the fulfilment of the internal market. This is contrasted by some authors, who have stated that EU public procurement law has in fact stretched far beyond what is necessary or justified for this field of law to be effective. Neither of these contributions, however, have coherently considered all facets of this nexus as described above. Hence, the importance of this nexus has not gone unnoticed over the years, but still provides a fertile stomping ground for further comprehensive research.

In the end, understanding this nexus is important for society. Public authorities need this understanding when they wish to rely on the discretionary power to organise themselves how they see fit and still aim to comply with the law, and third parties need this understanding when wanting to ensure that the obligations of EU public procurement law are upheld.³⁴

2. METHODOLOGY & RESEARCH QUESTION

The following sections consider how the nexus between EU public procurement law and self-organisation is discussed. It provides an outline of its general methodology and research question (Section 2.1) and its specific methodology (Section 2.3). Furthermore, the three analyses are further discussed (Section 2.2).

2.1. General methodology and main research question

This study categorises the discussion of the nexus between self-organisation and EU public procurement law into legal tensions and their reconciliation.

2.1.1. Tensions & reconciliations

Before the substantive discussion of the nexus, I will consider both sides of the nexus in order to define their scope. This will require a discussion of the scope of EU public procurement law, and a discussion of how the abovementioned facets of self-organisation are embedded in EU law in general and in EU public procurement law in particular.

³⁰ Manunza & Berends 2014, p. 375.

³¹ Manunza 2001; Manunza 2010.

³² Burgi 2010; Caranta 2010.

³³ See most recently, Wauters 2015. But also see the extensive work done by Manunza and Wiggen.

³⁴ See further on this development, Section 3 of this Chapter on the sources used. One explanation for this uncertainty is that the discussed relationship has not had recent coherent attention, either because research has focussed on a single aspect of this nexus or simply due to the fact that it occurred prior to the latest reform of EU public procurement law in 2014.

This will require determining which side take precedence over the other, and in which scenarios.

Based on the understanding of these two sides to the nexus, this research aims to identify and discuss legal tensions, which arise when self-organisation and EU public procurement law clash conceptually. I will only discuss legal tensions, thereby excluding other tensions, identified in other academic disciplines or the public debate. In order to strike a balance between the two, it is clear that two types of methods have been applied regarding EU public procurement law that can mitigate these tensions, either by applying exemptions or by limiting the scope of EU public procurement law entirely. In this sense, it must also become clear how these two sides interact in a legal sense. I will assume that a tension exists when the applied method is (1) unclear, which leads to minor or substantial legal uncertainty,³⁵ or (2) is inconsistent in the application of the legal principles involved. Finally, a tension may exist in light of incoherency (3) when the method (i.e. exemption or limitation of scope) itself is inherently incapable of reconciling a tension, meaning that a completely different resolution must be found by, for example, extending or limiting the scope of EU public procurement law. Tensions can, thus, exist in the field of certainty, consistency or coherency, discussed further below.

The aim of this study is to *reconcile* the tensions identified. The potential for reconciliation aims to ensure, on the one hand, the effectiveness of EU law in general, and EU public procurement law in particular, and on the other, that self-organisation sufficiently fits into this context.

I would argue that certainty, consistency and coherency are prerequisites for the desired effectiveness of EU law. However, effectiveness and EU law are an uneasy couple in academia which has - so far - not resulted in definitive methodological outcomes. As Allott argues: 'Effectiveness of a law, as I see it, is measured by the degree of compliance^{2,36} Acceto & Zleptnig argue that two roles of effectiveness can be identified and envision it 'either as a governing principle whose task is to ensure, by its application, that the law is respected and creates tangible effects; or in contrast, as an argument of factual existence that justifies (and, to some extent, demands) legal authority.'37 Without particularly dismissing these approaches, I will refer to effectiveness in the sense of legal effectiveness, which concerns the ability of rules that are based on legal principles to achieve the objective(s) of these rules.³⁸ For this reason, the approach taken here is not to measure effectiveness through empirical analysis, but to consider it in light of the above tensions, which allows for an ex ante discussion.³⁹ Applied to this research, this means that effectiveness is assumed when the rules are (1) clear and the principles of EU public procurement law, which also include general principles of law such as non-discrimination, equality, transparency and proportionality, are (2) consistently

³⁵ Logically, I will mostly focus on the substantial uncertainties that require attention.

³⁶ Allott 1981, p. 233.

³⁷ Accetto & Zleptnig 2005, p. 401. Also see Snyder 1999.

³⁸ Sarat 1985, p. 23.

³⁹ Manunza 2012, p. 2.

and (3) coherently applied. I would argue that the application of these principles will also contribute to further compliance, as supported by Allott, in practice, and links up with Acceto & Zleptnig's first role of effectiveness. This approach is therefore somewhat distinct from the principle of effectiveness applied by the CJEU, which is related to the need for national laws of the Member States to ensure that the objectives of EU legislation are fully achieved through national implementation.⁴⁰

In light of the above approach, legal certainty has been accepted as a general principle of EU law and refers to the requirement that the law must be certain, meaning clear and precise, and that its legal implications are foreseeable.⁴¹ Alliot refers to 'the limitations of linguistic expression' as a cause of ineffectiveness.⁴² In this view, another cause of ineffectiveness lies in the possible conflict between the aims of the legislature, and in implementation failures. Consistency means that the underlying public procurement principles must be applied consistently across the scope of EU public procurement law. In general, consistency has been given a significant role in the European Treaties in Articles 11 sub 3, 13 and 21 TEU, Article 7 TFEU and the case-law of the CJEU.⁴³ Coherence, however, is broader and is achieved if the applicable legal system can be viewed 'as emanating from or as explainable by a set of consistent principles and policies'.44 As such, coherence is derived from legal theory and concerns a question of scope. I will assume that a legal system is coherent if the relevant principles are applicable to the entirety of its relevant scope. It falls into the sphere of attempting to create the 'natural' borders of a field of law. 45 For example, it would mean that an aspect of the relationship between a Member State and the market has been left unregulated, even though it appears justified in light of these principles to regulate for the sake of coherency.

Research question

The above introduction and methodological considerations lead to the following main research question:

'How can legal tensions in the nexus between self-organisation of an EU Member State and its public authorities and the effectiveness of EU public procurement law be reconciled?'

⁴⁰ The CJEU has developed this concept mostly through the concept of 'effective judicial protection'. Prechal 1997, p. 3.

⁴¹ Chalmers 2006, p. 454. For a general and recent overview, Ávila 2016.

⁴² Allott 1981, p. 236.

⁴³ See for a discussion: Den Hertog & Stroβ 2013; Franklin 2011. See, for instance, CJEU, 6 March 2007, *Placanica and Others*, par. 53 and 58.

⁴⁴ Balkin 1993; Raz 1994; MacCormick 1978. Also see generally on coherence of EU law, Prechal & Van Roermund 2008.

⁴⁵ Manunza 2010.

2.2. Three subsequent analyses

The main research question is answered in three subsequent analyses that in turn raise sub-questions. In order to apply the above methodology, Chapter 2 of this research identifies the objectives and principles of EU public procurement law, whereas Chapter 3 considers the legal status of self-organisation in EU law. This study examines whether, based on the case-law of the CJEU and the TEU, a *right* to self-organisation can be identified. Based on these findings, Chapters 4 to 9 are the result of the three analyses that concern the facets of self-organisation introduced before: (1) the allocation of responsibilities and competences, (2) the make-or-buy decision and (3) service provision by public authorities. In the following chapters, I will start by discussing the first and the latter, because it relates to current legislation on public procurement, whereas the second provides food for thought for the future and is considered at the end.

2.2.1. Allocation of responsibilities and competences

The first analysis of this research concerns the first aspect of the nexus discussed: the allocation of responsibilities and competences. It is often in society's interest - and therefore necessary - to establish public authorities and to allocate them with the responsibility to ensure that essential services are sufficiently provided for citizens.⁴⁶ As the EU Commission states on the – often pressing – needs behind these services: 'parents would like to see healthy food for their children in schools, city dwellers expect increased investment in smart and sustainable cities for better living with dedicated safe bike paths, [...], road users expect safe, high-quality infrastructure constructions, patients need improved access to a better quality of healthcare and expect the latest innovation driven medical equipment and diagnostics tools.47 In the course of time, the responsibilities of public authorities have not been stagnant, but have tended to fluctuate based on cultural, historic and economic developments.⁴⁸ New responsibilities can be allocated in light of societal challenges, such as financial or refugee crises, old responsibilities might become unnecessary due to technological advancements,⁴⁹ or other public authorities might be deemed better suited to be involved with a certain responsibility.⁵⁰ A consistent factor, however, is that the desired role of these authorities in society determines how a Member State and its public authorities must organize themselves to ensure that they can fulfil these responsibilities.

Whether responsibilities are assigned to the national, regional or local level depends on the division of powers in the relevant Member State. In the Netherlands, it is often left to the democratic processes to decide *what* kind of responsibilities should be granted

⁴⁶ Baarsma & Theeuwes 2009.

⁴⁷ EU Commission 2017, p. 2.

⁴⁸ Balleisen & Moss 2009; Batley & Larbi 2004; Sørensen 2003.

⁴⁹ Postal services, for instance, used to be deemed an imperative responsibility of the state, whereas most countries have privatised or are in the process of privatising their state monopolies.

⁵⁰ Recently, various Dutch healthcare services have been decentralised from the central to the local government level in order to, amongst other things, improve the quality of service provision. Vermeulen 2015; Uenk 2017; Bouwman 2017.

to public authorities. This process is often problematically linked to the troublesome determination of the 'public interest' and, consequently, the internal organization is often the result of the answer to the question *how* these interests are best safeguarded.⁵¹ It goes without saying that these questions are part of an older and broader debate on the extent of the State's responsibilities, and the perceived beneficial role of other institutions, such as the market or civil society. Some argue that certain core responsibilities of the state can be identified. Safeguarding of internal peace and public safety are identified as public tasks 'par excellence'. Defending a nation's borders and ensuring the administration of justice are generally also seen as 'undisputed' public tasks.⁵² Others have advocated a wider category of primary tasks.⁵³ In addition to the structure of the democratic state, i.e. the police, the administration of justice and defence forces, this would also include physical infrastructure such as dykes, roads and bridges, and care for cultural infrastructure, such as education.⁵⁴

Identifying responsibilities of public authorities beyond the limited scope of those mentioned above becomes a much more difficult task. In the context of the EU, this is one of the reasons that the Member States differ substantially when it comes to self-organisation. This also rings true for the internal organisation of the Netherlands. In this Member State, self-organisation means that four traditional administrative levels of government are provided for in the *Grondwet* (the Dutch Constitution): *ministeries* (12 ministries), the *provincies* (12 provinces), the *gemeenten* (388 municipalities) and the *waterschappen* (22 water boards).⁵⁵ These traditional authorities have various responsibilities based on numerous laws and regulations. Furthermore, they have been given competences to act on those responsibilities. The responsibilities of municipalities include, amongst other things, the issuance of official documents, the provision of various healthcare services, the provision of social security payments, the construction and maintenance of municipal infrastructure, such as roads and bicycle paths, the collection of household waste, and the distribution of subsidies to local swimming pools or public libraries.⁵⁶ Knowing the importance of water management in the Netherlands,

⁵¹ Wetenschappelijke Raad voor het Regeringsbeleid 2000. The question of how to define public interests, such as the protection of the environment, is not further debated here. This research focuses on the self-organisation of EU Member States instead of considering more generally what these public interests must or should entail. As a consequence, I will also refrain from deeply delving into the EU concept of services of general or economic interest. I do, however, briefly consider this in light of the development of the right to self-organisation.

⁵² Sap 2002, p. 4.

⁵³ Hirsch Ballin 1994, p. 70. In De Ru's view, primary tasks are tasks that are directly linked to the structure of the state. If the state had no responsibility for the defence forces, the police, law-making and the administration of justice, the state itself would not exist. For this reason, these core activities are essential for *a state to be a state*. In addition to primary activities, secondary state activities are activities which are decided on through democratic decision-making. Vermeulen 2002, p. 24. It seems that the remaining activities may be provided by third parties on the market.

⁵⁴ In Chapter 9, I will question the relevance of this – sometimes seemingly stagnant – debate by providing food for thought for a more procedural approach of this debate.

⁵⁵ Chapter 2 and 7 *Grondwet* (Dutch Constitution). The number of these authorities is not defined in the Dutch Constitution, however, and is subjected to changes due to reorganisations. Numbers date from January 2018.

⁵⁶ See, generally, Gemeentewet (Muncipality Act), Stb. 1992, 415 or the Wet Basisregistratic personen (Citizens Registration Act), Stb. 2013, 494.

the water boards are involved with the governance of the Dutch water system, which includes the quality and quantity of water supplies and the protection from rising seawater levels.⁵⁷ The Dutch internal organisation is further complemented by various *zelfstandige bestuursorganen* (agencies), such as *De Nederlandsche Bank* (Dutch Central Bank), and private entities, such as the *woningcorporaties* (social housing corporations), which are established often by law to execute tasks. These authorities also extensively cooperate with each other by establishing separate legal entities, as discussed further in Section 2.2.3. This Dutch organisational structure, however, is not uniquely complicated and merely exemplifies the plurality of the Member States' administrative organisation in a common EU context.⁵⁸

The first analysis concerns the question how EU public procurement law's relationship with the allocation of responsibilities and competences is shaped, which legal tensions arise and how these can be reconciled if need be.⁵⁹ As a consequence, it will inevitably result in a discussion of the differences between awarding a public contract or concession contract and an allocation of responsibilities and competences.

2.2.2. Make-or-buy decision

The second analysis concerns the nexus between EU public procurement law and the make-or-buy decision. Public authorities are often in the position of having to outline how a certain allocated responsibility is best safeguarded. When involvement in the provision of a service is required due to inefficient delivery or the complete absence of its delivery in society, public authorities have various alternatives. Possible options include subsidization of activities, the use of authorisation schemes (limited or otherwise) to regulate the market's activities, open-house models, contracting out service provision after conducting a competitive procedure, supporting bottom-up societal initiatives by collectives of citizens, or service provision by these authorities themselves.

When the public authority needs to be directly involved in the service performance, however, the make-or-buy decision requires a public authority to choose what type of service provision is best suited for society. Reedless to say, this decision also arises if an authority has an internal need, such as HR or IT services. This choice, for instance, to provide a service itself, cooperate with other authorities, or contract out a service, has a significant effect on how a service is provided. If contracting out is deemed most beneficial, it is clear that EU public procurement law often prevents a direct award

⁵⁷ See, Waterschapswet (Water Boards Act), Stb. 1991, 444.

⁵⁸ For instance, the German federal constitutional structure is described as a 'labyrinth' that is 'extraordinarily pluralistic' with over 35,000 authorities within its borders. Burgi 2010, pp. 71-73.

⁵⁹ See Chapter 4.

⁶⁰ See predominantly Manunza 2010, who was joined by Hebly 2010. Also see, Janssen 2015.

⁶¹ These aspects are not discussed further, given the focus on service provision. See for an interesting review of the open-house model and a discussion of the *Dr. Falk* ruling by the CJEU: Bouwman 2016, pp. 908-916.

⁶² The term 'make-or-buy' decision is derived from the economic and management sciences, where it was first used to indicate the decision of firms to contract out or not. I have previously also referred to this as the 'pre-procurement phase', but due to the fact that it might lead one to believe that procurement would always be the most beneficial method of service provision, I have chosen not to use it here. Janssen 2015.

and requires an objective and transparent procedure based on the public procurement principles. As a consequence, it determines the associated costs, the quality, and the ability to achieve other societal goals, such as sustainability, innovation and social inclusion. This decision should therefore inherently require a comparison between the relevant performance alternatives, which ultimately results in a choice that prefers a type of service delivery.

The second analysis concerns the question how EU public procurement law's nexus with the make-or-buy decision is formed, which tensions arise and how these can be reconciled. More specifically, if there is no relationship, the question would be whether the scope of EU public procurement law would need to be altered accordingly.⁶³

2.2.3. Service provision by public authorities

The third analysis concerns the nexus between EU public procurement law and service provision by public authorities. It relates to the situation in which such provision is deemed most suitable based on the make-or-buy decision. Firstly, a public authority can choose to provide services itself by using its own resources (self-supply). For example, the municipality of Utrecht in the Netherlands collects household waste by using one of its internal departments. This is similar to the German tradition of municipal Stadswerke, which remain major employers at the regional level. Other examples concern the provision of supportive services by the internal department of a public authority.64 Secondly, service provision can occur through cooperation between public authorities (public-public cooperation).⁶⁵ It provides an additional layer of government in the Netherlands, which is also noticeable in other Member States. The landscape of this type of service provision is full of diverse examples.⁶⁶ Dutch municipalities, which participate in 27 collaborations on average, cooperate amongst each other to collect household waste within their municipal boarders in order to fulfil their statutory duties.⁶⁷ The water boards cooperate amongst each other to ensure the maintenance of Dutch dykes, which aims to avoid natural disasters, or to jointly perform research into the chemical and bacterial quality of surface water. The provinces cooperate for the provision of engineering services to assess the structural soundness of public works, such as bridges and other infrastructural projects that surpass their geographical borders.⁶⁸

⁶³ This is considered in Chapter 9.

⁶⁴ See Chapter 4.

⁶⁵ Cooperation – of course – also occurs with economic operators that are active on the competitive market, and that are often selected through a competitive procedure to provide a service.

⁶⁶ See more generally, the *Regio Atlas*, which provides a tool to consider the amount of cooperation in the Dutch regions. See www.regioatlas.nl (last accessed 12 February 2018).

⁶⁷ Art. 10.21(1) Wet Milieubeheer (Environmental Protection Act), Stb. 1979, 442. This has also sparked questions relating to democratic legitimacy of cooperation, because councils of Aldermen lack sufficient oversight functions. Nehmelman 2015. Also see Raad voor het openbaar bestuur 2015.

⁶⁸ Particularly relevant in relation to the latter is the call from the European Construction Industry Federation (FIEC) stating that EU procurement reforms do not solve key issues, mostly in relation to public-public cooperation. The FIEC even went as far as stating that it did not believe that the revised directives will achieve the modernization objectives as originally announced by the European Commission. See Ulrich Paetzold, 'EU heeft probleem veel te lage tenders niet opgelost', *Cobouw*, 18 January 2018.

Universities and medical centres cooperate in so-called 'shared-service centres' in the field of finance, human resources, or training programmes.⁶⁹ This illustrates that cooperation occurs between many different types of public authorities and for many different types of services.⁷⁰

In the Member States, public-public cooperation takes on many organisational forms and shapes.⁷¹ I will focus on the types of cooperation that are legally possible under EU public procurement law. Firstly, a public authority or public authorities can cooperate with a service-providing separate legal entity, established under private or public law (an 'institutionalised cooperation', which is also referred to as 'vertical cooperation'). Secondly, cooperation between public authorities also often occurs without setting up a separate legal entity ('non-institutionalised cooperation', which is also referred to as 'horizontal cooperation'). In both types of cooperation, a contractual agreement stipulates the terms and conditions of service performance. Thirdly, a cooperation can be based on an exclusive right. Here, the contractual agreement is concluded between a public authority or authorities and an exclusive service provider in a given market ('cooperation based on an exclusive right').

The third and final analysis will concern the question how the nexus of EU public procurement law and service provision by public authorities is shaped, which legal tensions arise and how these can be reconciled. More specifically, it delves into its relationship with self-supply, institutionalised cooperation, non-institutionalised cooperation, and cooperation based on exclusive rights.

2.3. Specific methodology

Taking into account the general methodology relating to legal tension and reconciliation, the sub-questions of the above-discussed analyses are answered by applying a twofold methodology: qualitative doctrinal legal research and comparative research.

⁶⁹ This development also takes place in the central government. Kamerbrief door de Minister van Wonen en Rijksdienst, *Ontwikkelingen ten aanzien van de opleidingsinstituten en academies bij de rijksdienst*, (Developments in relation to the civil service academies), 16 June 2014.

These are only some of the many Dutch examples of public-public cooperation, which amounted to over 1700 types of cooperation in 2010. In the Netherlands, somewhat outdated data from 2010 considered that an increase of collaborations between (local) public authorities occurred, which consisted of 698 collaborations based on public law, and 1022 collaborations based on private law. Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (Ministry of the Interior and Kingdom Relations), Visiedocument 'Bestuur en bestuurlijke inrichting: tegenstellingen met elkaar verbinden' (Vision document 'Administration and Administrative Design: Connecting Opposites'), 10 October 2011, p. 5. Interestingly enough though, this policy explicitly incentivized cooperation. This government policy even incentivized further cooperation. The respective 'vision' document demonstrates the ideas of former Dutch Minister Piet Hein Donner who advocated a 'compact' government. The term 'compact' refers to a strong and small government, which is able to swiftly respond to changing circumstances. It focuses on more efficiency and lower administrative burdens by intensifying collaboration amongst public authorities. Idem supra, p. 5. More recent empirical studies show a decline in numbers, but still strongly confirm the importance of cooperation in the Netherlands. Boogers et al. 2016. Theissen et al. 2017.

⁷¹ See Theissen et al. 2017, which also refers to informal arrangements.

When considering the first and third analysis, the methodology concerns qualitative doctrinal legal research, which relies on the sources discussed in Section 4 of this chapter. Furthermore, despite focusing predominantly on the legal aspects of EU public procurement law, it sometimes provides substantive support by relying on sources from other disciplines, such as public purchasing or economics, whether in the main text or in references. Needless to say, it does not concern substantive research into these fields of academia.

In addition to the above approach, a comparative method is applied for the second analysis.⁷² This analysis considers the United States of America (US) and analyses how the US regulates the make-or-buy decision, knowing that such regulation is absent at EU level (and in most EU Member States). It is therefore a comparison without a full comparative counterpart. Nevertheless, reference is made to relevant aspects of this regulation for the EU context. This is a macro comparison based on comparative methodology.⁷³ It is not a comparison between public procurement systems. Instead, it considers how the US has regulated the make-or-buy decision and what fundamental economic vision underlies this legal system. The context of such regulation is discussed where necessary.⁷⁴

Much comparative research is devoted to establishing the differences and similarities between jurisdictions. As part of a functional approach, ⁷⁵ this chapter mainly aims to consider why regulation was introduced, how it is substantively regulated and what the rights of individual stakeholders are in this phase. The purpose of this comparison is to gain further insight into this jurisdiction and its legislative choices in relation to the make-or-buy decision. It can, subsequently, be used to provide inspiration for the EU, depending on what level of regulation is deemed most suitable, which might consider regulation in the future. ⁷⁶ In this sense, it provides the relevant building blocks for future regulatory approaches. The aim of this exercise, however, is not to use US competitive sourcing methods as a blueprint, thereby taking away potential comparative problems relating to the different constitutional backgrounds. As a consequence, it is not considered or tested as a 'legal transplant'. ⁷⁷

Finally, the US was selected for a number of reasons.⁷⁸ The main reason for this discussion is the fact that very few countries in the world have actually regulated the make-orbuy decision. Denmark and the United Kingdom have also had this decision regulated,

⁷² See for a general overview: Van Hoecke 2015; Örüsü 2007. For this purpose, I was a visiting scholar for three months at the Government Procurement Law Program at The George Washington University, Washington D.C in 2014.

⁷³ As opposed to a macro-comparison. Van Hoecke 2015, p. 21.

⁷⁴ Zweigert & Kötz 1998, p. 5.

⁷⁵ As described by Van Hoecke 2015, p. 28: 'The functional method is looking at the actual societal problem (e.g., a train accident) and the way this is solved in different jurisdictions (most notably compensating the victims for their damage) along similar or different roads (e.g., contract liability or tort liability) and with similar or different results (e.g., compensation or not for pure economic loss). The focus is on the societal problem and the actual result of the legal approach to that problem.'

⁷⁶ Glen 2006.

⁷⁷ Watson 1974.

⁷⁸ Van Hoecke 2015, p. 3.

respectively at present and in the past.⁷⁹ The US is chosen, however, because it concerns the most comprehensive level of detailed regulation. It has also had regulation in effect since the 1960s, meaning that it concerns a rich source of experience. Knowledge of the English language was another reason to analyse the US rather than Denmark. Finally, it goes without saying that this discussion can also be relevant for the Member States themselves, because it relates to public authorities in the EU Member States faced with the same decision.

3. SOURCES

This research uses classic legal sources, which include the law, case law, policy, and academic literature. The use of the law and case-law in relation to the first and – even more so – the third analysis requires some further introduction. The case law of the CJEU is an important source for these two parts of this research, because the nexus between self-organisation and EU public procurement law was left largely unregulated for a long time. Comprehensive EU legislation addressing this relationship did not exist until 2014, meaning that a study of the case-law is essential for the understanding of the nexus discussed. It predominantly focuses on the CJEU's case law from the 1970s onwards, thich was further sparked by *RISAN* in 1990s and has consistently developed since then with milestones in *Teckal*, *Commission v Germany* and *Remondis*. The case law of the Dutch courts and of other national courts is considered to exemplify tensions that exist due to the lack of clear EU legislation and to provide inspiration for potential legal reconciliations.

The development in legal cases has taken place simultaneously with a regulatory development at EU level between 2002 and 2014. As stated before, the 2004 Directives on public procurement were notorious for only explicitly regulating cooperation based on exclusive rights, and did not contain any specific references to other types of service provision by public authorities. The 2014 Directives on public procurement, however, do include specific articles on the allocation of responsibilities and competences, institutionalised cooperation and non-institutionalised cooperation. Consequently, Article 1(6) and 12 of Directive 2014/24/EU are extensively discussed here. The conclusions are translatable to their counterparts in Directive 2014/23/EU and Directive 2014/25/EU, given their similar wording and the EU legislature's emphasis on consistent

⁷⁹ It goes without saying that future research into these jurisdictions may be fruitful as well. See extensively on the UK: Arrowsmith 2014. The Compulsory Competitive Tendering ('CCT') regime was embedded in the Local Government Planning and Land Act 1980 and the Local Government Act 1988. This regulatory approach clearly resembles the approach of the United States of America under the Reagan administration, discussed extensively in Chapter 9. In 1994, the new Labour Administration decided to abolish CCT. And on Denmark: Treumer 2010, p. 177. The rule allowing a central)government authority to draw up a control bid was laid down in a circular issued by the Danish Finance Ministry, which was most recently revised in March of 2016. Circular No. 9269 of 31 March 2016. Originally published as No. 42 of 1 March 1994, with earlier revisions having taken place in 2002 and 2010.

⁸⁰ Hage 2013.

⁸¹ See for instance, CJEU, 15 December 1971, International Fruit Company.

⁸² CJEU, 9 September 1999, *RI.SAN*; CJEU, 18 November 1999, *Teckal*; CJEU, 9 June 2009, *Commission v Germany*; CJEU, 21 December 2016, *Remondis*.

interpretation between these three Directives.⁸³ The same can be said about cooperation based on exclusive rights, which is currently based on Article 11 of Directive 2014/24/ EU.⁸⁴ Finally, the Member States' deadline for implementation expired on 18 April 2016. Although national implementation is not a focus here, reference is sometimes made to different jurisdictions, including the Netherlands, Belgium and Finland, in order to – similar to the national case law – provide further support for legal tensions or to draw inspiration for legal reconciliation.

4. TERMINOLOGY

The following sections define the most important terminology that is used throughout this research. These terms are categorized thematically instead of alphabetically.

Self-organisation

Self-organisation is the discretionary power of a Member State, including its public authorities, to organize itself as it sees fit. It includes the discretionary power to establish a public authority and to allocate responsibilities and competences to this authority as it sees fit ('the allocation of responsibilities and competences'), the discretionary power of a public authority to decide upon the preferred type of service delivery as it sees fit ('the 'make-or-buy' decision') and the discretionary power of a public authority to provide a service itself or in cooperation with other public authorities as it sees fit ('service provision by public authorities').

Responsibilities and competences

Responsibilities are allocated to public authorities by law and make them accountable to the democratic processes for their fulfilment. It concerns the exclusive obligation and right to fulfil a task by their own administrative, technical and other means or by calling upon external entities, and thus provides the basis for the make-or-buy decision. Competences are allocated in light of responsibilities and allow public authorities to act by law on these responsibilities, such as the setting of rates or regulatory quality requirements (in Dutch: *verantwoordelijkheden* and *bevoegdheden*).

Make-or-buy decision

The make-or-buy decision is the decision of a public authority that indicates what type of provision is best suited to provide a service for internal or external use. ⁸⁵ A public authority can choose between providing a service itself or in cooperation with other public authorities or to assign service provision to a third party by concluding a contractual agreement. Service provision by public authorities themselves can occur through self-supply, institutionalized cooperation, non-institutionalised cooperation and cooperation based on exclusive rights. The decision is sometimes also referred to as the 'make-buy-or-ally' decision, which includes cooperation, or 'insourcing vs. outsourcing' (in Dutch: *inbesteden versus uitbesteden*).

⁸³ Recital No. 38 Directive 2014/25/EU.

⁸⁴ Art. 10(1) Directive 2014/23/EU; Art. 22 Directive 2014/25/EU.

⁸⁵ Manunza 2010, p. 54.

Self-supply

Self-supply refers to service performance for internal or external use by a public authority that uses its own resources, such as provision by an authority's own department. It means that service performance never leaves the remit of an authority's hierarchical structure, even though the beneficiaries might still be outside this scope. ⁸⁶ This is also referred to as 'in-house performance' (in Dutch: *zuiver inbesteden* or *zelfvoorziening*).

Public-public cooperation

Public-public cooperation refers to contractual cooperation between public authorities by bundling or using each other's workforces, experience, skills or financial means for the joint provision of services for either internal or external use. Institutionalised cooperation, non-institutionalised cooperation and cooperation based on exclusive rights are common types of public-public cooperation. Public-public cooperation differs from public-private cooperation, but both concepts are not clear-cut. The latter refers to cooperation between public authorities and third parties. Reference is made to 'third parties' as the opposite of public authorities. Furthermore, the legal status of an entity does not define its status as 'third party'. Not being a public authority or falling within the chain of authority of a public authority does, however.

Institutionalised cooperation

Institutionalised cooperation concerns contractual cooperation in which a public authority or public authorities respectively cooperates or cooperate with a service-providing separate entity. The contractual agreement between the latter entity and the public authority or public authorities stipulates the terms and conditions of their cooperation. Even though the separate legal entity is not necessarily a public authority itself, it falls within the chain of authority of a public authority or public authorities. This type of service provision is also referred to as 'vertical cooperation' (in Dutch: *institutioneel samenwerken*, *quasi-inbesteden* of *verticaal samenwerken*). When considering the relationship with EU public procurement law, reference is made to the institutionalised exemption.

Non-institutionalised cooperation

Non-institutionalised cooperation concerns contractual cooperation that takes place solely between public authorities. As opposed to institutionalized cooperation, it does not use a separate entity to provide a service, but the public authorities provide a service by cooperating together. The contractual agreement between these authorities stipulates the terms and conditions of their cooperation. This type of service provision is also referred to as 'horizontal cooperation' (in Dutch: *niet-institutioneel samenwerken*, *publiek-publieke samenwerking*, of *horizontaal samenwerken*). When considering the relationship with EU public procurement law, reference is made to the non-institutionalised exemption.

⁸⁶ See Manunza 2010, p. 55. The term 'chain of authority' is derived from Manunza, who refers in Dutch to *'binnen zijn eigen gezagsstructuur'*.

Cooperation with an exclusive service provider

Cooperation with an exclusive service provider concerns cooperation between a public authority or public authorities and an exclusive service provider that has been granted an exclusive right by this authority or authorities. The terms and conditions of the cooperation are stipulated in a contractual agreement that is concluded with the exclusive provider based on this right (in Dutch: *samenwerking op basis van een exclusief recht*). When considering the relationship with EU public procurement law, reference is made to the exclusive right exemption.

For internal use vs. for external use

Self-supply or public-public cooperation may result in the provision of services for citizens ('for external use') and for public authorities themselves ('for internal use'). For example the former may refer to waste-management services for citizens, whereas the latter may refer to IT services that are provided for a public authority itself.

5. STRUCTURE

The research's structure consists of eight more chapters followed by a presentation of conclusions in the final chapter. These chapters are briefly introduced below.

Chapter 2 – Understanding the nexus: EU public procurement law

By providing the foundation for the discussion in this research, this chapter considers the objectives and principles of EU public procurement law to outline the requirements of effectiveness. Furthermore, it predominantly discusses its *ratio personae* and its *ratio materiae* in order to determine when a relationship between self-organisation and this field of law actually exists. It provides the first side of the nexus between EU public procurement law and self-organisation and should, consequently, be read in conjunction with Chapter 3.

Chapter 3 – Understanding the nexus: self-organisation of the EU Member States

If the relationship as discussed with EU public procurement law can indeed be established, this chapter delves into the general notion of self-organisation in the context of the European Union, by considering the essential parts of self-organisation of the Member States in light of EU law in general, and EU public procurement law in particular. Through a discussion of self-organisation, it considers whether a right to self-organisation has in fact materialised to counterbalance the influence of EU public procurement law on self-organisation. It provides the second side of the balancing act in the nexus between EU public procurement law and self-organisation.

Chapter 4 – Allocation of responsibilities and competences & EU public procurement law Based on Chapter 2 and Chapter 3, this chapter aims to describe two closely related concepts: the allocation of competences and responsibilities and the award of a public contract or a concession contract. Both are relevant – yet necessarily distinct – in light of self-organisation. This discussion aims to identify possible tensions due to their overlap and to further clarify this distinction by ensuring that it is interpreted consistently in

the context of self-organisation and EU public procurement law to avoid the need for reconciliation.

Chapter 5 − Self-supply & EU public procurement law

This chapter considers the first type of service provision: that of the service provision by public authorities themselves in light of EU public procurement law. It discusses self-supply and its relationship with this field of law in light of Directive 2014/24/EU and relevant case law if present. Furthermore, it aims to provide normative content to the discussion of its *ratio materiae* and, most importantly, it critically considers a potential tension relating to its *ratio personae* by discussing the various possible interpretations to discuss self-supply by the State and if the State in fact consists of one or multiple contracting authorities.

Chapter 6 − Institutionalised cooperation & EU public procurement law

Institutionalised cooperation, as the first type of collaborative service provision, and its relationship with EU public procurement law is discussed here in light of its roots in the milestone case of *Teckal*.⁸⁷ As a method of discussion, different types of institutionalised cooperation that take place in the Member States are analysed in light of how this relationship has been shaped by the CJEU, the Dutch Courts and Directive 2014/24/EU, and whether reconciliation is necessary given the tensions that may occur.

Chapter 7 – Non-institutionalised cooperation & EU public procurement law

Non-institutionalised cooperation, as the second type of collaborative service provision, and its relationship with EU public procurement law is discussed in light of its roots in the milestone case of *Commission v Germany*. The case law of the CJEU and Directive 2014/24/EU are discussed based on how this relationship has been shaped and whether reconciliation is necessary based on the tensions identified.

Chapter 8 – Cooperation based on exclusive rights & EU public procurement law Cooperation based on exclusive rights, as the third type of collaborative service provision, and its relationship with EU public procurement law is discussed in light of its roots in the Directives on public procurement. It analyses this type of cooperation based on how this relationship has been shaped through Directive 2014/24/EU, the case law of the CJEU and the Dutch courts, and, if tensions occur, where reconciliation can be found.

Chapter 9 – The make-or-buy decision & EU public procurement law

In this chapter, one final aspect of self-organisation is considered in more detail: the make-or-buy decision. The aim of this chapter is to bring to light the potential tension of leaving this decision unregulated. For this purpose, a comparison is made with the regulatory framework of the make-or-buy decision in the United States of America (US). It aims to provide food for thought.

⁸⁷ CJEU, 18 November 1999, Teckal.

⁸⁸ CJEU, 9 June 2009, Commission v Germany.

Chapter 10 – Towards reconciliation of current & future tensions

Finally, the research question is answered based on a synopsis of the findings in the previous chapters. Furthermore, some general conclusions are drawn on the nexus between EU public procurement law and self-organisation. It includes recommendations on the tensions identified.

This research was finalised on 15 January 2018. It does not take into account developments after this date.